



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Author and Title

The American State Reports.

Call Number	Volume	Copy
KF 133 A42	134	

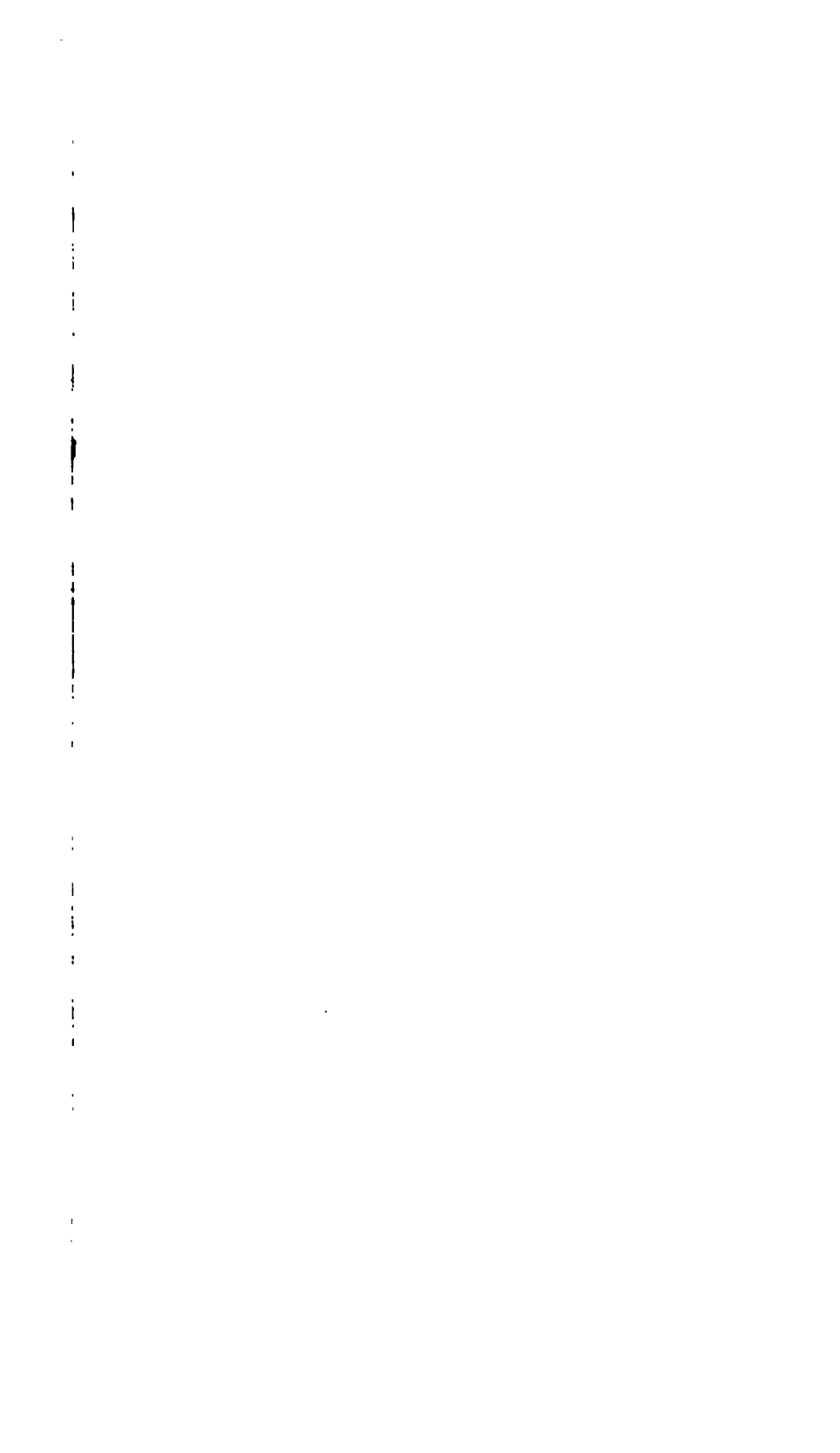
**THIS BOOK DOES NOT CIRCULATE
OUTSIDE THE BUILDING**

NAME	LOCATION

The American State Reports.

KF
133
A42

vol.
134



Author and Title

The American State Reports.

Call Number	Volume	Copy
KF 133 A42	134	

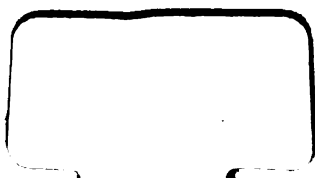
**THIS BOOK DOES NOT CIRCULATE
OUTSIDE THE BUILDING**

NAME	LOCATION

The American State Reports.

KF
133
A42

vol.
134



Author and Title

The American State Reports.

Call Number	Volume	Copy
KF 133 A42	134	

**THIS BOOK DOES NOT CIRCULATE
OUTSIDE THE BUILDING**

NAME	LOCATION

The American State Reports.

KF
133
A42

vol.
134



.

.

:

P

:

.

.

P
PP
P

:

:

:

P

:

.

P

:

P

:

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

VOLUME 134.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
Law Publishers and Law Booksellers.
1910.

COPYRIGHT 1910,
BY
BANCROFT-WHITNEY COMPANY.

THE FILMER BROTHERS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.
SAN FRANCISCO.

AMERICAN STATE REPORTS.

VOLUME 134.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ARKANSAS REPORTS	Vols. 90, 91. 17-106
CALIFORNIA REPORTS	Vol. 156. 107-185
GEORGIA REPORTS	Vol. 133. 186-244
IDAHO REPORTS	Vol. 17.. 245-301
ILLINOIS REPORTS	Vols. 242, 243. 302-401
IOWA REPORTS	Vol. 142. 402-435
KENTUCKY REPORTS	Vol. 133. 436-495
LOUISIANA REPORTS	Vol. 124. 496-533
MAINE REPORTS	Vol. 105. 534-585
MARYLAND REPORTS	Vol. 111. 586-644
MASSACHUSETTS REPORTS	Vol. 204. 645-711
MICHIGAN REPORTS	Vol. 159. 712-758
MINNESOTA REPORTS	Vol. 109. 759-795
NEW JERSEY LAW REPORTS . . .	Vol. 77. 796-826
NEW YORK REPORTS	Vols. 196, 197. 827-898
NORTH CAROLINA REPORTS . . .	Vols. 150, 151. 899-1009
PENNSYLVANIA REPORTS	Vol. 226. 1010-1091
WASHINGTON REPORTS	Vol. 56. 1092-1132

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA.—(83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90, 91) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38; (98) 39; (99) 42; (100, 101) 46; (102) 48; (103) 49; (104, 105) 53; (106, 107, 108) 54; (109, 110) 55; (111) 56; (112) 57; (113) 59; (114) 62; (115, 116) 67; (118, 119) 72; (120) 74; (121) 77; (122, 123, 124, 125) 82; (126, 127) 85; (128) 86; (129) 87; (130) 89; (131, 132) 90; (133) 91; (134) 92; (135) 93; (136) 96; (137) 97; (138) 100; (139) 101; (140) 103; (141) 109; (142) 110; (143) 111; (144) 113; (145) 117; (146, 147) 119; (148, 149) 121; (149) 123; (150) 124; (151) 125; (152) 126; (153) 127; (154) 129; (155, 156) 130; (157) 131; (158) 132; (159) 133.

ARKANSAS.—(48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 22; (54) 26; (55) 29; (56) 35; (57) 38; (58) 41; (59, 60) 46; (61, 62) 54; (63) 58; (64) 62; (65) 67; (66) 74; (67) 77; (68) 82; (69) 86; (70) 91; (71) 100; (72) 105; (73) 108; (74) 109; (75) 112; (76, 77) 113; (78) 115; (79) 116; (80) 117; (81, 82) 118; (83) 119; (84) 120; (85) 122; (86) 126; (87) 128; (88) 129; (89) 131; (90, 91) 134.

CALIFORNIA.—(72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 12; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38; (101) 40; (102) 41; (103) 42; (104) 43; (105) 45; (106) 46; (107) 48; (108) 49; (109) 50; (110, 111) 52; (112) 53; (113) 54; (114) 55; (115) 56; (116) 58; (117) 59; (118) 62; (119) 63; (120) 65; (121) 66; (122) 68; (123) 69; (124) 71; (125) 73; (126) 77; (127) 78; (128, 129) 79; (130) 80; (131) 82; (132) 84; (133) 85; (134) 86; (135) 87; (136) 89; (137) 92; (138) 94; (139) 96; (140) 98; (141) 99; (142) 100; (143) 101; (144) 103; (145) 104; (146) 106; (147) 109; (148) 113; (149) 117; (150) 119; (151) 121; (152) 125; (153) 126; (154, 155) 129; (156) 134.

COLORADO.—(10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36; (19) 41; (20) 46; (21) 52; (22) 55; (23) 58; (24) 65; (25) 71; (26) 77; (27) 83; (28) 89; (29) 93; (30) 97; (31) 102; (32) 105; (33) 108; (34) 114; (35) 117; (36) 118; (37) 119; (38) 120; (39) 121; (40) 122; (41) 124; (42) 126; (43) 127; (44) 130; (45) 132; (46) 133.

CONNECTICUT.—(54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38; (64) 42; (65) 48; (66) 50; (67) 52; (68) 57; (69) 61; (70) 66; (71) 71; (72) 77; (73) 84; (74) 92; (75) 96; (76) 100; (77) 107; (78) 112; (79) 118; (80) 125; (79, 81) 129.

DELAWARE.—(5 Houst.) 1; (6 Houst.) 22; (7 Houst.) 40; (9 Houst.) 43; (1 Marv.) 65; (2 Marv.) 69; (1 Pennewill) 73; (2 Pennewill) 82; (3 Pennewill) 94; (4 Pennewill) 103; (5 Pennewill) 119; (6 Pennewill) 130.

FLORIDA.—(22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37; (33) 39; (34) 43; (35) 48; (36)

51; (37) 53; (38) 56; (39) 63; (40) 74; (41) 79; (42) 89; (43) 99; (44) 103; (45, 46, 47) 110; (48, 49, 50) 111; (51, 52) 120; (53) 125; (54, 55) 127; (56, 57) 131.

GEORGIA.—(76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35; (91, 92, 93) 44; (94) 47; (95, 96) 51; (97) 54; (98) 58; (99) 59; (100) 62; (101) 65; (102) 66; (103) 68; (104) 69; (105) 70; (106) 71; (107) 73; (108) 75; (109) 77; (110, 111) 78; (112) 81; (113) 84; (114) 88; (115) 90; (116) 94; (117) 97; (118) 98; (119) 100; (120) 102; (121) 104; (122) 106; (123) 107; (124) 110; (125) 114; (126) 115; (127, 128) 119; (129) 121; (130) 124; (131) 127; (132) 131; (133) 134.

IDAHO.—(2) 35; (3, 4, 5) 95; (6) 96; (7) 97; (8) 101; (9) 108; (10) 109; (11) 114; (12) 118; (13) 121; (14) 125; (15) 128; (16) 133; (17) 134.

ILLINOIS.—(121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133) 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56; (166) 57; (167) 59; (168, 169) 61; (170) 62; (171) 63; (172, 173) 64; (174) 66; (175) 67; (176) 68; (177, 178) 69; (179) 70; (180, 181) 72; (182) 74; (183, 184) 75; (185) 76; (186) 78; (187) 79; (188) 80; (189) 82; (190) 83; (191, 192) 85; (193) 86; (194, 195) 88; (196) 89; (197) 90; (198) 92; (199, 200) 93; (201) 94; (202) 95; (203) 96; (204, 205) 98; (206, 207) 99; (208) 100; (209) 101; (210) 102; (211, 212) 103; (213) 104; (214) 105; (215) 106; (216, 217) 108; (218, 219) 109; (220) 110; (221) 112; (222) 113; (223) 114; (224) 115; (225) 116; (226) 117; (227) 118; (228) 119; (229, 230) 120; (231) 121; (232, 233) 122; (234) 123; (235) 126; (236, 237) 127; (238) 128; (239, 240) 130; (241) 132; (242, 243) 134.

INDIANA.—(112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3 Ind. App.; 141) 50; (4, 5, 6 Ind. App.; 142) 51; (7, 8 Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150; 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74; (23 Ind. App.; 154) 77; (24 Ind. App.) 79; (155) 80; (25 Ind. App.) 81; (156) 83; (26 Ind. App.) 84; (157; 27 Ind. App.) 87; (28 Ind. App.) 91; (158) 92; (29 Ind. App.) 94; (159) 95; (30 Ind. App.) 96; (160) 98; (31 Ind. App.) 99; (161) 100; (32 Ind. App.; 162) 102; (33 Ind. App.) 104; (163) 106; (34 Ind. App.) 107; (164) 108; (35 Ind. App.) 111; (165) 112; (36 Ind. App.) 114; (37 Ind. App.; 166) 117; (167) 119; (168) 120; (169) 124; (170) 127; (171) 131.

IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77; (110) 80; (111) 82; (112) 84; (113) 86; (114) 89; (115) 91; (116) 93; (117) 94; (118) 96; (119) 97; (120) 98; (121) 100; (122, 123) 101; (124) 104; (125, 126) 106; (127) 109; (128) 111;

(129) 113; (130) 114; (131) 117; (132, 133) 119; (134) 120; (135) 124; (136) 125; (137) 126; (138) 128; (139) 130; (140) 132; (141) 133; (142) 134.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72; (61) 78; (62) 84; (63) 88; (64) 91; (65) 93; (66) 97; (67) 100; (68) 104; (69) 105; (70) 106; (71) 114; (72) 115; (73) 117; (74) 118; (74, 75) 121; (76) 127; (77) 127; (78) 130; (79) 131; (80) 133.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 22; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 44; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72; (102) 80; (103) 82; (104) 84; (105) 88; (106) 90; (107) 92; (108) 94; (109) 96; (110) 96; (111) 98; (112) 99; (113) 101; (114) 102; (115) 104; (116) 105; (117, 118) 111; (119) 115; (120) 117; (122) 121; (123) 123; (123, 124) 124; (125, 126, 127) 128; (128) 129; (129) 131; (130) 132; (131) 133; (133) 134.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 12; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72; (52 La. Ann.) 78; (53) 81; (105) 83; (106) 87; (107) 90; (108) 92; (109) 94; (110) 96; (111) 100; (112, 113) 104; (114) 108; (115) 112; (116) 114; (117) 116; (118) 118; (119) 121; (120) 124; (121) 126; (119, 120) 129; (123) 131; (124) 134.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74; (94) 80; (95) 85; (96) 90; (97) 94; (98) 99; (99) 105; (100) 109; (101) 115; (102) 120; (103) 125; (104) 129; (105) 134.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 23; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 67; (87) 67; (88) 71; (89) 73; (90) 78; (91) 80; (92) 84; (93) 89; (94) 89; (95) 93; (96) 94; (97) 99; (98) 103; (99) 105; (100) 101; 109; (102) 111; (103) 115; (104) 118; (105) 121; (106) 126; (108) 129; (109) 130; (110) 132; (111) 134.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 32; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75; (175) 78; (176) 79; (177) 83; (178) 86; (179) 88; (180) 91; (181) 94; (182) 94; (183) 97; (184) 100; (185) 102; (186) 104; (187) 108; (188) 108; (189) 109; (190) 112; (191) 114; (192) 116; (193) 118; (194) 120; (195) 122; (196) 124; (197) 125; (198) 126; (199) 129; (200) 128; (201) 131; (202) 132; (203) 133; (204) 134.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69) 13; (70) 14; (71, 72) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 38; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 53; (104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 71; (118) 74; (119) 75; (120) 77; (121, 122) 80; (123) 81; (124) 84; (125) 84; (126) 86; (127) 89; (128) 92; (129) 95; (130) 98; (131) 100; (132) 102; (133) 103; (134) 104; (135) 106; (136) 108; (137) 110; (138) 111; (139) 111; (136, 140) 112; (141, 142) 113; (143) 114.

(144) 115; (145) 116; (146) 117; (147, 148) 118; (149) 119; (144, 150) 121; (146, 151) 123; (152) 125; (153) 126; (154) 129; (155) 130; (156) 132; (157, 158) 133; (159) 134.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 46; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77; (78, 79) 79; (80) 81; (81, 82) 83; (83) 85; (84) 87; (85) 89; (86) 91; (87) 94; (88) 97; (89) 99; (90) 101; (91) 103; (92) 104; (93) 106; (94) 110; (95) 111; (96) 113; (97) 114; (98, 99) 116; (100) 117; (101) 118; (98, 102) 120; (103) 123; (104) 124; (105) 127; (106) 130; (107) 131; (108) 133; (109) 134.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71; (77) 78; (78) 84; (79) 89; (80) 92; (81) 96; (82) 100; (83) 102; (84) 105; (85) 107; (86) 109; (87) 112; (88) 117; (89) 119; (86, 89, 90) 122; (91) 124; (92) 131.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54; (134) 56; (135, 136) 58; (137) 59; (138) 60; (139) 61; (140) 62; (141, 142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71; (149, 150) 73; (151) 74; (152) 75; (153, 154) 77; (155) 78; (156) 79; (157) 80; (158, 159) 81; (160) 83; (161) 84; (162, 163) 85; (164) 86; (165) 88; (166) 89; (167, 168) 90; (169) 92; (170, 171) 94; (172) 95; (173) 96; (174, 175) 97; (176) 98; (177) 99; (178, 179) 101; (180, 181, 182) 103; (183, 184, 185, 186) 105; (187) 106; (188, 189) 107; (190, 191) 109; (192) 111; (193, 194) 112; (195, 196) 113; (197) 114; (198) 115; (199) 116; (200) 118; (201, 202) 119; (203, 204, 205) 120; (206) 121; (207, 208, 209) 123; (210, 211) 124; (212) 126; (213, 214) 127; (215) 128; (216, 217) 129; (218, 219) 131; (220) 132; (221, 222) 133.

MONTANA.—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69; (22) 74; (23) 75; (24) 81; (25) 87; (26) 91; (27) 94; (28) 98; (29) 101; (30) 104; (31) 107; (32) 108; (33) 114; (34) 115; (35) 119; (36) 122; (37) 127; (38) 129; (39) 133.

NEBRASKA.—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53; (47, 48) 58; (49) 59; (50) 61; (51, 52) 66; (53) 68; (54) 69; (55) 70; (56) 71; (57) 73; (58) 76; (59) 80; (60) 83; (61) 87; (62) 89; (63) 93; (64) 97; (65) 101; (66) 103; (67) 108; (68) 110; (69) 111; (70) 113; (71) 115; (72) 117; (73) 119; (74, 75) 121; (76, 77) 124; (78, 79) 126; (80) 127; (81) 129; (82) 130; (83) 131; (84, 85) 133.

NEVADA.—(19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77; (25) 83; (26) 99; (27) 103; (28) 113; (29) 124; (30) 133.

NEW HAMPSHIRE.—(64) 10; (62) 13; (65) 23; (66) 49; (67) 68; (68) 73; (69) 76; (70) 85; (71) 93; (72) 101; (73) 111; (74) 124.

NEW JERSEY.—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 53 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N.

J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.) 53; (53 N. J. Eq.) 51; (54 N. J. Eq.) 58 N. J. L.) 55; (59 N. J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.) 64; (56 N. J. Eq.) 67; (61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.) 73; (63 N. J. L.) 76; (58 N. J. Eq.) 78; (64 N. J. L.) 81; (59, 60 N. J. Eq.) 83; (65 N. J. L.) 86; (61 N. J. Eq.) 66 N. J. L.) 88; (62 N. J. Eq.) 90; (67 N. J. L.) 91; (68 N. J. Eq.) 92; (68 N. J. L.) 96; (64 N. J. Eq.) 97; (69 N. J. L.) 101; (65 N. J. Eq.) 70 N. J. L.) 103; (66 N. J. Eq.) 105; (71 N. J. L.) 108; (67 N. J. Eq.) 110; (68 N. J. Eq.) 72 N. J. L.) 111; (69 N. J. Eq.) 115; (73 N. J. L.) 70 N. J. Eq.) 118; (74 N. J. L.) 122; (71 N. J. Eq.) 124; (75 N. J. L.) 127; (72 N. J. Eq.) 129; (76 N. J. L.) 131; (73 N. J. Eq.) 133; (77 N. J. L.) 134.

NEW YORK.—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57; (153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160) 73; (161, 162) 76; (163, 164) 79; (165) 80; (166, 167) 82; (168) 85; (169, 170) 88; (171) 89; (172) 92; (173) 93; (174) 95; (175) 96; (176) 98; (177) 101; (178) 102; (179) 103; (180) 105; (181) 106; (182) 108; (183) 111; (184) 112; (185) 113; (186, 187) 116; (188) 117; (184, 189) 121; (190, 191) 123; (192, 193) 127; (184, 194) 128; (195) 133; (196, 197) 134.

NORTH CAROLINA.—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54; (119) 56; (120) 58; (121) 61; (122) 65; (123) 68; (124) 70; (125) 74; (126) 78; (127) 80; (128) 83; (129) 85; (130) 89; (131) 92; (132) 95; (133) 98; (134) 101; (135) 102; (136) 103; (137, 138) 107; (139, 140) 111; (137, 141, 142) 115; (143) 118; (144) 119; (145) 122; (146, 147) 125; (148, 149) 128; (150, 151) 134.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73; (9) 81; (10) 88; (11) 95; (12) 102; (13) 112; (14) 116; (15, 16) 125.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63; (58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76; (62 Ohio St.) 78; (63 Ohio St.) 81; (64 Ohio St.) 83; (65 Ohio St.) 87; (66 Ohio St.) 90; (67 Ohio St.) 93; (68 Ohio St.) 96; (69 Ohio St.) 100; (70 Ohio St.) 101; (71 Ohio St.) 104; (72 Ohio St.) 106; (73 Ohio St.) 112; (74 Ohio St.) 113; (75 Ohio St.) 116; (76 Ohio St.) 118; (77 Ohio St.) 122; (78 Ohio St.) 125; (79 Ohio St.) 128; (80 Ohio St.) 131.

OKLAHOMA.—(20, 21; 1 Okl. Cr.) 129; (22) 132.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30) 60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76; (36) 78; (37) 82; (38) 84; (39) 87; (40) 91; (41) 93; (42)

95; (43) 99; (44) 102; (45) 106; (46, 47) 114; (48) 120; (49) 124; (50) 126; (51) 131; (52) 132; (53) 133.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74; (194 Pa. St.) 75; (195 Pa. St.) 78; (196 Pa. St.) 79; (197 Pa. St.) 80; (198 Pa. St.) 82; (199 Pa. St.) 85; (195, 200 Pa. St.) 86; (201 Pa. St.) 88; (202 Pa. St.) 90; (203, 204 Pa. St.) 93; (205 Pa. St.) 97; (206 Pa. St.) 98; (207 Pa. St.) 99; (208 Pa. St.) 101; (209 Pa. St.) 103; (210 Pa. St.) 105; (211 Pa. St.) 107; (212 Pa. St.) 108; (213 Pa. St.) 110; (214 Pa. St.) 112; (215 Pa. St.) 114; (216 Pa. St.) 116; (217 Pa. St.) 118; (217, 218 Pa. St.) 120; (219, 220 Pa. St.) 123; (221, 222 Pa. St.) 128; (223, 224 Pa. St.) 132; (225 Pa. St.) 133; (226 Pa. St.) 134.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84; (23) 91; (24) 96; (25) 105; (26) 106; (27) 114; (28) 125; (29) 132.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90; (64) 92; (65) 95; (66) 97; (67) 100; (68) 102; (69) 104; (70) 106; (71) 110; (73, 74) 114; (75) 117; (73, 76) 121; (77) 122; (78) 125; (79, 80, 81) 128; (82) 129.

SOUTH DAKOTA.—(1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86; (15) 91; (16) 102; (17) 106; (18) 112; (19) 117; (20) 129; (21) 130; (22) 133.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89; (108) 91; (109) 97; (110) 100; (111) 102; (112) 105; (113) 106; (114) 108; (115) 112; (116) 115; (117) 119; (117, 118) 121; (119) 123; (120) 127; (121) 130.

TEXAS.—(68) 2; (69, 24 Tex. App.) 5; (70, 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77, 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86, 32 Tex. Cr. Rep.) 40; (87, 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91, 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.)

73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86; (95) 93; (41, 42, 43 Tex. Cr. Rep.) 96; (96) 97; (44 Tex. Cr. Rep.) 100; (97) 104; (98) 107; (45, 46 Tex. Cr. Rep.) 108; (99; 47, 48, 49 Tex. Cr. Rep.) 122; (100; 50, 51 Tex. Cr. Rep.) 123; (52 Tex. Cr. Rep.) 124; (53 Tex. Cr. Rep.) 126; (101; 54 Tex. Cr. Rep.) 130; (55 Tex. Cr. Rep.) 131; (162) 132; (56 Tex. Cr. Rep.) 133.

UTAH.—(13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20) 77; (21) 81; (22) 83; (23) 90; (24) 91; (25) 95; (26) 99; (27) 101; (28) 107; (29) 110; (30) 116; (31) 120; (32) 125; (33) 126; (34) 131.

VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87; (74) 93; (75) 98; (76) 104; (77) 109; (78) 112; (79) 118; (80, 81) 130.

VIRGINIA.—(82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75; (98) 81; (99) 86; (100) 93; (101) 99; (102) 102; (103) 106; (104) 113; (105) 115; (106) 117; (107) 122; (108) 128; (109) 132.

WASHINGTON.—(1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75; (22) 79; (23) 83; (24) 85; (25) 87; (26) 90; (27) 91; (28, 29) 92; (30) 94; (31) 96; (32) 98; (33) 99; (34) 101; (35) 102; (36) 104; (37, 38) 107; (39) 109; (40, 41) 111; (42) 114; (43) 117; (44) 120; (45) 122; (46) 123; (47, 48) 125; (49, 50) 126; (51) 130; (52, 53, 54) 132; (55) 133; (56) 134.

WEST VIRGINIA.—(29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72; (46) 76; (47) 81; (48) 86; (49) 87; (50) 88; (51) 90; (52) 94; (53) 97; (54) 102; (55) 104; (56) 107; (57) 110; (58) 112; (59) 115; (60) 116; (61) 123; (62) 125; (63) 129; (64, 65) 131.

WISCONSIN.—(69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53; (93) 57; (94) 59; (95) 60; (96, 97) 65; (98, 99) 67; (100) 69; (101) 70; (102) 72; (103) 74; (104, 105) 76; (106) 80; (107, 108) 81; (109) 83; (110) 84; (111) 87; (112) 88; (113) 90; (114) 91; (115) 95; (116) 96; (117) 98; (118) 99; (119) 100; (120) 102; (121) 105; (122) 106; (123) 107; (124) 109; (125, 126) 110; (125, 127) 115; (128, 129) 116; (130) 118; (131) 120; (132) 122; (133, 134) 126; (135, 136) 128; (137) 129; (138, 139) 131; (140) 133.

WYOMING.—(3) 31; (4) 62; (5) 63; (6) 71; (7) 75; (8) 80; (9) 87; (10) 98; (11) 100; (12) 109; (13) 110; (14) 116; (15) 123; (16) 125; (17) 129.

AMERICAN STATE REPORTS.

VOLUME 134.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Adkins v. Bryant.....	<i>Judgment.</i> ..	133 Ga. 465.....	211
American Ex. Nat. Bank v. Fed- eral Nat. Bank.....	<i>Pledge</i> ...	226 Pa. 483.....	1071
Bank of Monroe v. Ouachita Val- ley Bank.....	<i>Garnishment.</i> ..	124 La. 798.....	518
Bank of Russellville v. Russellville.	<i>Taxation.</i> ..	133 Ky. 637....	479
Bank of Sampson v. Hatcher.....	<i>Notes</i>	151 N. C. 359...	989
Barker v. Chicago P. & S. L. Ry. Co.	<i>Officers</i>	243 Ill. 482.....	382
Bender v. Bender.....	<i>Will</i>	226 Pa. 607....	1088
Bodenhofer v. Hogan.....	<i>Officers</i>	142 Iowa, 321...	418
Bollinger v. Rader.....	<i>Negligence</i> ..	151 N. C. 383...	999
Bond v. Sullivan.....	<i>Deed</i>	133 Ga. 180.....	199
Bradley Engineering & Mfg. Co. v. Heyburn	<i>Notes</i>	56 Wash. 628..	1127
Brooke v. Glos.....	<i>Records</i>	243 Ill. 392....	374
Bryant Timber Co. v. Wilson.....	<i>Option</i>	151 N. C. 154. .	982
Burks v. Harris.....	<i>Lottery</i>	91 Ark. 205...	67
Cadwalader v. Price.....	<i>Boundary</i> ..	111 Md. 310....	603
Campbell v. Huffines.....	<i>Partnership.</i> ..	151 N. C. 262...	987
Carlin v. Grand Trunk Ry. Co.....	<i>Railroad</i>	243 Ill. 64.....	354
Carruthers v. Whitney.....	<i>Estoppel</i>	56 Wash. 327..	1114
Charland v. Home for Aged Women.....	<i>Tax Deed</i>	204 Mass. 563...	696
Cincinnati, N. O. & Tex. Pac. Ry. Co. v. Curd.....	<i>Railroads</i>	133 Ky. 138....	444
Clute v. Clute.....	<i>Cotenancy</i>	197 N. Y. 439...	891
Coburn v. Moline & Watertown Ry. Co.	<i>Carrier</i>	243 Ill. 448. .	377
Coburn v. Page.....	<i>Cotenancy</i>	105 Me. 458....	575
Colbath v. Bangor & Aroostook R. R. Co.....	<i>Carrier</i>	105 Me. 379....	569
Coleman v. Connolly.....	<i>Coexecutors</i> ..	242 Ill. 574.....	347
Commercial Loan and Trust Co. v. Mallors	<i>Corporation</i> ..	242 Ill. 50.....	306
Commercial Nat. Bank v. Gillinaky.	<i>Corporation</i> ..	142 Iowa, 178...	406
Commonwealth v. Fisher.....	<i>Jury</i>	226 Pa. 189.....	1027
Commonwealth v. Griffith.....	<i>Minors</i>	204 Mass. 18...	645

NAME.	SUBJECT.	REPORT.	PAGE.
Conner v. Seattle R. & S. Ry. Co...	<i>Evidence</i> ...	56 Wash. 310.	1110
Connors v. Cunard Steamship Co...	<i>Carrier</i> ...	204 Mass. 310.	662
Cox v. New Bern L. & F. Co.....	<i>Fixtures</i> ...	151 N. C. 62.	966
Crandall's Estate.....	<i>Divorce</i> ...	196 N. Y. 127.	830
Creswill v. Grand Lodge Knights of Pythias	<i>Association</i>	133 Ga. 837.	231
Currier v. Ritter Lumber Co.....	<i>Employer</i> ...	150 N. C. 694.	955
Darcy v. Brooklyn & New York Ferry Co.....	<i>Corporation</i> ..	196 N. Y. 99.	827
Davies v. Wickstrom.....	<i>Boundaries</i> ...	56 Wash. 154.	1100
Dick v. Albers.....	<i>Trust</i> ...	243 Ill. 231.	369
Dickson v. McCartney.....	<i>Judicial Sale</i> ..	226 Pa. 552.	1078
Douglas v. Hanbury.....	<i>Vendor</i> ...	56 Wash. 63.	1096
Downs v. Swann.....	<i>Arrest</i> ...	111 Md. 53.	586
East Jellico Coal Co. v. Hays.....	<i>Prescription</i> ...	133 Ky. 4.	436
Eaves v. Sheppard.....	<i>Lease</i> ...	17 Idaho, 268.	256
Edwards v. Kevil.....	<i>Slander</i> ...	133 Ky. 392.	463
El Dorado & Bastrop Ry. Co. v. Knox	<i>Dogs</i> ...	90 Ark. 1.	17
Elliott v. Hodgson & Jackson.....	<i>Lien</i> ...	133 Ga. 209.	206
Elliott v. Western Coal Co.....	<i>Advancements</i>	243 Ill. 614.	398
Exler v. American Box Co.....	<i>Bankruptcy</i> ..	226 Pa. 384.	1067
Finnell v. Finnell.....	<i>Vendor's Lien</i> ..	156 Cal. 589.	143
Fleming v. Cardwell.....	<i>Partition</i> ...	90 Ark. 500.	40
Floody v. Chicago S. P. M. & O. Ry. Co.	<i>Railway</i> ..	109 Minn. 228.	771
Forbes v. Gorman.....	<i>Lessee</i>	159 Mich. 291.	718
Glynn v. Corning.....	<i>Will</i>	159 Mich. 474.	739
Godette v. Gaskill.....	<i>Perjury</i> ...	151 N. C. 52.	964
Graves, Estate of.....	<i>Charity</i> ...	242 Ill. 23.	302
Greenhalgh Co. v. Farmers' Nat. Bank	<i>Banking</i> ..	226 Pa. 184.	1016
Grierson v. Grierson.....	<i>Divorce</i> ...	156 Cal. 434.	137
Griffin v. Anderson-Tully Co.....	<i>Timber</i> ...	91 Ark. 292.	73
Grimsley v. Singletary.....	<i>Contract</i> ..	133 Ga. 56.	196
Guffanti v. National Surety Co...	<i>Suretyship</i>	196 N. Y. 452.	848
Hancock, Estate of.....	<i>Divorce</i> ...	156 Cal. 804.	177
Handy v. Bliss.....	<i>Contract</i> ..	204 Mass. 513.	673
Hardie-Tynes Mfg. Co. v. Eastern Cotton Oil Co.....	<i>Sale</i>	150 N. C. 150.	899
Harding v. Harker.....	<i>Mortgage</i>	17 Idaho, 341.	259
Harper v. Goldschmidt.....	<i>Stat. of Frauds</i> ..	156 Cal. 245.	124
Harrelson v. Webb.....	<i>Bankruptcy</i>	124 La. 1007.	529
Henry v. Babcock & Wilcox Co....	<i>Corporation</i> ...	196 N. Y. 302.	835
Henry v. St. Paul City Ry. Co.....	<i>Railway</i> ...	109 Minn. 503.	794
Hinton v. Roane.....	<i>Exemption</i>	124 La. 927.	526

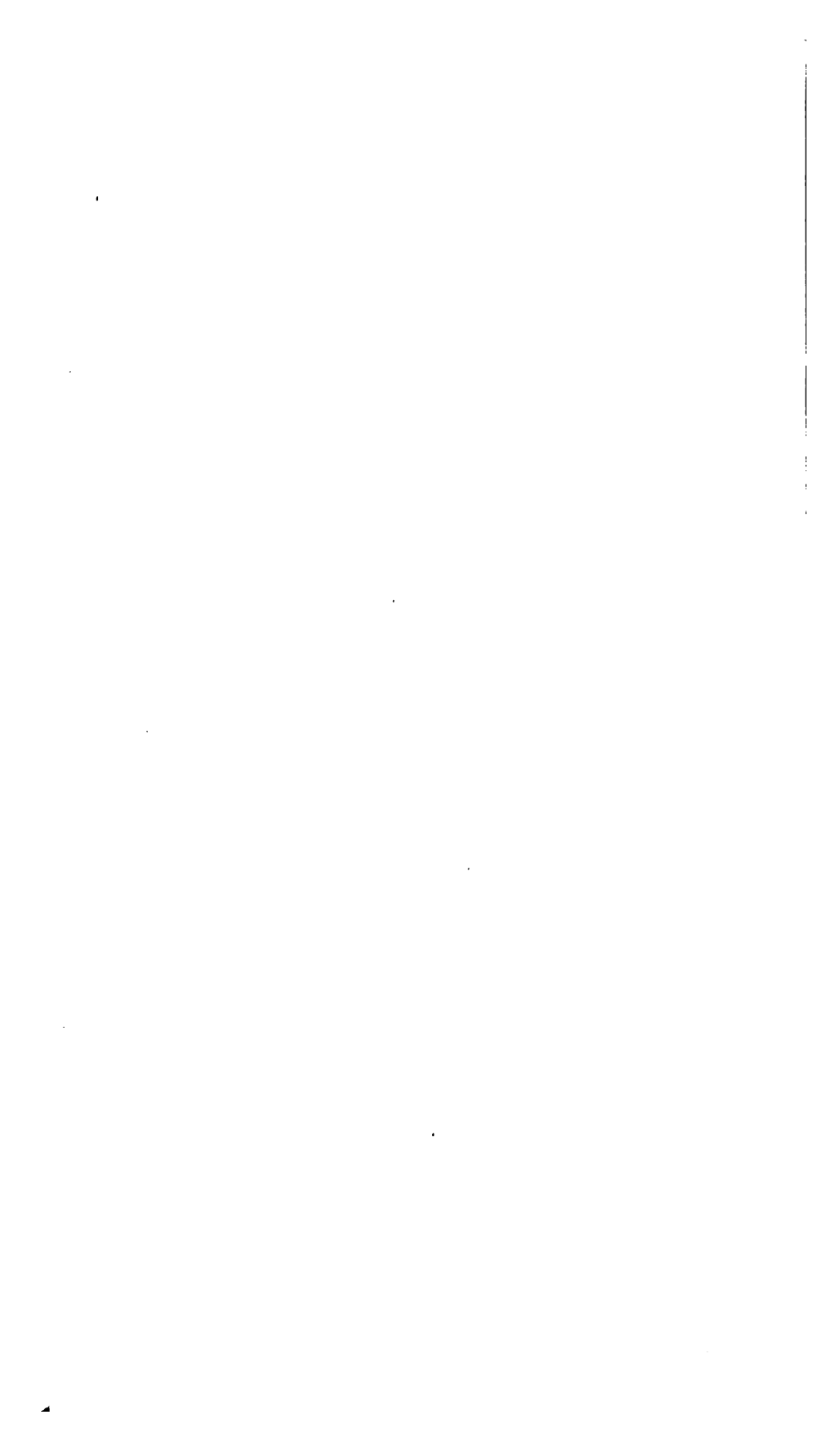
NAME.	SUBJECT.	REPORT.	PAGE.
Historical Society v. Kelker.....	<i>Will</i>	226 Pa. 16....	1010
Hockfield v. Southern Ry. Co.....	<i>Carrier</i>	150 N. C. 419...	945
Hot Springs v. Demby.....	<i>Railroads</i>	90 Ark. 574....	43
Hunter State Bank v. Mills.....	<i>Bonds</i>	90 Ark. 10....	20
Hutchins v. Page.....	<i>Partnership</i> ...	204 Mass. 284...	656
Jefferson v. Bangs.....	<i>Mortgage</i> ...	197 N. Y. 35....	856
Jordan v. Chambers.....	<i>Deed</i>	226 Pa. 573....	1081
Kansas City Southern Ry. Co. v.			
Carl	<i>Carriers</i>	91 Ark. 97....	56
Kennedy's Estate.....	<i>Will</i>	159 Mich. 548...	743
Kentucky Heating Co. v. Hood....	<i>Damages</i> ..	133 Ky. 383....	457
Kidder Press Co. v. J. V. Reed & Co.	<i>Sale</i>	133 Ky. 350....	450
La Cotts v. Pike.....	<i>Partition</i>	91 Ark. 26....	48
La Veine v. Stack-Gibbs Lumber Co.	<i>Waters</i>	17 Idaho, 51...	253
Lawrence v. Hardy.....	<i>Partition</i>	151 N. C. 123...	976
Leask, Matter of.....	<i>Adoption</i> ..	197 N. Y. 193...	866
Leavitt v. Dow.....	<i>Assault</i> ..	105 Me. 50....	534
Louisville & Nashville R. R. Co. v.			
Stiles	<i>Carrier</i>	133 Ky. 786....	491
Lydon v. Campbell.....	<i>Will</i>	204 Mass. 580...	702
McDaniels v. McClure.....	<i>Mar. Women</i> ...	142 Iowa, 370...	424
McGaw v. Acker, Merrill & Condit Co.	<i>Corporation</i> ..	111 Md. 153....	592
McGrory v. Ultima Thule, A. & M. Ry. Co.	<i>Vice-principal</i> .	90 Ark. 210....	24
McKinley v. Martin.....	<i>Will</i>	226 Pa. 550....	1076
Mackin v. Blalock.....	<i>Notes</i>	133 Ga. 550....	220
Maloney v. State.....	<i>Forgery</i>	91 Ark. 485....	83
May v. Hurley.....	<i>Vessels</i>	77 N. J. L. 611.	796
Meade v. Ratliff.....	<i>ChamPERTY</i> ..	133 Ky. 411....	467
Meeker v. East Orange.....	<i>Waters</i>	77 N. J. L. 623.	798
Meholin v. Carlson.....	<i>Corporation</i> ...	17 Idaho, 742..	286
Melvin v. Piedmont Mut. Life Ins.			
Co.	<i>Insurance</i>	150 N. C. 398...	943
Merrill v. Fisher.....	<i>Salvage</i> ..	204 Mass. 600...	706
Mettler v. Warner.....	<i>Wills</i>	243 Ill. 600....	388
Mills v. Baltimore C. & A. Ry. Co.	<i>Carrier</i>	111 Md. 260....	599
Monahan v. Fidelity Life Ins. Co.	<i>Insurance</i> ...	242 Ill. 488....	337
Moody v. Macomber.....	<i>Will</i>	159 Mich. 657...	755
Moore v. Trott.....	<i>Deed</i>	156 Cal. 353....	131
Moore v. White.....	<i>Ways</i>	159 Mich. 460...	735
Morgan v. Kendrick.....	<i>Mortgages</i> ..	91 Ark. 394....	78
Morganton Hardware Co. v. Mor-			
ganton Graded School.....	<i>Lien</i>	150 N. C. 680...	953

NAME.	SUBJECT.	REPORT.	PAGE.
Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.....	<i>Minors</i>	111 Md. 561....	636
Munsch v. Stelter.....	<i>License</i> ..	109 Minn. 403..	785
Musco v. United Surety Co.....	<i>Commerce</i> ...	196 N. Y. 459...	851
Navailles v. Dielmann.....	<i>Automobiles</i> ..	124 La. 421.....	508
Netograph Mfg. Co. v. Scrugham..	<i>Process</i> ..	197 N. Y. 377...	886
Newburyport v. Spear.....	<i>Banking</i> ..	204 Mass. 146...	655
Noble v. John L. Roper Lumber Co.	<i>Employer</i> ...	151 N. C. 76....	974
O'Callaghan v. Dellwood Park Co..	<i>Railway</i> ...	242 Ill. 336.....	331
Orton v. Orton.....	<i>Divorce</i> ...	159 Mich. 236...	716
Paine's Guardian v. Calor Oil & Gas Co.	<i>Highways</i> ..	133 Ky. 614....	475
Pancoast v. Dinsmore.....	<i>Agency</i> ...	105 Me. 471....	585
Parker v. Carter.....	<i>Contracts</i> ...	91 Ark. 162....	60
Patchin v. Seward Coal Co.....	<i>Guardian</i> ..	226 Pa. 159....	1013
Peasley v. Noble.....	<i>Sale</i>	17 Idaho, 686..	270
Pelt v. Payne.....	<i>Curative Stats.</i>	90 Ark. 600....	45
Pennsylvania Co. v. Pittsburg....	<i>Municipalities</i>	226 Pa. 322....	1063
People v. Poole	<i>Homicide</i> ..	159 Mich. 350...	725
People v. Reardon	<i>Taxation</i> ..	197 N. Y. 236...	871
People v. Tilden	<i>Forgery</i> ...	242 Ill. 536....	341
People v. Weil	<i>Criminal Law</i>	243 Ill. 208....	351
Pereira v. Pereira.....	<i>Divorce</i> ...	156 Cal. 1.....	107
Phillips v. Stewart.....	<i>Boundaries</i> ..	133 Ky. 134....	441
Pitcock v. State.....	<i>Contempt</i> ...	91 Ark. 527....	86
Pittsburg C. C. & S. L. Ry. Co. v. Chicago	<i>Carrier</i> ...	242 Ill. 178....	316
Plummer v. School Dist. No. 1 of Marianna	<i>Garnishment</i> ..	90 Ark. 236....	25
Puckett v. Guenther.....	<i>Judgment</i> ..	142 Iowa, 35....	405
Richardson v. Richardson.....	<i>Curtesy</i>	150 N. C. 549...	948
Rigdon v. More.....	<i>Jury</i>	242 Ill. 256....	326
Robertson v. Schard.....	<i>Bankruptcy</i> ..	142 Iowa, 500...	430
Robinson v. Robinson.....	<i>Trusts</i> ...	105 Me. 68....	531
Roger v. Whitham.....	<i>Judicial Sale</i> ..	56 Wash. 190..	1105
Rosen v. Rosen.....	<i>Usury</i>	159 Mich. 72....	715
Rossberg v. State.....	<i>Ordinance</i> ..	111 Md. 394....	626
Rounds Brothers v. McDaniel....	<i>Minors</i> ...	133 Ky. 669....	485
Roy v. Poulin.....	<i>Bastardy</i> ..	105 Me. 411....	575
Sample v. John L. Roper Lumber Co.	<i>Estoppel</i> ..	150 N. C. 161...	905
Scurry v. City of Seattle.....	<i>Evidence</i> ...	56 Wash. 1....	1095
Sewell v. Underhill.....	<i>Vendor</i> ...	197 N. Y. 168..	865
Seymour v. Oelrichs.....	<i>Stat. of Frauds</i>	156 Cal. 782....	155
Shepard v. Jacobs.....	<i>Employer</i> ..	204 Mass. 110...	645

NAME.	SUBJECT.	REPORT.	PAGE.
Siegwarth's Estate.....	<i>Trust</i>	226 Pa. 591.....	1086
Simmons v. Respass.....	<i>Homestead</i> ..	151 N. C. 5.....	961
Slater v. Taylor.....	<i>Mortgage</i> ...	109 Minn. 492..	793
Sloan v. Hart.....	<i>Lessor</i> ...	150 N. C. 269...	911
State Bank of Iowa Falls v.			
Brown	<i>Vendor's Lien</i> ..	142 Iowa, 190...	412
State v. Bartlett	<i>Attorney</i> ...	105 Me. 212....	542
State v. Bruce	<i>Trust</i>	17 Idaho, 1....	245
State v. Butterfield Livestock Co.	<i>Commerce</i> ...	17 Idaho, 441..	263
State v. Cale	<i>Former Jeop'y</i> ..	150 N. C. 805...	957
State v. De Groat.....	<i>Corporations</i> ..	109 Minn. 168..	764
State v. Martin	<i>Usury</i> ...	77 N. J. L. 652.	814
State v. Matheson	<i>Evidence</i> ...	142 Iowa, 414...	426
State v. Messier	<i>Bail</i> ...	105 Me. 210....	541
State v. Montgomery	<i>Trial</i> ...	56 Wash. 443..	1119
State v. Parr	<i>License</i>	109 Minn. 147..	759
State v. Perry	<i>Markets</i> ...	151 N. C. 661...	1002
State v. Pooler	<i>Officer</i>	105 Me. 224....	543
State v. Price	<i>Fine</i>	124 La. 917....	523
State v. Ray	<i>Bigamy</i> ...	151 N. C. 710...	1005
State v. Shreveport	<i>Office</i>	124 La. 178....	496
State v. Tolman	<i>Statute</i> ...	124 La. 630....	514
Stone v. Penn Yan K. P. & B. Ry.	<i>Receiver</i> ...	197 N. Y. 279...	879
Strampe v. Minnesota Farmers'			
Mut. Ins. Co.....	<i>Insurance</i> ..	109 Minn. 364..	781
Sturdivant v. Ward.....	<i>Executions</i> ..	90 Ark. 321....	32
Swan v. Walden.....	<i>Entireties</i>	156 Cal. 195....	118
Thompson v. Allen.....	<i>Lien</i>	56 Wash. 582..	1124
Thompson v. Grace.....	<i>Mortgage</i> ...	91 Ark. 52....	52
Thornton v. Ferguson.....	<i>Execution</i> ..	133 Ga. 825....	226
Times Square Auto. Co. v. Ruther-			
ford Nat. Bank.....	<i>Checks</i> ...	77 N. J. L. 649.	811
Vermeule v. York Cliffs Imp. Co.	<i>Suretyship</i> ..	105 Me. 350....	553
Webster v. Cadwallader.....	<i>Deed</i>	133 Ky. 500....	470
Weeks v. Hosch Lumber Co.....	<i>Executors</i> ..	133 Ga. 472....	213
Whitley v. McConnell.....	<i>Lottery</i> ...	133 Ga. 738....	223
Williams v. Atchison T. & S. F. Ry.			
Co.	<i>Costs</i> ...	156 Cal. 140....	117
Willis v. White.....	<i>Railroad</i>	150 N. C. 199...	906
Windley v. Swain.....	<i>Judgment</i> ...	150 N. C. 356...	923
Wirth v. Fawkes.....	<i>Sale</i> ...	109 Minn. 254..	778
Woodruff v. Zaban.....	<i>Conversion</i> ..	133 Ga. 24....	186
Wright v. County of Sonoma.....	<i>Contract</i> ..	156 Cal. 475....	140
Wright v. Knights of Maccabees...	<i>Insurance</i> ..	196 N. Y. 391...	838
Wunderlich v. Merchants' Nat.			
Bank	<i>Garnishment</i> ..	109 Minn. 468..	788
Yost v. Coyle.....	<i>Judicial Sale</i> ..	226 Pa. 458....	1069
Zoltovski v. Gzella.....	<i>Automobile</i> ..	159 Mich. 620...	752

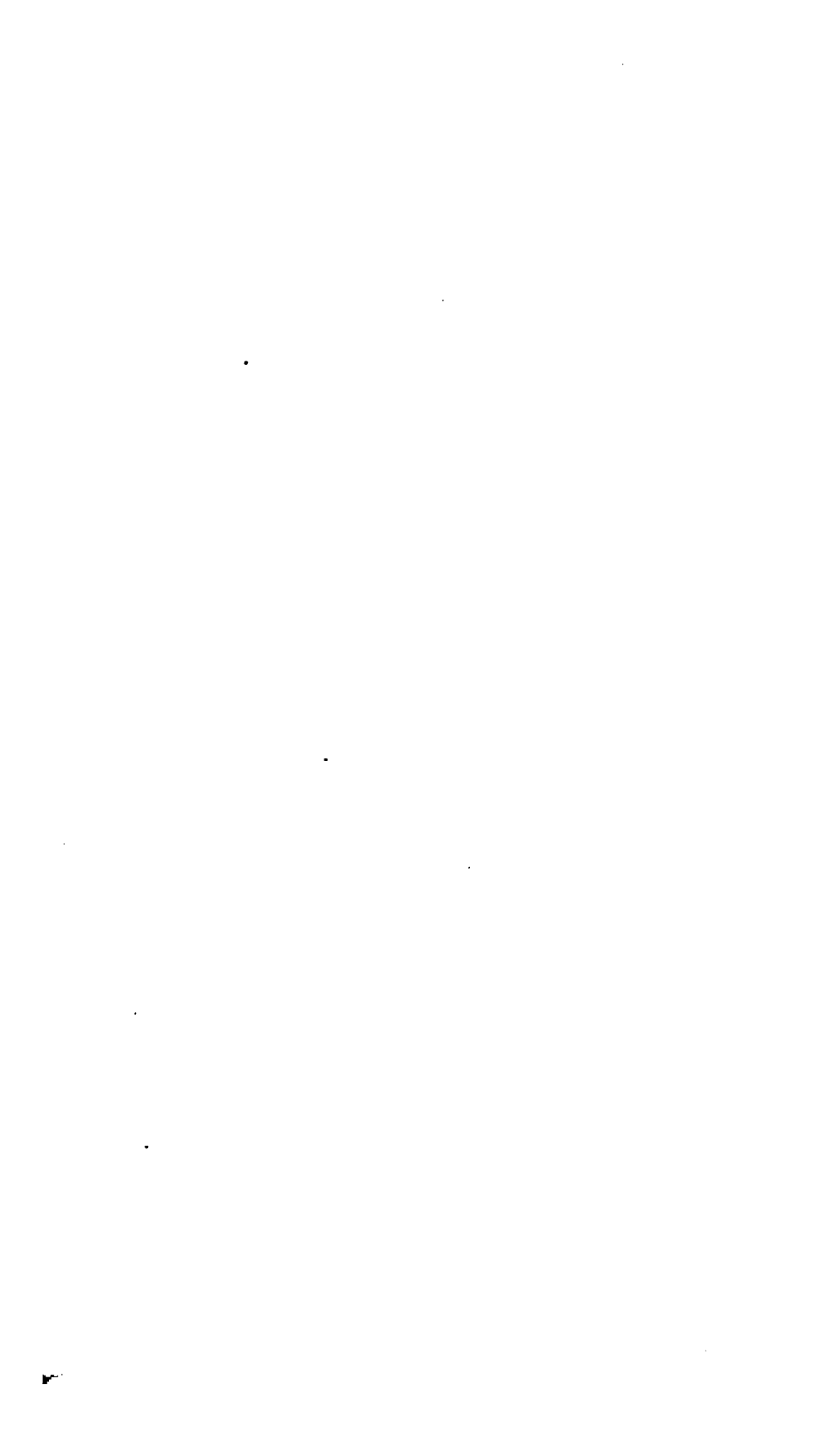
NAME.	SUBJECT.	REPORT.	PAGE.
Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.....	<i>Minors</i>	111 Md. 561....	636
Munsch v. Stelter.....	<i>License</i> ..	109 Minn. 403..	785
Musco v. United Surety Co.....	<i>Commerce</i> ...	196 N. Y. 459...	851
Navailles v. Dielmann.....	<i>Automobiles</i> ..	124 La. 421....	508
Netograph Mfg. Co. v. Scrugham..	<i>Process</i> ..	197 N. Y. 377...	886
Newburyport v. Spear.....	<i>Banking</i> ..	204 Mass. 146...	652
Noble v. John L. Roper Lumber Co.	<i>Employer</i> ...	151 N. C. 76....	974
O'Callaghan v. Dellwood Park Co..	<i>Railway</i> ...	242 Ill. 336....	331
Orton v. Orton.....	<i>Divorce</i> ...	159 Mich. 236...	716
Paine's Guardian v. Calor Oil & Gas Co.	<i>Highways</i> ..	133 Ky. 614....	475
Pancoast v. Dinsmore.....	<i>Agency</i> ...	105 Me. 471....	582
Parker v. Carter.....	<i>Contracts</i> ...	91 Ark. 162....	60
Patchin v. Seward Coal Co.....	<i>Guardian</i> ..	226 Pa. 159....	1013
Peasley v. Noble.....	<i>Sale</i>	17 Idaho, 686..	270
Pelt v. Payne.....	<i>Curative Stats</i> ..	90 Ark. 600....	45
Pennsylvania Co. v. Pittsburg...	<i>Municipalities</i> ..	226 Pa. 322....	1063
People v. Poole	<i>Homicide</i> ..	159 Mich. 350...	722
People v. Reardon	<i>Taxation</i> ..	197 N. Y. 236...	871
People v. Tilden	<i>Forgery</i> ...	242 Ill. 536....	341
People v. Weil	<i>Criminal Law</i> ..	243 Ill. 208....	357
Pereira v. Pereira.....	<i>Divorce</i> ...	156 Cal. 1....	107
Phillips v. Stewart.....	<i>Boundaries</i> ..	133 Ky. 134....	441
Pitcock v. State.....	<i>Contempt</i> ...	91 Ark. 527....	88
Pittsburg C. C. & S. L. Ry. Co. v. Chicago	<i>Carrier</i> ...	242 Ill. 178....	316
Plummer v. School Dist. No. 1 of Marianna	<i>Garnishment</i> ..	90 Ark. 236....	28
Puckett v. Guenther.....	<i>Judgment</i> ..	142 Iowa, 35....	402
Richardson v. Richardson.....	<i>Curtesy</i>	150 N. C. 549...	948
Rigdon v. More.....	<i>Jury</i>	242 Ill. 256....	328
Robertson v. Schard.....	<i>Bankruptcy</i> ..	142 Iowa, 500...	430
Robinson v. Robinson.....	<i>Trusts</i>	105 Me. 68....	537
Roger v. Whitham.....	<i>Judicial Sale</i> ..	56 Wash. 190..	1105
Rosen v. Rosen.....	<i>Usury</i>	159 Mich. 72....	712
Rossberg v. State.....	<i>Ordinance</i> ..	111 Md. 394....	626
Rounds Brothers v. McDaniel....	<i>Minors</i> ...	133 Ky. 669....	482
Roy v. Poulin.....	<i>Bastardy</i> ..	105 Me. 411....	573
Sample v. John L. Roper Lumber Co.	<i>Estoppel</i> ..	150 N. C. 161..	902
Scurry v. City of Seattle.....	<i>Evidence</i> ...	56 Wash. 1....	1092
Sewell v. Underhill.....	<i>Vendor</i> ...	197 N. Y. 168..	863
Seymour v. Oelrichs.....	<i>Stat. of Frauds</i> ..	156 Cal. 782...	154
Shepard v. Jacobs.....	<i>Employer</i> ..	204 Mass. 110..	648

NAME.	SUBJECT.	REPORT.	PAGE.
Siegwarth's Estate.....	<i>Trust</i>	226 Pa. 591.....	1086
Simmons v. Respasa.....	<i>Homestead</i> ..	151 N. C. 5.....	961
Slater v. Taylor.....	<i>Mortgage</i>	109 Minn. 492..	793
Sloan v. Hart.....	<i>Lessor</i>	150 N. C. 269...	911
State Bank of Iowa Falls v. Brown	<i>Vendor's Lien</i> ..	142 Iowa, 190...	412
State v. Bartlett	<i>Attorney</i>	105 Me. 212....	542
State v. Bruce	<i>Trust</i>	17 Idaho, 1....	245
State v. Butterfield Livestock Co..	<i>Commerce</i>	17 Idaho, 441..	263
State v. Cale	<i>Former Jeop'y</i> ..	150 N. C. 805...	957
State v. De Groat.....	<i>Corporations</i> ..	109 Minn. 168..	764
State v. Martin	<i>Usury</i>	77 N. J. L. 652.	814
State v. Matheson	<i>Evidence</i>	142 Iowa, 414..	426
State v. Messier	<i>Bail</i>	105 Me. 210....	541
State v. Montgomery	<i>Trial</i>	56 Wash. 443..	1119
State v. Parr	<i>License</i>	109 Minn. 147..	759
State v. Perry	<i>Markets</i>	151 N. C. 661..	1002
State v. Pooler	<i>Officer</i>	105 Me. 224....	543
State v. Price	<i>Fine</i>	124 La. 917....	523
State v. Ray	<i>Bigamy</i>	151 N. C. 710..	1005
State v. Shreveport	<i>Office</i>	124 La. 178....	496
State v. Tolman	<i>Statute</i>	124 La. 630....	514
Stone v. Penn Yan K. P. & B. Ry.	<i>Receiver</i>	197 N. Y. 279...	879
Strampe v. Minnesota Farmers' Mut. Ins. Co.....	<i>Insurance</i> ..	109 Minn. 364..	781
Sturdivant v. Ward.....	<i>Executions</i> ..	90 Ark. 321....	32
Swan v. Walden.....	<i>Entireties</i>	156 Cal. 195....	118
Thompson v. Allen.....	<i>Lien</i>	56 Wash. 582..	1124
Thompson v. Grace.....	<i>Mortgage</i> ..	91 Ark. 52....	52
Thornton v. Ferguson.....	<i>Execution</i> ..	133 Ga. 825....	226
Times Square Auto. Co. v. Ruther- ford Nat. Bank.....	<i>Checks</i>	77 N. J. L. 649.	811
Vermeule v. York Cliffs Imp. Co..	<i>Suretyship</i> ..	105 Me. 350....	553
Webster v. Cadwallader.....	<i>Deed</i>	133 Ky. 500....	470
Weeks v. Hosch Lumber Co.....	<i>Executors</i> ..	133 Ga. 472....	213
Whitley v. McConnell.....	<i>Lottery</i>	133 Ga. 738....	223
Williams v. Atchison T. & S. F. Ry. Co.	<i>Costs</i>	156 Cal. 140....	117
Willis v. White.....	<i>Railroad</i>	150 N. C. 199...	906
Windley v. Swain.....	<i>Judgment</i> ...	150 N. C. 356...	923
Wirth v. Fawkes.....	<i>Sale</i>	109 Minn. 254..	778
Woodruff v. Zaban.....	<i>Conversion</i> ..	133 Ga. 24....	186
Wright v. County of Sonoma.....	<i>Contract</i> ..	156 Cal. 475....	140
Wright v. Knights of Maccabees..	<i>Insurance</i> ..	196 N. Y. 391...	838
Wunderlich v. Merchants' Nat. Bank	<i>Garnishment</i> ..	109 Minn. 468..	788
Yost v. Coyle.....	<i>Judicial Sale</i> ..	226 Pa. 458....	1069
Zoltovski v. Gzella.....	<i>Automobile</i> ..	159 Mich. 620...	752



AMERICAN STATE REPORTS.

VOLUME 134.



CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

EL DORADO AND BASTROP RAILWAY COMPANY v.
KNOX.

[90 Ark. 1, 117 S. W. 779.]

CONTINUANCE—Grounds of Application—Due Diligence.—A motion for continuance on the grounds of absence of the regular attorney of the party and ignorance by the present attorney of who and where the witnesses are is properly overruled for not showing the efforts to get the witnesses. (p. 18.)

RAILROADS—Killing of Dogs.—Dogs are personal property, for the negligent killing of which a railway company is liable. (p. 19.)

RAILROADS—Killing of Dogs—Negligence.—Under section 6773 of Kirby's Digest, the killing of a dog by the running of a train is prima facie evidence of negligence of the railroad company. (p. 19.)

DAMAGES—Value of Dog—Nonassessment.—The fact that a dog is not assessed does not prove that it is of no value, especially when the evidence shows it is valuable. (p. 19.)

RAILROADS—Action for Negligence—Venue.—Kirby's Digest, section 6776, provides that actions for killing horses, mules, cattle or other stock shall be brought in the county where the killing occurred. In the case of a dog this section does not apply. (p. 19.)

E. B. Kinsworthy and Lewis Rhoton, for the appellant.

R. G. Harper, for the appellee.

BATTLE, J. J. A. Knox brought an action against the El Dorado and Bastrop Railway Company to recover damages caused by the killing of a certain dog, the property of plaintiff. In a trial before a jury a verdict was returned in favor of plaintiff for twenty-five dollars, and judgment was rendered accordingly, to reverse which an appeal was taken to this court.

When the action was called for trial, on the eighth day of April, 1908, the defendant filed a motion for continuance as follows:

"Comes the defendant herein and moves the court to continue this cause to the next term of this court, and for cause ³ states: That Hon. C. C. Hamby, its regular attorney, who has prepared for trial this cause, and who tries all cases at El Dorado, Arkansas, is absent from this court in attendance upon the circuit court at Mt. Ida, Arkansas, and is there engaged in the trial of a large and important case for the St. Louis, Iron Mountain and Southern Railway Company; that C. C. Hamby is the only attorney for the defendant who is prepared to try this case, and that his absence is unavoidable, and that he would have to be absent was unknown to defendant until the sixth day of this month, when it spoke to the other counsel for the purpose of getting this continuance, and that the counsel it now has is not familiar with the case, does not know who the witnesses for the defendant are, and does not know how to reach them to get them here."

The court properly overruled the motion. The motion does not show any effort made to get witnesses. It seems none were summoned. It was known two days before the trial that the regular attorney would not be present, and other attorneys were employed. It fails to show the exercise of diligence in getting ready for trial.

On the 12th of November, 1907, the dog of plaintiff was found dead on the railroad of the defendant, between Dollar Junction and Felsenthal. He was cut in two. His body was scattered upon the track. The blood was fresh and appeared to have been shed recently. The passenger train of the defendant had passed over the track where the dog was killed about an hour before he was found. No other train was seen to pass there about that time. The dog was a valuable dog. One witness testified that his reasonable cash market value was fifty dollars.

The court instructed the jury over the objections of the defendant as follows:

"The jury are instructed that if they find from a preponderance of the testimony in this case that the defendant railway company, by the operation of its trains, killed the dog in controversy, the property of the plaintiff, the killing is presumed to have been negligently done, and the burden is upon the defendant to show that the killing of said dog was not through its negligence.

"You are further instructed that if you find for the plaintiff ⁴ in this case you shall assess his damages at such amount as you may believe from the evidence that he is entitled to recover for the killing of said dog, not to exceed twenty-five dollars, the amount sued for."

The following instruction was requested by the defendant and refused by the court: "The jury are instructed that if they find from the evidence in this case that the dog in con-

troverſy was not aſſeſſed, and that the plaintiff was the owner of ſaid dog on the firſt Monday in June, 1907, then you will find for the defendant."

This court has held that dogs are perſonal property, for the negligent killing of which a railway company is liable: *St. Louis S. W. Ry. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; *St. Louis etc. Ry. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901.

Section 6773 of Kirby's Digest provides: "All railroads which are now or may be hereafter built and operated in whole or in part in this ſtate ſhall be reſponsible for all damages to perſons and property done or cauſed by the running of trains in this ſtate." Under this ſtatute the killing of the dog by the running of a train was *prima facie* evidence of negligence on the part of the railroad company: *St. Louis etc. Ry. Co. v. Neely*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616, and caſes cited.

There was no prejudicial error committed in giving the inſtruction at the requeſt of plaintiff. The court properly reſuſed to give the inſtructions aſked for by appellant. The fact that the dog was not aſſeſſed did not prove that the dog was of no value, eſpecially when the undisputed evidence ſhows that the dog was valuable.

Appellant contends that the ſtatute requires that actions of this kind ſhould be brought in the county in which the animal was killed; that, the action in this caſe having been brought in Union county, it was neceſſary to prove that the dog in queſtion was killed in that county. But the ſtatute referred to does not include dogs. It does ſay that actions for damages ſuſtained by the killing or wounding of certain animals by railroad trains ſhould be brought in the county where the killing or wounding occurred: Kirby's Digest, ſec. 6776. It deſcribes the animals referred to to be ſuch as horſes, mules, cattle or other ſtock. Other ſtock means ſuch as horſes, mules and cattle, and this does not ⁵ include dogs: *Hempstead County v. Harkneſs*, 73 Ark. 600, 84 S. W. 799. It was therefore not neceſſary to prove that the dog was killed in Union county.

The evidence in the caſe ſhows that the market value of the dog was at leaſt twenty-five dollars. There is none to the contrary. The evidence was ſufficient to ſuſtain the verdict. Judgment affirmed.

That an Action Lies to Recover for the Negligent Killing of a Dog by a railroad company has been recognized by many recent authorities: Columbus R. R. Co. v. Woolfolk, 128 Ga. 631, 119 Am. St. Rep. 404; *Harper v. St. Paul City Ry. Co.*, 99 Minn. 253, 116 Am. St. Rep. 415, and caſes cited in the cross-reference note thereto. As to the manner of proving the value of the dog in ſuch caſes, ſee *Hodges v. Gaunſey*, 77 Miſs. 353, 78 Am. St. Rep. 525; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754; note to *Hamby v.*

Samson, 67 Am. St. Rep. 292. The value of the animal may be proved by evidence of his breed, qualities, and the market value: Columbus E. R. Co. v. Woolfolk, 128 Ga. 631, 119 Am. St. Rep. 404.

Presumptions of Negligence from the Happening of Accidents are considered in the note to Cincinnati Traction Co. v. Holzenkamp, 113 Am. St. Rep. 986. The presumption of the exercise of due care is the subject of a note to Chicago etc. Ry. Co. v. Wilson, 116 Am. St. Rep. 108.

HUNTER STATE BANK v. MILLS.

[90 Ark. 10, 117 S. W. 760.]

OFFICIAL BONDS, Sureties on—For What Liable.—The sureties on a county treasurer's bond are not liable for penalties imposed upon him by an act which came into operation after the date of the bond, except such was the intention of the statute. (p. 23.)

OFFICERS—New Duties—Subsequent Legislation.—The rights and duties attached to the office of county treasurer are created by law, and may be by legislation changed or increased appropriately to the office. (p. 23.)

OFFICERS—New Duties—New Penalties.—A county treasurer is liable for penalties under a statute passed after his term has commenced, provided the penalty is for failure to perform a duty appropriate to his office. (p. 23.)

J. T. Patterson, for the appellant.

H. M. Woods, for the appellee.

¹¹ **BATTLE, J.** The Hunter State Bank, the depository of the public funds of Woodruff county, brought this action against C. B. Mills, county treasurer of said county, and certain sureties on his official bond, to recover penalties on account of the failure of Mills, as county treasurer, to immediately pay over to the plaintiff, as such depository, the public funds of the county upon receipt of same.

¹² The first paragraph of the complaint, omitting the caption, is as follows:

"The plaintiff, the Hunter State Bank, for its cause of action herein against the defendants, C. B. Mills, Robt. C. Lynch, T. C. Carter, and F. H. Kennedy, states that the plaintiff herein is a corporation organized and existing under the laws of the State of Arkansas and having its situs and principal office and place of business at the town of Hunter in Woodruff County, Arkansas. That the above-named defendant, C. B. Mills, is and has been since the 17th day of November, 1906, the duly elected, qualified, commissioned and acting treasurer of Woodruff County, Arkansas; that on the 31st day of October, 1906, the said C. B. Mills, as treasurer

as aforesaid, made, executed and filed his bond as such county treasurer, with Robt. C. Lynch, T. C. Carter and F. H. Kennedy, who are also made defendants herein, as his sureties upon such bond, and which bond was on the 17th day of November, 1906, duly approved by the county court of Woodruff County. . . . That at the April term, 1907, of the county court of Woodruff County, Arkansas, this plaintiff, the Hunter State Bank, was by the county court selected and designated to be the depository of the public funds of Woodruff County, including the school funds thereof. . . . That, in making the aforesaid order so selecting and designating this plaintiff as such depository of the public funds of Woodruff County as aforesaid, the county court acted pursuant to the authority and in conformity to the provisions and requirements of an act of the Thirty-sixth General Assembly of the State of Arkansas, entitled 'An Act to create a depository for the county funds of Woodruff County, Arkansas,' which was approved March 7, 1907. That on the 27th day of April, 1907, and within twenty days next after the county court made the aforesaid order selecting this plaintiff to be the depository of the public funds of Woodruff County, including the school funds thereof, as aforesaid, this plaintiff made, executed and filed with the county clerk of Woodruff County its bond as such county depository, as required by law, which bond was on the 27th day of April, 1907, duly approved by the county court of Woodruff County. . . . That thereafter on the — day of —, 1907, the said C. B. Mills, as county treasurer of Woodruff ¹³ County as aforesaid, paid over to this plaintiff as such county depository of said county the public funds of Woodruff County, including the school funds thereof which were then in his hands as such county treasurer of Woodruff County, as required by law. That on the tenth day of September, 1907, C. B. Mills, as county treasurer of Woodruff County, as aforesaid, received from the treasurer of the State of Arkansas the sum of \$7,469.68, the same being a part of the public funds of said Woodruff County, including the school funds of said county; that, after the receipt of the aforesaid sum of \$7,469.68 by the said C. B. Mills as county treasurer as aforesaid, the said C. B. Mills, as such county treasurer as aforesaid, failed to immediately deposit the same with the plaintiff herein as such depository of the public funds of said Woodruff County as aforesaid, as required by law, but the said C. B. Mills, county treasurer as aforesaid, held the aforesaid sum of money, the same being a part of the public funds of the said Woodruff County and a part of the school funds thereof, from the time of the receipt of the same by him as aforesaid until the 3d day of October, 1907, when he deposited the same with the plaintiff herein as such county depository as aforesaid; that

the action of the said C. B. Mills as county treasurer as aforesaid in failing to deposit with this plaintiff as such depository of the public funds of Woodruff County the aforesaid sum of \$7,469.68, the same constituting a part of the public funds and a part of the school funds of Woodruff County as aforesaid, immediately upon receipt thereof by him as required by law, and in withholding and failing to so deposit with this plaintiff as such depository the aforesaid sum of money from the 10th day of September, 1907, or the time of the receipt thereof by him until the 3d day of October, 1907, when he deposited the same with this plaintiff as aforesaid, constitute a breach of the conditions of the bond of the said C. B. Mills as county treasurer, as aforesaid, and by reason of such breach of the conditions of the bond of the said C. B. Mills, as county treasurer as aforesaid, this plaintiff has sustained injury and damage in the sum of five hundred seventy-two and 66-100 (572.66) dollars, the same being ten per centum per month on the aforesaid sum of \$7,469.68 from September 10, 1907, to October 3, 1907, and for which sum the defendants herein are liable to the plaintiff herein ¹⁴ under the provisions of the act of the General Assembly of the State of Arkansas as hereinabove referred to."

The complaint contains other paragraphs of like tenor alleging further damages.

The condition of the bond sued on is as follows: "Whereas the above bounden C. B. Mills was on the third day of September, 1906, duly elected to the office of treasurer of Woodruff County, Arkansas: now, if he, the said C. B. Mills, shall well, truly and faithfully perform and discharge all of the duties of the said office, and if he shall account for and pay over all moneys that may come into his hands as such treasurer, then this obligation to be void; otherwise to remain in full force and effect."

Defendants demurred to the complaint for the following reason:

"Because the act entitled 'An Act to Create a Depository for the County Funds of Woodruff County, Ark.' is in violation of article 2, section 10, of the constitution of the United States, and in violation of article 2, section 17, of the constitution of the state of Arkansas, because said act impairs the obligation of a contract, said contract being a bond executed by defendants on the — day of —, 1906, and upon which this action is based; the penalties and liabilities under the special act herein mentioned being greatly in excess of those fixed by the statute in force at the time of the execution of the bond herein mentioned."

The court sustained the demurrer and dismissed the action, and plaintiff appealed.

The bond sued on was executed on the 31st day of October, 1906, and the act referred to in the demurrer was approved March 7, 1907. This act makes it the duty of the county judge of Woodruff county to loan the county funds of such county, including school funds, to any bank, banker or trust company, which or who shall offer to pay the highest rate of interest thereon, at such rate; makes the successful bidder, on performing certain conditions, the depository of such county; and makes it the duty of the county treasurer immediately upon the receipt of any county funds to deposit the same with the depository, to the credit of the county and the particular fund to which it may belong, and for a failure to perform this duty makes him ¹⁵ liable to the depository on his official bond for ten per centum per month upon any sum not so deposited, to be recovered by civil action in any court of competent jurisdiction; and makes it the duty of the depository to provide for the prompt payment of all checks of the county treasurer drawn upon the county funds in his hands.

The obligation of the sureties on the bond sued on was that Mills would well, truly and faithfully perform and discharge all of the duties of the office of county treasurer, and account for and pay over all moneys that may come into his hands as such treasurer. This does not include penalties imposed upon the treasurer after the execution of the bond: *Jeffreys v. Malone*, 105 Ala. 489, 17 South. 21; *McDowell v. Burwell's Admrs.*, 4 Rand. 317; 29 *Cyclopedia of Law and Procedure*, 1454, and cases cited; *Murfree on Official Bonds*, sec. 654.

In *Murfree on Official Bonds*, section 654, it is said: "The obligation of a surety for the due discharge of his official duties by his principal is that the surety will answer the damage that may result from the breach of the bond; it is not that the principal will respond to such fines and penalties for his misconduct as may be prescribed by law and awarded by judicial authority. The fine and penalty are punishment for neglect of duty, and may be imposed or incurred, irrespective of actual damages or loss suffered by anyone."

It follows that the sureties on the bond sued on are not liable for the penalties imposed by the act of March 7, 1907, which was subsequent to the execution of the bond. But this is not true of the principal, Mills. He did not hold the office of treasurer by contract or grant. The rights and duties attached to it were created by law, and may be changed, or additional ones may be imposed upon him during the currency of his term, provided the new duties are appropriate to his office, and to secure the performance thereof penalties may be imposed upon him for failure or neglect to perform. New duties, which were appropriate to his office, were law-

fully imposed upon Mills, with penalties attached for the failure to perform them, by the act of March 7, 1907, and he is liable therefor.

We have not failed to notice *Christian v. Ashley County*, 24 Ark. 142. The court in that case held that the sureties were ¹⁶ liable for the penalty, because it was the intention of the statute to make them responsible. It did not say that they would be liable in the absence of such a statute.

The judgment is sustained as to the sureties, and reversed as to Mills, and cause is remanded with directions to the court to overrule the demurrer to the complaint.

The Liability of Sureties on the Bond of a Public Officer for duties imposed upon their principal subsequently to the execution of the bond is discussed in the note to Feller v. Gates, 91 Am. St. Rep. 503.

MCGRORY v. ULTIMA THULE, ARKADELPHIA AND MISSISSIPPI RAILWAY COMPANY.

[90 Ark. 210, 118 S. W. 710.]

APPEAL AND ERROR—Peremptory Instruction to Return Verdict—Question Presented.—Where, after all evidence had been taken, the trial court gave the jury a peremptory instruction to return a verdict for the defendant, the only question an appeal presents is whether the evidence was sufficient to warrant a verdict for the plaintiff at the strongest probative value. (p. 25.)

MASTER AND SERVANT—Fellow-servant—Negligence.—A master is not responsible to a vice-principal for the negligence of another of his servants subordinate to and under the control of the vice-principal. (p. 26.)

MASTER AND SERVANT—Fellow-servant—Negligence.—A master is not bound, under the doctrine of respondeat superior, to indemnify one servant for an injury caused by the negligence of another servant in the same common employment unless the negligent servant is the vice-principal of the master. (p. 26.)

MASTER AND SERVANT—Vice-principal—Negligence.—The master discharges his full duty to his vice-principal by exercising ordinary care in selecting competent subordinate servants. (p. 26.)

MASTER AND SERVANT—Fellow-servant—Negligence—Proximate Cause.—Where there is no causal relation between an alleged act of negligence and the injury complained of, the former cannot constitute a basis of recovery. (p. 27.)

Wood & Henderson, for the appellant.

T. D. Wynne, J. H. Crawford and T. D. Crawford, for the appellee.

²¹¹ McCULLOCH, C. J. The plaintiff, Patrick McGrory, sues his employer, the Ultima Thule, Arkadelphia and Mis-

Mississippi Railway Company, for damages resulting from physical injuries received while performing his duties, and alleged to be due to the negligence of other servants for whom the employer is claimed to be responsible. After all the testimony had been introduced, the trial court gave the jury a peremptory instruction to return a verdict in favor of the defendant, and judgment was entered accordingly. Thus the only question presented here is whether the testimony was sufficient to warrant a verdict in favor of the plaintiff, giving it the strongest probative force which the jury might have accorded to it.

There is little, if any, conflict in the testimony on the material points. The defendant owned a railroad which it operated as a common carrier through Clark and Dallas counties in Arkansas, and plaintiff was employed as roadmaster and superintendent of construction. He had no authority to employ or discharge trainmen, but in the event of accident or wreck of a train on the line it was his duty to take charge of the train or trains for the purpose of clearing up the wreck and restoring the trains to proper service. On such occasions he had charge of the trains, and his authority was supreme, the conductors and other trainmen being under his immediate supervision and subject ²¹² to his orders. The evidence shows, however, that the conductors were left in charge of their trains subject to his orders, and that they were expected to give orders according to their judgment except when otherwise directed by the plaintiff as superintendent. The latter's orders to trainmen were given through the conductors.

On the occasion of the plaintiff's injury, one of the engines, No. 12, got off the track, and it was necessary to procure the assistance of another engine in getting it back, and plaintiff was notified. He got another engine, No. 14, and after coupling two flat-cars to it proceeded to the scene of the wreck of engine No. 12. Night fell while the work was going on, and plaintiff went over to engine No. 14 to give an order to the engineer, and, water being up to the track on either side, he undertook to climb upon a flat-car attached to the engine in order to pass over to the engine, and while doing so the engine and cars were moved, and his foot was caught between the drawhead and bumper. The signal to the engineer to move his engine was given by the conductor in response to the request of the section foreman for the engine to be moved, so that he could repair the track. This was after engine No. 12 had been gotten back on the track. Neither the conductor who gave the signal nor the engineer of No. 14 knew of the situation of plaintiff when the signal to move the engine was given and acted upon. It was dark, and neither of the trainmen knew where the plaintiff was or that he had started over to engine No. 14.

It is contended that the act of the conductor in giving the signal to move the train constituted negligence, for which the defendant would be liable.

According to the undisputed facts, the plaintiff was a vice-principal of the defendant at the time of the injury; and the negligence of the employé, if any, which caused the injury was that of one of his subordinates. Is the master responsible to a vice-principal on account of the negligence of another of its servants who is a subordinate of the vice-principal and under the latter's control? It is plain that the master is not responsible, for that is one of the ordinary risks which the servant assumes when he takes service and assumes control over his subordinates. The master is not bound, under the doctrine of respondent superior, ²¹³ to indemnify one servant for an injury caused by the negligence of another servant in the same common employment unless the negligent servant is at the time acting as the master's representative—in other words, the vice-principal of the master: 2 Labatt on Master and Servant, sec. 470; Quebec Steamship Co. v. Merchant, 133 U. S. 376, 10 Sup. Ct. Rep. 397, 33 L. ed. 656.

The subordinates of the vice-principal over whom he exercises control are his fellow-servants in a common employment, so far as the responsibility of the master to him for their acts is concerned, and the master discharges his full duty to his vice-principal by exercising ordinary care in selecting competent subordinate servants.

It is contended that a contrary doctrine is announced in the case of St. Louis etc. R. R. Co. v. McFall, 75 Ark. 30, 86 S. W. 824, 69 L. R. A. 217, 5 Ann. Cas. 161. We think, however, that that case announced a principle altogether different from the one applicable here. There the injured party was a conductor on a train, and his injury was caused by the concurring negligence of Adams, the engineer of his train, and the servants in charge of another train. The question there was whether the negligence of Adams, which contributed to the injury, should be imputed to McFall, so as to deny him the right of recovery; and we held that, inasmuch as Adams was not under the immediate control of McFall, the negligence of the one could not be imputed to the other. The controlling principle in that case was announced in the following language: "It follows, then, that in cases where the injured and negligent do not sustain to each other the relations of master and servant or principal and agent, or other relation by which alone one is responsible for the act of the other, the contributory negligence of a third person will not be imputed to the party thereby affected unless he was at the time subject to the control of the injured person, and the wrong, the negligence, was committed at a time when it was within the power of such person to prevent it, and it was his

duty to do so, and under circumstances which indicated that he assented to or acquiesced in the wrong by his failure to interfere, or directed it to be done; and that when the conditions are reversed, the reverse is true—it will be imputed.”

Now, in the present case there is no question of imputed negligence involved. The sole question, as before stated, is ²¹⁴ whether the master is responsible to his representative, or vice-principal, for the acts of another servant in the common employment, but who is a subordinate of the former.

There is another allegation of negligence in the complaint, to the effect that the master was guilty of negligence in permitting the spring of the drawhead of the flat-car to become out of repair, so that too much space or play was allowed between the drawhead, when pulled out, and the bumper. It is contended that but for this negligence there would not have been enough space between the drawhead and bumper for the plaintiff's foot to have got down between them, and therefore no injury would have occurred. We are of the opinion, however, that this could not be made the basis of a charge of negligence as the proximate cause of the injury. It could not have been anticipated by the master, in furnishing reasonably safe appliances, that a danger of this sort should be guarded against. It could not have been reasonably anticipated that a servant would place his foot between the drawhead and bumper, or in the discharge of his duties would permit his foot to get in that position. We can see no causal relation between the alleged act of negligence and the injury, and therefore it could not be made the basis of a recovery.

We do not undertake to decide whether or not, under the facts in this case, the plaintiff himself was, as a matter of law, guilty of contributory negligence in climbing on the car in the darkness without apprising the trainmen of his presence. It is unnecessary to do so. Upon the whole, we are of the opinion that the undisputed evidence shows affirmatively that the plaintiff is not entitled to recover, and the peremptory instruction to the jury was correct.

Affirmed.

As to Who is a Vice-principal, see the note to Mast v. Kern, 75 Am. St. Rep. 584.

The Right of Recovery by Employés, injured while performing hazardous duties, is considered in the notes to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884; Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289.

PLUMMER v. SCHOOL DISTRICT NO. 1 OF MARIANNA.

[90 Ark. 236, 118 S. W. 1011.]

GARNISHMENT—School District.—The Funds of a School District cannot be garnished in an action at law. (pp. 29, 30.)

GARNISHMENT—School District—Equitable Relief.—The creditors of a contractor for a school building are entitled in equity to have applicable funds in a school district's control subjected to their claims, and their liens by equitable garnishment take priority as in proceedings at law. (pp. 30, 31.)

H. F. Roleson, for the appellants.

P. D. McCulloch, for the appellee.

²³⁶ WOOD, J. The appellants Plummer & Davis, O. C. Sutton, M. Lesser, Twen-Cen Granite Company and Hays & Sturdivant filed their suits in the Lee chancery court, alleging that the defendants, C. A. Alstead and G. B. Thomason, were indebted to them in various sums on account of material furnished to the defendants as contractors engaged in the erection of a school building for the defendant, Special School District No. 1 of Marianna; that the ²³⁷ said school district was indebted to the said Alstead & Thomason in a sum greater than the amounts sued for; that the said defendants, Alstead & Thomason, were insolvent; that the plaintiffs had no remedy at law by which they could obtain satisfaction of their debt; and praying for judgment against the defendants in various sums set out in their complaints, and further praying that the said school district be required to answer as to what sum of money it was indebted to Alstead & Thomason, that the said sum of money be impounded and garnished, and that a lien be declared and established against the same in favor of the plaintiffs, and that the said school district be required to pay such judgment as might be recovered against the defendants, Alstead & Thomason.

On the thirtieth day of April, 1906, the appellants W. H. Paslay, J. T. Johnson and — Brewer also filed their complaint, setting up substantially the same facts and asking the same remedy against the defendants, Alstead & Thomason and the school district. On the twenty-second day of May, 1906, G. H. Vineyard filed a similar suit for \$71.25. On May 27, 1906, L'Anguille Lumber Company filed its suit for \$709.40, alleging substantially the same facts, and on the twenty-second day of May, 1907, the Coffeyville Brick Company brought suit for \$952.81, alleging substantially the same facts as set forth in other complaints.

The school district answered and denied that it was indebted to Alstead & Thomason in any amount, but alleging that the said school district had complied in every way with

the contract, that the same provided for liquidated damages of \$25 per day for all the days that the said school building remained incomplete after the time mentioned in the contract, and that the said Alstead & Thomason were indebted to the school district in the sum of \$669, and that the said school district was not indebted to the said Alstead & Thomason in any sum whatever.

The causes were consolidated and heard upon the pleadings and depositions in the various cases. On the 27th of May, 1907, a decree was rendered, finding that the said school district was indebted to the contractors, Alstead & Thomason, in the sum of \$1,730.08, and finding also the amount of indebtedness from Alstead & Thomason to the various plaintiffs as follows: To Plummer & Davis, \$746.71; to O. C. Sutton & Company, \$94.70; ²³⁵ to Twen-Cen Granite Company, \$197.99; to Hays & Sturdivant, \$94.20; to Paslay & Johnson et al., \$325; to — Brewer, \$126; to G. H. Vineyard, \$71.25; to L'Anguille Lumber Company, \$709.40; and Coffeyville Brick Company, \$952.81.

On the twentieth day of May, 1908, the plaintiffs, Plummer & Davis, O. C. Sutton & Company, Twen-Cen Granite Company, and Hayes & Sturdivant filed their motions and petition in said court, asking that they be declared entitled to priority in the distribution of said fund, alleging and showing that their actions were filed prior to the actions of any other of the plaintiffs, and were for the purpose of impounding, garnishing and attaching the funds in the hands of the School District of Marianna.

The plaintiffs Paslay & Johnson and Brewer also asked to be made parties to the motion, and asked that they have priority in the distribution of the fund.

The court found that the plaintiffs Plummer & Davis, O. C. Sutton & Company, Twen-Cen Granite Company, and Hays & Sturdivant had filed their suit on the tenth day of May, 1906; that the other plaintiffs had filed their suits subsequent to said dates; that all of the debts sued for by all of the plaintiffs amounted to the sum of \$3,632.01, and that the pro rata amount, if distributed among all the creditors, would amount to the said .476 per cent.

The decree directed that the funds in the hands of the clerk be distributed accordingly among all the creditors. Thereupon Plummer & Davis, O. C. Sutton & Company, Twen-Cen Granite Company, Hayes & Sturdivant, Paslay & Johnson and — Brewer excepted and appealed.

²³⁹ In Boone County v. Keck, 31 Ark. 387, this court held that public municipal corporations are not subject to the process of garnishment. The court said: "Public policy, indeed public necessity, requires that the means of public corporations, which are created for public purposes with powers

to be exercised for the public good, which can contract alone for the public, and whose only means of payment of the debts contracted is drawn from the corporators by a special levy for that purpose, should not be diverted from the purposes for which it was collected, to satisfy the demands of others than the parties contracted with." This was said in a case where the interests of a county were involved. But the rule and the reason for it are the same in the case of a school district. So that the appellants were remediless at law to have the funds in the hands of the directors applied to the payment of their debts against the contractors. They would be likewise without any remedy in equity, and for the same reason, if the question were one of diverting the public funds from the channel to which they have been turned by public authority. But, ²⁴⁰ as the school building has been completed and the purpose consummated for which the fund was raised, the public interest cannot be injuriously affected by further withholding the fund from distribution to those who are justly entitled to it. No reason is assigned here on behalf of the school district why the creditors of the contractors should not come into equity to have the funds in the hands of the district subjected to the payment of their debt. But for the public policy which forbids liens to be declared on public buildings, all those who had claims for labor done, materials furnished, etc., on the school building could have their liens declared on same and be on an "equal footing" under section 4979, Kirby's Digest. But this doctrine of public policy forbids such procedure. Then how are they to reach the fund which the district owes the contractor and which the contractor owes them? In the absence of a statute giving them a lien upon the fund superior to that of the contractor, and making them to share pro rata in its distribution when impounded, their relation to the contractor is simply that of creditors, and they can only resort to the remedies common to creditors for the collection of their debts: *Riggin v. Hillard*, 56 Ark. 476, 35 Am. St. Rep. 113, 20 S. W. 402. In the absence of legislation or contract affecting the status of the parties otherwise, their relation is simply this: the school district owes the contractors a certain amount which it has in its possession, and the contractors owe the various claimants who brought these suits the respective amounts that the court found due them. Says Judge Cockrill, in the above case of *Riggin v. Hillard*: "Every equitable proceeding wherein a remedy is devised to apply the debt of a third person to the extinguishment of the plaintiff's demand against his debtor is an equitable garnishment." The complaints in this case, as in that, alleged insolvency of the contractors, and that no relief could be had at law, and other facts, which laid the proper foundation for a creditor's suit to subject the

funds in the hands of the directors. Therefore, as the plaintiffs in these various suits are nothing more nor less than simple contract creditors, the law governing the question of the priority of their respective claims is well established. "The lien obtained on the equitable assets of a debtor by a creditor's suit attaches thereto from the time of the service of process, or, as stated in some of the cases, on the filing of the bill ²⁴¹ suing out of process": 12 Cyc. 64 F, note. The plaintiffs in these several suits had no lien before the commencement of their respective suits, either in law or equity, which they could enforce. But the commencement of their suits to subject the fund in controversy created the lien by equitable garnishment of the assets in the hands of the directors, and these garnishments are subject to priorities: *Watkins v. Field*, 6 Ark. 391; *Martin v. Foreman*, 18 Ark. 249; *Adams v. Penzel*, 40 Ark. 531. See *Jones v. Ark. Mech. & Agl. Co.*, 38 Ark. 17; *Little Rock T. & E. Co. v. Wilson*, 66 Ark. 582, 53 S. W. 43; *Green v. Robertson*, 80 Ark. 1, 96 S. W. 138.

Equity follows the law as to priority in garnishment proceedings. It follows that appellants *Plummer & Davis*, *O. C. Sutton*, *M. Lesser*, *Twen-Cen Granite Company* and *Hays & Sturdivant*, who filed their suits on the same day and obtained service at the same time, for aught that appears to the contrary, are entitled to preference in the satisfaction of their claims, and that *Paslay & Johnson* and *Brewer*, who made their complaint a general creditor's bill, and the subsequent claimants are entitled to share in the residue pro rata.

The decree is therefore reversed, and the cause remanded with directions to enter a decree in accordance with the opinion.

Municipal Corporations are Generally Held not Subject to Garnishment: *Flood v. Libby*, 38 Wash. 336, 107 Am. St. Rep. 851; *City of Sherman v. Shobe*, 94 Tex. 126, 86 Am. St. Rep. 825; *Geist v. St. Louis*, 156 Mo. 643, 79 Am. St. Rep. 545; *State v. Tyler*, 14 Wash. 495, 53 Am. St. Rep. 878; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 61 Am. St. Rep. 395. Compare, however, *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 75 Am. St. Rep. 778; *Waterbury v. Deer Lodge County*, 10 Mont. 515, 24 Am. St. Rep. 67.

That Public School Buildings are not Subject to a Mechanic's Lien, see *National Fireproofing Co. v. Huntington*, 81 Conn. 632, 129 Am. St. Rep. 228; *Eureka Stone Co. v. First Christian Church*, 86 Ark. 212, 126 Am. St. Rep. 1088, and cases cited in the cross-reference note thereto.

STURDIVANT v. WARD.

[90 Ark. 321, 119 S. W. 247.]

EXECUTIONS—Vacating Satisfaction—Nugatory Purchase—

Where property sold as the judgment debtor's and purchased at a sheriff's sale by the judgment creditor is not in fact the judgment debtor's property, and the execution has been returned satisfied, the satisfaction will be vacated. (p. 34.)

W. C. Rodgers, for the appellant.

W. P. Feazel, for the appellee.

323 HART, J. Eugenia Ward, in the circuit court of Howard county, Arkansas, sued out a scire facias to revive a judgment against J. B. Sturdivant. The case was tried upon the following agreed statement of facts:

"It is agreed between the parties to this action, as follows: That on or about February 18, 1895, the plaintiff, Eugenia Ward, recovered judgment against the defendant, J. B. Sturdivant, before J. K. Floyd, a justice of the peace of Mineral Springs, Township, Howard county, Arkansas, for the sum of eighty-nine dollars and sixty cents with interest at six per centum per annum from said date. That on October 26, 1889, said Eugenia Ward, plaintiff herein, sued out an execution under said judgment in said justice's court, placed same in the hands of the constable of that court for service, and in due course said constable returned said execution nulla bona. That thereafter, on November 14, 1901, plaintiff filed a transcript of said judgment, together with all the docket entries thereon, in the office of the clerk of the Howard circuit court, whereby said judgment became a judgment of said Howard circuit court. That on November 14, 1901, plaintiff sued out of the circuit court of Howard county an execution under said judgment directed to the sheriff of Howard county, and said execution was on the same day delivered by the plaintiff to said sheriff with directions to levy same upon an undivided one-half interest in the following land in Howard county, Arkansas, to wit: West half of the southwest quarter, section 9; southwest quarter, northwest quarter, section 15, and southeast quarter, northeast quarter, section 16, all in township 11 south, range 27 west, as the property of the execution defendant, J. B. Sturdivant, who is also defendant in this action. That after advertisement, according to law, said land was offered for sale at public auction according to the law of sales under execution on December 12, 1901, at which time plaintiff herein became the purchaser at and for the price of \$125, the amount of the execution and cost. That on the thirtieth day of April, 1903, after the time for redemption had expired, said sheriff

executed to her a sheriff's deed in pursuance of said sale and for the consideration of said bid, reciting therein all the facts required by law to be recited in a sheriff's deed. That this deed was made to and accepted by the plaintiff, was by her placed of record, and that, shortly after receiving this deed, the plaintiff began ³²⁴ an action in the Howard circuit court against W. A. J. Sturdivant to recover the undivided one-half interest in said land which said sheriff's deed purported to convey. . . . That at the time of suing out said execution under which said land was sold by the sheriff the said Eugenia Ward knew that J. B. Sturdivant, the defendant herein, had by warranty deed, conveyed his undivided one-half interest in said land to his brother, W. A. J. Sturdivant, in the year 1894. That she prosecuted her cause in that action for possession with diligence through all the courts to the supreme court, which finally held that the title to said land passed out of J. B. Sturdivant when he conveyed the same to his brother, W. A. J. Sturdivant, in the year 1894. And that said supreme court held that same did not belong to J. B. Sturdivant when sold under plaintiff's execution. That plaintiff has never recovered any judgment against this defendant other than the one herein mentioned. That an undivided one-half interest in said land was worth, at the time of the sale under execution, five hundred dollars or more. That J. B. Sturdivant did not lose anything by reason of said sale and purchase, further than to help defend the suit. That said judgment in favor of the plaintiff herein has never been paid in whole or in part except by the purchase of said land at said sheriff's sale and at and for the amount of the execution and cost, to wit, one hundred and twenty-five dollars, as aforesaid."

The court found that the judgment in question had not been satisfied, and rendered judgment reviving it. Sturdivant has duly prosecuted an appeal to this court.

The only question raised by the appeal is, Did the sale and purchase of the property by Eugenia Ward, now appellee, as shown by the agreed statement of facts, operate as a satisfaction of her judgment against J. B. Sturdivant, now appellant?

Mr. Freeman says that the authorities on this subject are quite evenly divided, and are in irreconcilable conflict: Freeman on Executions, sec. 54.

In his article on executions in the Cyclopedia of Law and Procedure, the Honorable John G. Carlisle, in discussing the question of vacating entry of satisfaction, says: "Where property is sold to satisfy an execution, and the execution is returned satisfied, the authorities are at variance whether such satisfaction can be vacated when it appears that the title to the property sold is ³²⁵ not in defendant. Some jurisdic-

tions allow the right to vacate the satisfaction. Others deny the right, in the absence of fraud on the part of defendant in his representation of title, and leave the creditor to seek whatever remedies the equities of his case require. Even in those jurisdictions where the vacation of satisfaction is allowed, the right is not extended to cases where defendant really has an interest in the property and the judgment creditor who purchases gets, without any fraud on the part of defendant, a smaller estate than he contemplated": 17 Cyc. 1401, 1402.

Authorities are cited by the learned writer to sustain both positions. Counsel for the parties hereto have also cited authorities from other states to sustain their respective contentions. It would serve no useful purpose to review them, for they are in direct conflict. Moreover, we think the reasoning of this court in the case of *Jones v. Ark. Mech. & Agl. Co.*, 38 Ark. 17, resulted in the adoption of the rule that in such cases there is no satisfaction of the judgments. In that case Wait had obtained a foreclosure decree upon property in Little Rock, Arkansas, known as the Fair Grounds, to satisfy a balance of purchase money remaining unpaid. The land was sold on July 25, 1874, to George R. Weeks for four thousand dollars, payable in three months. In the meantime, Jones, McDowell & Company had recovered a judgment against the old fair association before a justice of the peace. An execution was issued and returned nulla bona. A transcript of the judgment was then filed in the office of the circuit clerk. An execution was issued and levied upon the land. Jones, McDowell & Company purchased the land at the sheriff's sale, bidding therefor the amount of their debt. Townsend later pursued identically the same course. Neither of these purchases redeemed the land by paying off Wait's decree before the sale in his chancery suit, nor did they intervene for the surplus produced by that sale. After the period of redemption from the execution sale had expired, they procured a conveyance of the land from the sheriff. They filed a bill against Weeks and against the two associations, alleging that Weeks was not an innocent purchaser. Without going into the further details of the case, the court held that there was evidence enough in the record to set aside the sale to Weeks and his subsequent conveyance to the ³²⁶ State Fair Association as an attempt to place the assets of the association beyond the reach of creditors. The court declared that Weeks and the State Fair Association took the property charged with a trust in favor of creditors. The court held that the purchases of the land by Jones, McDowell & Company and by Townsend, under their respective executions, were nugatory, and the satisfaction of their judgments thereby was apparent and not real, and a decree was entered charging the land with a trust in their favor. If their purchase

under the execution sales was a satisfaction of their judgments, then the court should have rendered a decree in favor of Jones, McDowell & Company for the land, they having purchased the equity of redemption, and having offered to redeem from the Wait foreclosure sale. We think the reasoning of the court and the grounds upon which its decision was placed in that case are conclusive of the issue here presented, and that the purchase by appellee at the execution sale in the instant case was not a satisfaction of her judgment.

Finding no prejudicial error in the records, the judgment is affirmed.

Mr. Chief Justice McCulloch and Mr. Justice Battle dissent.

VACATING SATISFACTION OF EXECUTION BECAUSE TITLE OF PURCHASER FAILS.

I. The Evolution of the Remedy, 35.

II. The Status of Purchasers at Sheriffs' Sales, 37.

I. The Evolution of the Remedy.

In the consideration of this once vexed question, we think that a great part of the discussion upon it might have been saved, if, in lieu of disposing of it airily on the strength of the much used doctrine of caveat emptor—that the purchaser at a sheriff's sale takes all the right, title and interest of the judgment debtor in the property sold, if he has any, and, if he has not any, that the purchaser takes it just the same—the proposition had been reduced to logical form and debated in an open forum. We propose to adopt that method here, premising that a judgment creditor has caused what he assumed to be the property of the judgment debtor to be sold under execution; that at such sale the judgment creditor has bought such property for a sum sufficient to satisfy the execution, which was returned satisfied; that it subsequently transpires that such property was not the property of the judgment debtor, but of some third person who has sued for and recovered it from the judgment creditor; and that the judgment creditor is then in the same position as he was before the sale by the sheriff—the judgment debtor is similarly placed—but the execution has been satisfied by the sale and return of the execution, and an action could not be brought on the judgment.

Is the judgment creditor entitled to have that entry of satisfaction removed from the record and to be placed in his original position? Has he done anything to disentitle him? Is there any reason why he should lose the benefit of his judgment? Is the judgment debtor prejudiced in any manner soever?

This statement and these queries enable us to deduce the following propositions: 1. Every judgment creditor is entitled to an execution, or rather the satisfaction of an execution, which is "the end of the law"; 2. A return of a sale of property assumed to be that of a judgment debtor, but which is not his property and is claimed and held or recovered by another, is equivalent to a return that the judgment debtor had no property levied upon under that execution—i. e., nulla bona; 3. A nulla bona return is not the satisfaction of an

execution, and therefore that execution has not reached the end of the law, and the judgment creditor is still entitled to it, and to effectuate this conclusion the pseudo satisfaction must be deleted in order that the judgment creditor may have his rights.

Mr. Freeman puts it thus: "An execution may be returned satisfied, and yet it may turn out that no actual satisfaction has taken place. This may happen (1) when the writ or the levy is avoided and therefore does not transfer the title to the property seized and sold under it; (2) when the entry of satisfaction was made, either wrongfully or by mistake; and (3) when the property sold was purchased by the plaintiff, but did not belong to the defendant, and plaintiff has therefore been compelled to account for it to the true owner": Freeman on Executions, sec. 54. With the first two phases we do not propose to deal, and our inquiry is limited to the third; but we do not refrain from noting another dictum of Mr. Freeman's in the same section of his work, both from its inherent accuracy and the support of the several cases cited by him: "And when the defendant has not lost, nor the plaintiff acquired, anything by the writ, it is not to be disputed that a new writ may and ought to issue."

This principle has been recognized in England almost from time immemorial, but at all events from the time of Henry VIII when the statute 22 Henry VIII, chapter 5, was passed to provide a remedy to the creditor to whom the debtor's land had been delivered under an elegit, when the tenant by elegit was thereafter evicted without any fault on his part. It must be remembered that under the English common law the lands of the debtor could not be sold in execution, but were delivered to the judgment creditor to hold until his debt was paid. This was the law for three hundred years before the statute of Henry VIII.

In those states in which that statute has passed into law—for in New York and what subsequently became the states of Massachusetts, Maine and New Hampshire it became part of the common law by reason of the charter to the Duke of York, and in 1732 the statute of 5 George II, chapter 5, subjected land in the American colonies to sale on execution like personal property—the principle of relief has been kept alive, though the writ of elegit itself has been practically abolished.

But as to those other states in which it did not become part of the law and no statutory provision had been made, the necessity to decide whether the satisfaction was irrevocable or the parties should be returned to their original status was bound to and did soon arise, and the answers are admittedly irreconcilable. It is the object of this note to give the results of inquiry into them, and by emphasizing their variance, give support to the call for uniformity of decision already voiced in other parts of this series. Without making invidious comparisons, we cannot suggest a better solution than the general adoption of some such declaration of the law as has been enacted in California: Code Civ. Proc., sec. 708. "If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning

the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more."

The section has been construed and applied in the well-known case of *Cross v. Zane*, 47 Cal. 602, and followed in *Hitchcock v. Carruthers*, 100 Cal. 100, 34 Pac. 627, and *Merguire v. O'Donnell*, 139 Cal. 6, 96 Am. St. Rep. 91, 72 Pac. 337. In those cases it was held that as the section was remedial in its character, it was to be liberally construed, and that, if the property sold was not the property of the defendant in the execution, it amounted to a sale of property not subject to execution and sale within the intent of the statute, and the purchaser was entitled to the remedies afforded by the act.

The subject therefore calls for no great elaboration, having in mind that the machinery is perfected, the adoption of which will relegate the old differentiate dicta to the archives of a less intelligent era.

II. The Status of Purchasers at Sheriffs' Sales.

In commencing an inquiry on the subject, the fact of hopeless and irreconcilable conflict of decision faces us. Text-book and authority alike contain confirmation of the variances—both interstate and in the one state—a condition rigidly pointing to the desirability of a uniform statutory standard.

It will be found that in those states in which it is lawful to vacate the so-called satisfaction that certain affirmed principles guide the courts. These are, first, that no question can be raised of their power to vacate in a proper case the record of the satisfaction of a judgment by execution, levy and sale where it has not in fact been satisfied. The only question that can be made is, as to what case is a proper one for the exercise of the power. A proper case is one where the creditor has got no benefit, and the debtor has lost nothing, by the levy and sale, even though brought about by the mistake, either of fact or law, of the creditor. In such a case the debtor has no equities, while the creditor has some, perhaps not very cogent but sufficient in the absence of any on the part of the debtor: *Osborne v. Wilson*, 37 Minn. 8, 32 N. W. 786.

In Missouri, where the doctrine of caveat emptor formerly applied with all force to purchasers at sheriffs' sales, the eighth article of the act to regulate proceedings in justice's courts was found to be broad enough to cover all executions rendered fruitless by the failure of the title acquired, and it was then laid down that when the plaintiff received no benefit from anything which had been done under his execution, and the defendant had received no injury, where the plaintiff had received no money, and the defendant had lost nothing, that both parties should be in statu quo before the levy, and to hold that the plaintiff was estopped from showing this because of the return of the sheriff, which would show the collection of the money, could only be justified by regarding the plaintiff as bound by the fruitless levy and sale. The plaintiff would thus be penalized for taking a course which he is expressly authorized to take by law. The article referred to, taken in connection with the decision in *Heath v. Daggett*, 21 Mo. 69, warranted the permission to vacate.

the satisfaction in such cases notwithstanding the "respectable authorities to the contrary": *Magwire v. Marks*, 28 Mo. 193, 75 Am. Dec. 121.

In Tennessee the code, section 2900, provides that where an execution has been returned satisfied by the sale of the defendant's property and afterward the property is recovered by some third person by suit against the plaintiff, the plaintiff may have the satisfaction set aside and the judgment revived by *scire facias*, and it has been held that an application to vacate the satisfaction is premature, if made before an actual recovery by the third person referred to: *Swaggerty v. Smith*, 1 Heisk. 403.

The existence of the equitable remedy has never there been questioned. The jurisdiction of a court of equity to set aside the satisfaction of an execution on the ground of mistake of fact as to the state of defendant's title to the land levied on is original and inherent, and is not affected by the legal remedy which prescribes a certain formula by *scire facias* at law for the same purpose. A failure under the statutory remedy cannot be relied on as a defense to a bill for that purpose as *res judicata*, when the same case is brought by original bill into a court of equity. The statutory remedy is one thing and the equitable remedy another. The statute, in order to avoid the harsh results of the rule of caveat emptor, prescribes the formula for the speedier remedy at law, and if this be resorted to, the terms of the statute must be strictly complied with. But when a bill is filed for a like purpose, the proceedings must be conducted according to the course of a court of equity: *Swaggerty v. Neilson*, 8 Baxt. 32.

In Texas, whatever difficulties were formerly created by such cases as *Harle v. Langdon's Heirs*, 60 Tex. 550, where the rule of caveat emptor was inflexibly applied, *Cavanaugh v. Peterson*, 47 Tex. 197, where it was held that a levy upon land in that state was not a satisfaction of the judgment, *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400, and *Stone v. Darnell*, 25 Tex. Supp. 430, 78 Am. Dec. 582, which were against the rule of caveat emptor being stringently adopted, those difficulties were removed by the case of *Hollon v. Hale*, 21 Tex. Civ. App. 194, 51 S. W. 900, the opinion in which adopts the view taken by Mr. Freeman. "It seems to be held in these cases that when real estate is sold at execution sale as the property of the defendant in execution, to which it is ascertained he has no title, he may be held liable for the purchase money which has been thus applied in satisfaction of his judgment or debt. This is the construction Mr. Freeman places on these decisions, and he treats the question as settled in this state in favor of granting the relief: Freeman on Judgments, 4th ed., sec. 478, note 3; Freeman on Executions, 2d ed., sec. 352. When we look to other jurisdictions we find an irreconcilable conflict in the decisions. Mr. Freeman states that there is a slight preponderance of the authorities in favor of giving the relief: Freeman on Judgments, secs. 478, 478a. . . . We think it only equitable, where the defendant in execution has parted with nothing by the sale, that the plaintiff in judgment, who has acquired nothing by his purchase, should have his judgment restored to him as it was previous to the sale and satisfaction. Where the satisfaction of a judgment results from a sale under void or irregular process, the authorities in this state seem to be uniform that relief will be granted: *Burns v. Ledbetter*, 56 Tex. 282."

In Arkansas the conflict that has raged from the earliest reported cases has at length, we presume, ceased in the decision in *Sturdivant v. Ward*, 90 Ark. 321, ante, p. 32, 119 S. W. 247. In that case the question is squarely met and answered by Mr. Justice Hart. "Authorities are cited . . . to sustain both positions. Counsel for the parties hereto have also cited authorities from other states to sustain their respective contentions. It would serve no useful purpose to review them, for they are in direct conflict." The learned judge decided that the reasoning in *Jones v. Arkansas Mech. & Agr. Co.*, 38 Ark. 17, which culminated in the adoption of the rule that in such cases there is no satisfaction of the judgment, was to be followed. The case of *De Loach Mill & Mfg. Co. v. Little Rock Mill & Elevator Co.*, 65 Ark. 467, 67 Am. St. Rep. 942, 47 S. W. 118, was cited in the argument, and is in point. Under somewhat similar circumstances the opinion in that case says: "The satisfaction of the plaintiff's judgment pro tanto may be set aside as to the proceeds of the interpleader's property, to which the defendant in the attachment had no title, it having been procured without gain to the plaintiff or loss to the defendant. The satisfaction pro tanto was apparent, but not real: *Jones v. Arkansas Mech. & Agr. Co.*, 38 Ark. 17; *Freeman on Executions*, secs. 54, 352."

In South Carolina the case of *Jones v. Burr*, 5 Strob. 147, 53 Am. Dec. 699, is the strongest decision upholding the caveat emptor doctrine, and on that account, the opinion being unqualified and emphatic in its terms, we give the following excerpt from it: "This is a common case of the application of the rule that there is no warranty at sheriffs' sales and excites no surprise nor doubt. But the application of the rule is not so obvious when it is made directly between the plaintiff and defendant, on account of the apparent contradiction of satisfaction, without payment. Yet this occurs when the plaintiff's execution is satisfied by the purchase of property, and it is recovered from him by the owner. The person whose goods are wrongfully sold may have his remedy against a stranger who has purchased, to recover their value, or against the plaintiff and sheriff, for the wrongful taking. When the defendant is not held to warranty in favor of an innocent purchaser, still less can he be held to warranty in favor of the plaintiff, by whose agency the property has been tortiously sold. The plaintiff levies and sells at his own risk, and with notice that the sales will be applied in satisfaction of his execution, though he may be made responsible for damages, if he has tortiously sold the property of another person as the property of the defendant. The rule that there is no warranty in sheriff's sales, must be enforced in favor of the defendant, against the plaintiff, as much as against strangers."

In Illinois, in such cases, the purchaser is entitled to relief in equity against the debtor: *Warner v. Helm*, 1 Gilm. 220. This case is cited in *United States v. Duncan*, 12 Ill. 523, in the famous opinion of Judge Drummond in 1850. In the course of his opinion the learned judge of the United States circuit and district courts for the district of Illinois laid it down that as to strangers purchasing at a sheriff's sale, caveat emptor was the rule, and said: "It is true, where a plaintiff in an execution purchases a tract of land belonging, apparently, or which he supposes to belong, to the defendant, and there is in fact no title, a court will interpose and place the parties in their former condition. But that is because it is a matter between

themselves, the purchaser having neither benefited nor injured any third person; and it has been decided that where there was no fraud, and a stranger to the execution purchased a piece of land as the property of the defendant, when he had no title, a court of equity would compel the judgment debtor to refund the amount to the purchaser, on the ground that his purchase had paid the debt."

In Pennsylvania the same rule applies as in South Carolina, and in *Freeman v. Caldwell*, 10 Watts, 9, a case frequently cited by the advocates of this doctrine, the court, after affirming the principle of caveat emptor, went further and said: "Without power derived from a statute, therefore, I take it that execution cannot be repeated; and though the clear common-law principle may be violated, it cannot be evaded. . . . The plaintiff's case may be thought a hard one; but it is not more so than would be the case of a stranger, and to say that every sheriff's vendee who is deprived of the property by title paramount shall have his money again would destroy all confidence in the stability of judicial sales."

In California purchasers, whether judgment creditors or not, are fully protected: *Ante*, subd. I. As to those states in which there are reported decisions to the contrary—the states of Indiana, Iowa, Ohio and Vermont—the law is now practically similar to the California code, and there appears to be a gradual trend toward the recognition of the logical right of the judgment creditor that his status shall not be worse after the so-called satisfaction of an execution, where the judgment debtor did not own the property sold by the sheriff and restitution of it has been made, than it was when he, under mistake, directed the sheriff to sell; and generally the extension of the rule to those bona fide purchasers at sheriffs' sales, other than the judgment creditor, whose purchases are fruitless for want of any interest of the judgment debtor in the property sold, may be looked for in the future, near or far, according to the interest taken by the community in obtaining the necessary amendments in the respective states.

FLEMING v. CARDWELL.

[90 Ark. 500, 119 S. W. 654.]

TRUSTS—Partition—Commissioners' Purchase of Lands—Conflict of Integrity and Self-interest.—Where partition commissioners have reported that property could not be divided, and another commissioner is appointed who sells the land to them, the sale will be set aside on the ground that such a purchase would be contrary to public policy. (p. 41.)

PARTITION—Responsibilities of Commissioners.—To permit commissioners to advise the court to order the lands sold, and then become purchasers at the sale, would be to open the doors to concealed fraud. (p. 42.)

Johnson & Burr, for the appellant.

J. D. Block, for the appellee.

⁵⁰¹ HART, J. William Barr died seised of certain lands in Greene county, Arkansas. His heirs at law brought suit

in the Greene chancery court for partition of the lands. William Guine Fleming, the plaintiff herein, and his brother, C. V. Fleming, who were his grandchildren, and who each inherited an undivided one-eighth interest in his estate, were parties to the suit. John R. Thompson, J. F. Cardwell and E. S. Bray were appointed commissioners to examine and make partition of said lands. Thompson failed to qualify as commissioner; but Cardwell and Bray proceeded to act, and reported to the court that said lands could not be divided. Their report was duly approved and confirmed. G. T. Breckenridge, clerk of the court, was then appointed as commissioner to make the sale of the lands. Said Cardwell and Bray became purchasers at the sale. Upon their paying the purchase price, the court directed a deed to be made to Cardwell and Bray, which was accordingly done, and the sale to them was by the court duly approved and confirmed. Subsequently C. V. Fleming died intestate, leaving the plaintiff herein as sole heir at law. Bray conveyed his undivided half interest to Cardwell.

The present bill was filed by the plaintiff, William Guine Fleming, against the defendant, J. F. Cardwell, to set aside said sale, and to cancel the deed from G. T. Breckenridge as commissioner ⁵⁰² to J. F. Cardwell and E. S. Bray as a cloud on his title.

The defendant filed a demurrer to the bill, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff electing to stand upon his complaint, a decree was rendered dismissing it for want of equity. The plaintiff has duly prosecuted an appeal to this court.

The only question presented by the record is, Should the sale be set aside because the commissioners appointed by the court to partition the land became the purchasers at a sale of the land decreed to be made for the purpose of partition?

We think the question should be answered in the affirmative. It is not claimed that there was any actual fraud in the purchase; but we are of the opinion that commissioners appointed by the court to make partition belong to the forbidden class who may not purchase at all, however fair their intentions. The rule stands upon grounds of public policy, and "upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity." The primary object of a partition suit is a division of the land. As was said in the case of *McGee v. Russell*, 49 Ark. 104, 4 S. W. 284: "In proceedings for partition of land, each party has a right to have his interest set apart in kind, so far as can be done without material detriment to the interest of the other; and where the commissioners report that they cannot make partition

without great prejudice to both parties, they should state the facts on which their conclusion is based."

The duties of the commissioners are more than evidentiary. They act in an advisory capacity to the court. In equity, if necessary, they may allow ovelty, or call to their assistance a surveyor in making their report; and they must make a careful examination of the land. While their report is subject to the approval of the court, it is apparent that they act not as mere witnesses, but as advisers of the court. Their services are paid for by the estate to be divided. They do not act merely as a conduit for the collection of facts to be carried to the court, but they are required to exercise judgment and give to the court their ⁵⁰⁸ conclusions based upon these facts. In short, they have an official duty to perform in ascertaining whether the lands are susceptible of division in kind without great prejudice to the owners. Their official connection in respect to the matter gives them special opportunities and advantages in regard to the lands not possessed by anyone else not similarly situated. It is their duty to protect the interest of the owners, which, as we have seen, is primarily a division of the land, and from the faithful discharge of this duty no personal interest should be permitted to withdraw them. In this conflict of interests the law interposes. To permit them to advise the court to order the lands sold, and then to become purchasers at the sale, would be to open the doors to concealed fraud. It might become a temptation to advise a sale when none was necessary. It is no answer to this to say that their advice is subject to the approval of the court. If the court must weigh their testimony as it does that of witnesses, it is idle to say that they act in an advisory or official capacity.

Hence we think they have a duty to perform in relation to the property which is inconsistent with the character of purchaser on his individual account.

We have been cited to no case, and after diligent search have been unable to find any case, directly in point; but we think the rule we have announced is in accord with the principles declared in adjudicated cases by this court where similar questions have been involved: *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373; *West v. Waddill*, 33 Ark. 575; *Livingston v. Cochran*, 33 Ark. 294.

The decree is reversed, and the cause is remanded with directions to overrule the demurrer.

Mr. Chief Justice McCulloch and Mr. Justice Battle dissent.

A Commissioner Appointed to Sell Land for Partition cannot directly or indirectly purchase for his own benefit: Tuttle v. Tuttle, 146 N. C. 484, 125 Am. St. Rep. 481.

HOT SPRINGS v. DEMBY.

[90 Ark. 574, 119 S. W. 1126.]

RAILROADS—Location of Hack-stands—Right to Designate.—

A railroad company has the right to designate the place, abutting on the platform, where hackmen who are competitors shall stand their vehicles while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage. (p. 44.)

C. Floyd Huff, for the appellant.

⁵⁷⁵ HART, J. Jerry Demby, the appellee, was arrested and tried in the police court of the city of Hot Springs, in Garland county, Arkansas, on the charge of trespassing upon private premises belonging to the Little Rock and Hot Springs Western Railroad Company, in violation of a city ordinance. He was convicted and appealed to the circuit court. There the case was tried before the court sitting as a jury, and the court found the defendant not guilty and discharged him. The city of Hot Springs has appealed from the judgment of the circuit court.

The agreed statement of facts, upon which the case was tried in the court below, shows that the railroad company owned a gravel platform with stone curbing, upon which passengers from its trains alighted. That part of the platform was covered, and part of it was uncovered. That Cooper Brothers, who operated a line of hacks and carriages for the purpose of carrying passengers to and from the railroad station, and who also were under contract with the railroad company to deliver the United States mail to and from the postoffice, were given the exclusive right to place their vehicles at the curb of that portion of the platform where the cars were usually stopped, and which was covered. All other hackmen were required to stop their vehicles at the curb of the uncovered portion of the platform, and which was more remote from the place where the passengers usually alighted from the trains. Demby attempted to stand his hack at the place designated for those of Cooper Brothers.

There is a conflict of the authorities on the right of a railroad company to grant an exclusive privilege to certain hackmen to solicit patronage in its station or grounds; but we are not ⁵⁷⁶ called upon to determine that question. The question presented by this appeal is, Has the railroad company the right to designate the place abutting on the platform where hackmen who are competitors shall stand their vehicles while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage?

In the case of *Landrigan v. State*, 31 Ark. 50, 25 Am. Rep. 547, this court held: "A railroad company may make reasonable regulations for the conduct of all persons who come upon its premises, and authorize its agents and servants to remove therefrom any person who violates its regulations, using no greater force than is necessary."

A rule by which a railroad company reserves the right to assign places upon its grounds to the different hackmen and to exclude from such places others not assigned thereto, is reasonable, and the company has a right to enforce it": *Fetter on Carriers of Passengers*, sec. 245; 2 *Hutchinson on Carriers*, sec. 945. For cases where the precise question has been decided, see *Lucas v. Hubert*, 143 Ind. 64, 47 N. E. 146, 37 L. R. A. 376; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848; *Smith v. New York etc. R. R. Co.*, 149 Pa. 249, 24 Atl. 304.

The reason for the rules is thus stated in the case of *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848: "They [the rules] in no manner give place to one hackman to the exclusion of another, and they deprive no common carrier of necessary approach to the depot grounds to carry on his business of carrier of freight and passengers. The rules touch and affect all alike. The mere fact that the railroad company fixes and determines the place where each particular hack shall stand is not a discrimination between hackmen, but is a necessary rule to prevent quarrels for place, so often seen among hackmen around depots."

In the case of *Lucas v. Herbert*, 143 Ind. 64, 47 N. E. 146, 37 L. R. A. 376, the court said: "The arrangements offered by the railroad company gave appellees access to the depot grounds, and the privilege to receive and discharge passengers and baggage, and to stand their bus at the platform while awaiting the arrival and departure of trains. It may be that the position offered to appellees was not as favorable as the part left for appellants, for the reason that passengers alighting from the trains would pass the buses of appellants in going to appellees' bus, as all the buses would be backed against ⁵⁷⁷ the same platform and stand side by side. Be this as it may, the railroad company having the power to designate the place each should occupy, neither can complain that the best or most convenient location with reference to the depot or platform was given to the other."

It will be observed that these decisions are by courts which deny the right of a railroad company to grant the exclusive privilege to occupy its station grounds with vehicles and soliciting the patronage of incoming passengers to one of several competing omnibus lines.

The reasoning given in the cases cited *supra* determines the issue raised by this appeal.

It seems from the evidence that Cooper Brothers were given the most favored place to stand their vehicles. This was because they had entered into a contract with the railroad company to carry the mail from the station to and from the postoffice, and to haul the injured employes of the railway company to the hospital. Competing hackmen were not excluded from the platform. They were assigned a portion of it, where they might stand their vehicles, receive and discharge passengers and baggage, and wait for the arrival of trains.

Therefore it is ordered that the judgment be reversed and the cause remanded for a new trial.

Railways—Regulation of Hackmen.—The Rule Announced in the Principal Case is supported by *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848; *Smith v. New York etc. R. R. Co.*, 149 Pa. 249, 24 Atl. 304. See, also, *Union Depot & Ry. Co. v. Meeking*, 42 Colo. 89, 126 Am. St. Rep. 145. In *Summitt v. State*, 8 Lea, 413, 41 Am. Rep. 637, it is held that a regulation by a railway company forbidding hackmen to enter a passenger-room is valid. That a municipal corporation may prescribe the places where hacks may be stood, see *Vann v. State*, 45 Tex. Cr. 434, 108 Am. St. Rep. 961; *Ex parte Battis*, 40 Tex. Cr. 112, 76 Am. St. Rep. 708; *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100.

PELT v. PAYNE.

[90 Ark. 600, 30 S. W. 426.]

HOMESTEAD—Sale—Curative Statutes.—The act of April 13, 1893, has the effect of curing all instruments affecting homesteads made defective by the act of March 18, 1887, for want of execution by the wife of the grantor. (p. 46.)

APPEAL AND ERROR—Act Passed Pending Appeal—Effect. Where the law has been changed after a decree and before judgment on appeal, the appeal decision must be controlled by the law at the time of such appeal, when the language of the statute clearly indicates that it shall have a retroactive effect. (p. 46.)

CONSTITUTIONAL LAW—Statute Legally Passed—Presumption.—A bill signed by the governor, deposited with the Secretary of State, and duly published as a state law, will be presumed, *prima facie*, to be duly enrolled and formally passed. (p. 47.)

STATUTES—Journal of House.—There is no constitutional requirement that the journal of the legislature shall show that a bill was enrolled and signed. (p. 47.)

CONSTITUTIONAL LAW—Conveyances—Curative Statutes.—When a deed or other conveyance is invalid by reason of the failure of the parties thereto to conform to some formality imposed by a statute, the legislature, which imposed the formality, may by a subsequent act cure the defect, and give the deed the effect intended at the time of execution. (p. 47.)

C. C. Hamby, for the appellants.

J. M. Montgomery, for the appellees.

⁶⁰² RIDDICK, J. The appellees, Z. T. Payne et al., being indebted to appellants, James Pelt and Samuel Pelt, partners under the firm name of Pelt & Brother, in the sum of seventeen hundred dollars, gave them a mortgage on lands to secure the same. The lands mortgaged consisted of the homestead of appellees, Z. T. Payne, W. B. Johnson and T. M. Davis. Each of said mortgagors was a married man, and the wife of neither of them joined in the deed except to relinquish dower. The appellees brought this suit in equity to have said mortgage declared void, and to remove it as a cloud from their title. There was a demurrer to the complaint, which was overruled, and, the appellants electing to stand on their demurrer, a decree was entered declaring said mortgage to be void, in accordance with the prayer of the complaint.

The decree in this case must be reversed, not because the chancellor committed an error, but for the reason that the legislature has changed the law since the rendition of the decree. The act of March 18, 1887, providing that, with certain exceptions therein named, no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity "unless his wife joins in the execution of such instrument and acknowledges the same," was in force at the time the decree was rendered, and under that act the chancellor properly held that the mortgage in question was void. But the act of April 13, 1893, cured this defect in the mortgage by providing that all deeds and conveyances, etc., which are defective by reason of the act of March 18, 1887, should be "as valid and effectual as though said act had never been passed." Although this act of April 13, 1893, was passed after the rendition of the decree in this case, still our decision here must be controlled by it: *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648.

At first thought, it may appear strange that a decree, correct at the time when rendered, should have to be reversed and set aside because the law was afterward changed. It is true that courts do not usually give statutes a retroactive effect, and it is the general rule that the soundness of a decree must be tested by the law in force at the time of its rendition, but this is not so in all cases, for "when the language of the statute clearly indicates an intention that it shall have a retroactive effect, it must be so applied": *State v. Norwood*, 12 Md. 195.

⁶⁰³ "It is in general true," said Chief Justice Marshall, in the case of *United States v. Schooner Peggy*, "that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if,

subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law is constitutional, . . . I know of no court which can contest its obligation": *United States v. Schooner Peggy*, 1 Cranch, 103, 2 L. ed. 49.

That case was decided in 1801, and the rule of law thus announced has been frequently followed. The same question came before this court in *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, when the effect of the act of 1893 was discussed, and it was held to be retroactive, and applied in a case similar to this. The court held that the appeal from a decree in chancery transferred the action to the appellate court, to be heard upon the same pleadings and evidence as in the court below, and that it was the duty of the appellate court to render judgment according to the law in force at the time.

It is further contended that the act of 1893 is of no validity, for the reason that the journal of the House does not show that it was enrolled, or that it was signed by the Speaker of the House or President of the Senate, or that it was delivered to the governor. There is no constitutional requirement that the journal shall show that the bill was enrolled and signed. The journal does not show that the bill for the act in question was passed by the House. It was signed by the governor, deposited with the Secretary of the State and duly published as a law of the state. It will therefore be presumed, in the absence of any showing to the contrary, that it was duly enrolled, and that the rules of the legislature were complied with in its passage: *Chicot County v. Davies*, 40 Ark. 200; *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882.

It has also been urged that this act is unconstitutional and void, for the reason that it was beyond the power of the legislature to cure and make valid a void deed. We think that this contention is not based on sound principles, for it is settled law that when a deed or other conveyance is invalid by reason of the failure of the parties thereto to conform to some formality imposed by the statute, the legislature, which imposed the formality, may by a subsequent act cure the defect and give the deed such ⁶⁰⁴ effect as the parties thereto intended that it should have at the time of its execution. "A party," says Judge Cooley, "has no vested right in a defense based on an informality not affecting his substantial equities": *Cooley's Constitutional Limitations*, 454; *Green v. Abraham*, 43 Ark. 420; *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648. For these reasons, the judgment of the circuit court is reversed and the cause remanded, with an order that the demurrer to the complaint be sustained.

The Legislature has Power to Pass a Curative Statute to correct errors in deeds, mortgages, and other instruments, defectively exe-

cuted or acknowledged, where the rights of third parties which have been acquired in good faith are saved (*Wingert v. Zeigler*, 91 Md. 318, 80 Am. St. Rep. 453; *Gordon v. City of San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802; *Steger v. Traveling Men's Building Assn.*, 208 Ill. 236, 100 Am. St. Rep. 225), for the reason that no one has a vested right to be unjust or to do a moral wrong: *Finlayson v. Peterson*, 5 N. D. 587, 57 Am. St. Rep. 584. A conveyance of a homestead, invalid because defectively acknowledged by the wife, may be made valid by a subsequent statute: *Williamson v. Lazarus*, 66 Ark. 226, 74 Am. St. Rep. 91.

LA COTTS v. PIKE.

[91 Ark. 26, 120 S. W. 144.]

PARTNERSHIP—Nature of.—In Order to Constitute a Partnership, it is necessary that there shall be something more than the joint ownership of property. (p. 50.)

TENANCY IN COMMON—Nature of.—Mere Community of Interest by ownership is sufficient to create a tenancy in common. (p. 50.)

PARTNERSHIP—Nature and Requisites of.—Before there can be a partnership there must be an agreement for community of profit and loss. (p. 50.)

PARTNERSHIP—Nature and Requisites of.—It is ordinarily considered that an agreement to share in the profits is an essential element of every partnership, and yet because one shares in the profits, this does not necessarily constitute him a partner. (p. 50.)

PARTITION—Adverse Possession.—Partition cannot be had of land held adversely. (p. 51.)

PARTITION—Parties Entitled.—Unless a Tenant in Common is in possession of the land or his title is admitted, he cannot maintain a bill in equity for a partition thereof. (p. 51.)

TENANCY IN COMMON—Ouster.—The Remedy of a tenant in common ousted from the land, or his rights totally denied by the cotenants, is by an ejectment suit for his proportion. (p. 51.)

LAND—Adverse Possession.—The party in adverse possession of land has the right to have a trial of his cause at law. (p. 51.)

PARTITION—Parties Entitled—Legal or Equitable Relief.—Where a party in adverse possession of land is having his cause tried at law, a court of equity has no jurisdiction to partition the land until the issue of title is determined. (p. 51.)

H. A. Parker, for the appellant.

J. M. Brice, for the appellees.

²⁷ **FRAUENTHAL, J.** The plaintiff, John La Cotts, instituted this suit on December 14, 1904, in the Arkansas chancery court against the defendants, who are the widow and children of J. F. Pike, deceased. In his complaint he alleges that he formed a partnership with said J. F. Pike on September 1, 1888, and that the contract of partnership was

evidenced by a deed of that date executed by J. F. Pike to him by which said Pike conveyed to him an undivided one-half interest in certain land and a saw and gristmill, gin-stand, press and machinery located on the land; that there had never been any settlement of the partnership; and he seeks an accounting of the partnership business and a division of the partnership assets. Subsequently, the administrator of J. F. Pike was made a party defendant. The defendants denied the existence of a partnership at any time between plaintiff and J. F. Pike, and specifically denied each allegation of the complaint; they also denied that plaintiff had any interest in or title to any of the property; and they pleaded laches and limitation against the alleged claim of plaintiff. John A. Bower filed an intervention, in which he alleged that J. F. Pike had executed to him a mortgage upon the property involved in the suit to secure certain indebtedness owing by Pike to him; and he asked for a foreclosure of this mortgage.

Upon the trial of the cause the chancery court entered a decree in which it dismissed the complaint for want of equity, and dismissed the intervention of Bower without prejudice. From that decree the plaintiff appeals to this court.

The evidence by which the plaintiff seeks to establish the alleged partnership between himself and J. F. Pike consists of a deed in ordinary form executed by J. F. Pike to the plaintiff on September 1, 1888, by which said Pike conveyed to plaintiff an undivided one-half interest in a certain tract of land and the above-mentioned personal property. The plaintiff testified that by virtue of said deed there was a partnership between them, but he did not make any other statement relative to the partnership. He did not state that they should share in the profits, or that they should be liable for the losses of the alleged partnership ²⁸ business; nor did he state the nature and extent of the business contemplated or intended by the alleged partnership. On the contrary, the plaintiff testified that J. F. Pike paid him fifty dollars rent per year for certain years for his interest in the property; and the undisputed evidence is that J. F. Pike replaced all the personal property from time to time with other property of a similar kind, and that he purchased all said property upon his sole and individual account. During all the years from 1888 until the death of J. F. Pike in September, 1903, the property was in the possession of said Pike, and all transactions relative thereto with third persons were had and made in the sole and individual name of J. F. Pike. The evidence tended also to prove that in December, 1888, the plaintiff executed to one Merritt a mortgage upon his undivided interest in the land, and that this interest in the land was sold in 1894 under a decree of foreclosure of said mortgage, and in

1894 after confirmation of said sale, a deed therefor was executed by the commissioner in chancery to one J. W. Crockett, trustee. The plaintiff testified that after the conveyance of said interest in the land to said Crockett he considered that the partnership between himself and Pike was thereby dissolved. In 1900 J. W. Crockett, trustee, for fifty dollars conveyed this interest in the land to plaintiff.

In order to constitute a partnership, it is necessary that there shall be something more than the joint ownership of property. A mere community of interest by ownership is not sufficient. This creates a tenancy in common, but not a partnership: *Oliver v. Gray*, 4 Ark. 425; *Haycock v. Williams*, 54 Ark. 384, 16 S. W. 3; *Harris v. Umsted*, 79 Ark. 499, 96 S. W. 146.

The test of a partnership between the parties themselves is largely a question of intention, but before there can be a partnership between the parties themselves there must be an agreement from which a community of profit and loss arises. There is no presumption of a partnership from a mere joint ownership of the property: *Neill v. Shamburg*, 158 Pa. 263, 27 Atl. 992; *St. John v. Coates*, 63 Hun, 460, 18 N. Y. Supp. 419.

It is ordinarily considered that an agreement to share in the profits is an essential element of every partnership, and yet because one shares in the profits this does not necessarily constitute him a partner. But if there is an absence of a sharing in the ²⁰ profits, then there is no agreement by which it can be said a partnership exists. Between the parties themselves, it is essential that they shall share in the profits before it can be said that an agreement of partnership has been entered into and exists: *Culley v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614; *Johnson v. Rothschilds*, 63 Ark. 518, 41 S. W. 996; *Herman Kahn Co. v. Bowden & Co.*, 80 Ark. 23, 96 S. W. 126, 10 Ann. Cas. 132; *Buford v. Lewis*, 87 Ark. 412, 112 S. W. 963; 30 Cyc. 366.

In this case there is a total lack of evidence on the part of the plaintiff to show that there was an agreement between him and Pike by which they should share in the profits, or that there was any understanding as to the proportion in which such profits should be shared. And the evidence of plaintiff seems to indicate that he himself had no idea, much less an intention, of bearing any loss. The plaintiff relies upon the deed as an evidence of a partnership; but such deed only makes the parties tenants in common of the property and not partners.

We are of the opinion, therefore, that the chancellor was correct in his finding that the evidence does not show that the relationship of partners existed between plaintiff and J. F. Pike.

It is urged by the plaintiff that the complaint should be considered in the nature of a petition for partition of the land, and that he should have that relief. But the defendants claim that they are, and always have been, in the adverse possession of the land, and they dispute the title of plaintiff to the land, and dispute any interest of plaintiff therein. The complaint is founded upon the allegation of a partnership, and the relief sought therein is the winding up of that partnership. The land, by the bill, is claimed to be a part of the assets of the partnership, and its disposal is sought only upon a settlement of the business of the partnership. When the court determined that there was no relation of partnership existing between the parties, there was no equitable ground upon which to assume jurisdiction over the land and the parties. The defendants were claiming the land adversely to plaintiff, and partition cannot be had of land held adversely: *Landon v. Morris*, 75 Ark. 6, 86 S. W. 672.

It has been repeatedly held by this court that unless a tenant in common is in possession of the land or his title is admitted, he cannot maintain a bill in equity for a partition thereof: *Byers v. Danly*, 27 Ark. 77; *London v. Overby*, 40 Ark. 155; *Moore v. Gordon*, ³⁰ 44 Ark. 334; *Criscoe v. Hambrick*, 47 Ark. 235, 1 S. W. 150; *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058; *Eagle v. Franklin*, 71 Ark. 544, 75 S. W. 1093; *Landon v. Morris*, 75 Ark. 6, 86 S. W. 672; *Cannon v. Stevens*, 88 Ark. 610, 115 S. W. 388.

By virtue of his deed the plaintiff was only a tenant in common in the land. Where the tenant in common is ousted from the land or his rights totally denied by the cotenants, his remedy is by an ejectment suit for his proportion of the land: *Kirby's Digest*, sec. 2746; *Trapnall v. Hill*, 31 Ark. 345.

The party who is in possession claiming the land adversely has a right to have a trial of his cause in the law court; and until the issue as to the title is determined, a court of equity has no jurisdiction to partition the land between alleged tenants in common. But the plaintiff should not be prejudiced by any decree herein in his right to institute an ejectment suit for the recovery of his alleged portion of the land, if he should so desire.

In order that the decree in this case may not possibly have such effect, the decree should be modified so that it will dismiss his complaint; but will dismiss it without any prejudice to the plaintiff to institute a suit for a recovery of his alleged portion of the land.

The decree will be here modified in that regard. And, so modified, the decree is affirmed.

What Constitutes a Partnership is the subject of a note to *Brotherton v. Gilchrist*, 115 Am. St. Rep. 400.

As to Whether Land may be Partitioned when adversely claimed or held, see Gore v. Dickinson, 98 Ala. 363, 39 Am. St. Rep. 67; Weston v. Stoddard, 137 N. Y. 119, 33 Am. St. Rep. 697; Camp Phosphate Co. v. Anderson, 48 Fla. 226, 111 Am. St. Rep. 77; note to Carter v. White, 101 Am. St. Rep. 872. An heir denied recognition in his ancestor's estate may join a count in ejectment with a count in partition, and succeeding with the former proceed at once to partition: Grimes v. Miller, 221 Mo. 636, 133 Am. St. Rep. 501.

THOMPSON v. GRACE.

[91 Ark. 52, 120 S. W. 397.]

MORTGAGE—Equitable—What Interest to be Encumbered.—

Where one owning nearly the whole stock of a corporation and in possession of the plant undertakes to mortgage such plant to secure advances made on the stock, the transaction constitutes an equitable mortgage enforceable by the court. (p. 55.)

PARTIES—Construction of Kirby's Digest, Section 6011.—

The obvious intention of this section is to require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it, where it cannot be done without prejudice to the rights of others or by saving their rights. (p. 55.)

MORTGAGE—Foreclosure—Parties.—The immediate parties to a mortgage of the greater part of the stock of a corporation are the only necessary parties to a foreclosure suit. The interests of the minority stockholders and the corporation itself do not call for their inclusion. (p. 55.)

Bullock & Davis and John M. Parker, for the appellant.

Priddy & Chambers, for the appellee.

52 WOOD, J. This was a suit by appellee against appellant (defendant below) and wife, and E. G. Collier, to foreclose a mortgage given by appellant and his wife to appellee on certain lands and also what was known as the Post-Dispatch printing plant.

53 On the fourteenth day of October, 1908, the defendant Thompson and Collier filed answer admitting the execution of the note and mortgage to appellee, Grace, but allege that the printing plant was sold to Thompson by Jacoway without authority; that John H. Page, from whom Jacoway bought the plant, had no authority to sell same; that Thompson has been greatly damaged; that the sale of said property in its present condition of title will work a great sacrifice to the defendants, in that, without the cancellation of the title outstanding against the property, it will be sacrificed for want of bidders. They allege the printing plant to be the property of the Post-Dispatch Publishing Company, a corporation, and

ask that the Post-Dispatch Publishing Company, John H. Page and H. M. Jacoway be made parties defendant; that their answer be taken as a cross-complaint against Jacoway and Page; that on final hearing the sale from Jacoway to Thompson be rescinded for failure of consideration; and that Jacoway and Page be decreed to pay off the mortgage debt to appellee, Grace, and that note and mortgage given by Thompson to Jacoway be also canceled.

Depositions were taken, and on the day of the trial oral proof was heard, which was reduced to writing and duly made a part of the record.

On the twenty-second day of October, 1908, the day the cause was set for hearing, plaintiff (appellee) filed an amended complaint, in which, in addition to certain allegations (in substance the same as those in the original complaint), he alleged that said J. S. Thompson mortgaged all the property of the Dardanelle Post-Dispatch Publishing Company; that said Thompson was not the owner of said Post-Dispatch Publishing Company, and that he had no right to convey same, but in fact he was the owner of one hundred and four shares of stock in said Post-Dispatch Publishing Company, of the face value of \$25 per share, aggregating \$2,600, the entire stock of said publishing company being \$3,000; that said mortgage was a lien on said stock or shares of stock of said Thompson, or an equitable assignment thereof; that by the sale of said Post-Dispatch by the said Jacoway to Thompson the said Jacoway intended to convey all his interest to the said Thompson, whether it consisted of stock or otherwise of such company, and such likewise were the intentions of said Thompson when he executed to ⁵⁴ plaintiff the mortgage sued on; and prayed that the said one hundred and four shares of stock be sold, etc.

Defendant (appellant), answering the amended complaint, denies that said Thompson bought the stock of the said Post-Dispatch Publishing Company, but alleges that said Jacoway sold to and delivered to him (Thompson) the whole of the personal property mortgaged and took the mortgage (to himself), and induced him to execute the said mortgage to Grace, the said defendant at the time believing that he was acquiring title thereto; and, if he fails to secure the full amount of said property, that it will endanger the rights of said Collier, who is a surety on said notes, by requiring him to pay a larger sum than he agreed or is legally bound to pay.

Others owning shares were made parties, but their rights are not involved here. The court overruled the motion of appellant (defendant) to make the Post-Dispatch Publishing Company, H. M. Jacoway and J. H. Page parties. Then the court made the following findings and decree:

"That defendant Thompson is the owner of one hundred and four shares of stock of said Post-Dispatch Publishing Company of the nominal value of \$25 per share; that said Thompson transferred his said shares for value to plaintiff, John Grace, and undertook to encumber same with a mortgage lien by executing a mortgage on the physical property of the Post-Dispatch Publishing Company, which the court finds, and so finding decrees, constitutes an equitable mortgage on the shares of said J. S. Thompson in favor of the plaintiff as security for said debt; that the shares so designed and intended to be encumbered for the debt due Grace had in fact never been issued to Thompson, but that he is entitled to have said shares issued to him upon his demand and by otherwise complying with the law; that said mortgage operated as an equitable transfer by said Thompson to Grace of \$2,600 of the capital stock of the said Post-Dispatch Publishing Company, and that there is still due on said debt the sum of \$2,434 as principal and interest." The court rendered judgment against appellant for that amount, and decreed that the shares of stock held by appellant in the Post-Dispatch Publishing Company be sold, and appointed a commissioner to make the sale with proper orders to give title thereto to the purchaser at said sale. To reverse that decree this appeal was prosecuted by appellant.

⁵⁵ 1. The proof showed that the Post-Dispatch Publishing Company was a corporation having a capital stock of \$3,000, issued in shares of \$25 each. John H. Page finally became the owner of all except sixteen shares, and he transferred all of his shares except one to H. M. Jacoway. Jacoway became the owner of one hundred and four shares of the stock of the nominal value of \$2,600. Jacoway sold all of his stock to appellant for \$2,750. Two thousand of this was furnished by appellee. Jacoway had a mortgage to secure him for the balance of the purchase money, but there is an agreement in the record between him and appellee to the effect that appellee's mortgage should have precedence over his. Appellant testified "that it was his understanding that Jacoway owned the Post-Dispatch, and that Jacoway sold it to him; that the only evidence of the ⁵⁶ transaction was the note and mortgage; that there was no written transfer of the stock; that he had several times demanded the stock of Jacoway, and he stated that he did not have it; that the stock certificates and books were lost; that Jacoway may have stated that he owned \$2,600 in it, would not say that he did not; that at the time Jacoway sold him the Post-Dispatch he did not tell him anything about there being other stock; that he [appellant] may have had knowledge of that before, may have known that there was \$3,000 of stock, and, of course, that there was \$400 more of the stock outstanding." The finding of the court

that the appellant was the owner of one hundred and four shares of stock in the Post-Dispatch Publishing Company was amply sustained by this evidence. Appellant was put in possession of the plant, and whether he supposed that he owned the whole plant or the entire capital stock (which carried the right to the corpus) or not, it is evident that he intended by the note and mortgage to transfer to appellee the entire interest he had purchased from Jacoway, to secure appellee for the money he had advanced to appellant to enable the latter to make the purchase. It is also true that the only interest he acquired from Jacoway was the one hundred and four shares of stock, for that was all the interest Jacoway had. This evidence, we think, is ample to support the finding of fact by the court that appellant "transferred his shares of stock for value to appellee, and undertook to encumber same with a mortgage on the physical property of the Post-Dispatch Publishing Company."

The court was also correct in holding upon these findings of fact that the transaction constituted an equitable mortgage in favor of appellee on the shares of stock or interest that appellant owned. It is clear that both parties intended that the mortgage should cover appellant's interest, and the court properly construed and enforced the mortgage accordingly.

2. Section 6011 of Kirby's Digest provides that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights. It also provides that when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, the court must order them to be brought in. "The obvious intention of the statute," says the court in *Smith v. Moore*, 49 Ark. 100, 4 S. W. 282, "is to ⁵⁷ require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it where it cannot be done without prejudice to the rights of others or by saving their rights."

There were no other mortgagees of this stock except Jacoway, and he acknowledged appellee's superior rights. His agreement in the record shows that he did not question the transfer to appellee.

Page was a witness, and his evidence was such as to warrant the chancellor in finding that he had no interest. The interest of the few outstanding small stockholders could not possibly have been affected by the transfer of appellant's shares of stock, and the corporate entity could not have been in any manner affected by the transfer and by the sale of the stock under the mortgage. Appellee was in no wise con-

cerned with any grievance that appellant claimed to have against Jacoway. No one who was in any wise connected with the corporation was affected by the controversy except appellant and appellee, and appellant was in no position to ask for a postponement of the proceedings. The court of chancery had plenary power to protect the purchaser of the stock at the sale ordered and to see that he secured a correct transfer on the books of the corporation and a perfect legal title. No mere irregularities in the transfer of stock can defeat the rights of the purchaser thereof: *Helliwell on Stock and Stockholders*, sec. 159; see *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043; 26 Am. & Eng. Ency. of Law, 2d ed., 876.

There is therefore no merit in appellant's contention that bidders would be deterred and the stock sacrificed unless the parties named were brought in. The court did not err in overruling the motion to have others made parties. The decree is in all things correct, and is affirmed.

Hart, J., not participating.

As to What Constitutes an Equitable Mortgage, see the note to *Hutler Bros. v. Phillips*, 4 Am. St. Rep. 696. An equitable mortgage arises whenever a writing shows a clear agreement to make some particular property security for the debt or obligation mentioned therein: *Dulaney v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815; *Higgins v. Manson*, 126 Cal. 467, 77 Am. St. Rep. 192. Any agreement which shows an intention to create a lien is an equitable mortgage: *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. CARL.

[91 Ark. 97, 121 S. W. 932.]

CARRIERS—Restriction of Liability in Contract—Interstate Commerce Act.—The "Hepburn amendment" to the interstate commerce act (June 29, 1906) renders nugatory any stipulation in bills of lading for through interstate shipment which exempts the initial carrier or his connecting carrier from liability for loss caused by either of them. (p. 58.)

CARRIERS—Policy of the Law.—Public Policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. (p. 58.)

CARRIERS—Negligence—Burden of Proof.—Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier, the burden of proof is on it to show that the loss did not occur on its line. (p. 59.)

APPEAL AND ERROR—Harmless Error.—Where a judgment is right upon the undisputed testimony, no prejudice can result to an appellant from any instruction given by the court. (p. 59.)

Read & McDonald, for the appellant.

²⁸ HART, J. This is an action to recover damages for loss of a box of household goods shipped from Lawton, Oklahoma, to Gentry, Arkansas. The suit was brought before a justice of the peace in Benton county, Arkansas, and judgment was rendered in favor of the plaintiff. The case was duly appealed to the Benton circuit court.

On a trial anew in that court the plaintiff testified that on October 8, 1907, he delivered to the Chicago, Rock Island and Pacific Railway Company at Lawton, Oklahoma, two boxes and one barrel, containing household goods, and that he signed a contract and received a bill of lading. The goods were consigned to himself at Gentry, Arkansas. He received the barrel of goods, and also one of the boxes; but one of the boxes was never received. The value of the goods as testified to by the plaintiff exceeded the sum of seventy-five dollars.

The defense of the railway company was that the goods were shipped upon a contract between the plaintiff and the Chicago, Rock Island and Pacific Railway Company and its connecting carriers; that the defendant is one of the connecting carriers, and is entitled to the benefit of all the provisions of said contract; that said contract contained a stipulation that, in consideration that the plaintiff would receive the lower of two freight rates, in case of loss said goods should be valued at five dollars per hundredweight. That all of the goods received weighed four hundred pounds; that there was delivered to the plaintiff by the defendant three hundred pounds of said goods.

The jury returned a verdict for plaintiff for seventy-five dollars, and the defendant has appealed from the judgment rendered.

²⁹ Counsel for appellant urge that upon the undisputed evidence the court should have directed a verdict for appellant. They rely for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss. They contend that the stipulations restricting the liability in case of loss were made for their benefit as well as for the benefit of the initial carrier, and base their contention on our decisions to that effect in the cases of *St. Louis etc. Ry. Co. v. Weakley*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; *St. Louis etc. R. R. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161, and cases cited. But in making their contention they have not taken into consideration the effect of the Hepburn amendment to the interstate com-

merce act, which became effective on June 29, 1906, a date prior to the time the contract in question was made. That part of the Hepburn act which applies to the present case is contained in section 20, which reads as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing laws."

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

¹⁰⁰ The undisputed evidence shows that the initial carrier received the property for transportation from a point in one state to a point in another state, and the presumption, in the absence of evidence to the contrary, was, as will be seen from our decisions hereinafter referred to, that the goods were lost through the negligence of appellant, the last carrier.

The section of the Hepburn act above quoted makes the carrier liable "for any loss, damage or injury to such property caused by it, . . . and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

The express terms of the act make the carrier liable for any loss caused by it, and provide that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid all stipulations designed to limit liability for losses caused by the carrier. Public policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason a statute may prohibit it from making stipulations in a contract which provide for such partial exemption. If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it should not make a contract limiting the liability of its connecting carriers; for the sec-

tion of the Hepburn act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier on whose line the loss occurs the amount of the loss it may be required to pay the owner.

"The act expressly invalidates all stipulations designed to limit liability for losses caused by the carrier": In the Matter of Released Rates, 13 Int. Com. Rep. 550.

In the case of *St. Louis S. W. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933, we held that a restriction of the liability of a carrier to loss upon its own line is in violation of the Hepburn act, making the initial carrier liable for damage to an interstate shipment, whether it occurs on its own line or on its connecting lines, and in support of the decision cited the case of *Smeltzer v. St. Louis etc. R. R. Co.*, 158 Fed. 649. The validity of this clause of the Hepburn act has also been sustained by the court of appeals of the state of Georgia in the case of *Southern Pacific Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865.

¹⁰¹ Therefore, we hold that the contract in question was prohibited by the terms of the Hepburn act, and is invalid in so far as it attempts to limit the liability of the carrier in case of loss caused by it.

This case is distinguished from the case of *St. Louis etc. Ry. Co. v. Furlow*, 89 Ark. 404, 117 S. W. 917, and *St. Louis etc. R. R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254, where we held that a stipulation in a contract for an interstate shipment which required notice in writing of the loss to be given within a specified time, if reasonable, was not in conflict with the provisions of the Hepburn act. The stipulation in question there did not exempt the carrier from any liability imposed by the Hepburn act. They were mostly rules or regulations adopted by the carrier for the purpose of securing it from fraud and imposition.

Having held the contract of shipment invalid in so far as it restricted the liability of the carrier as to the value of the goods shipped in case of loss because such restriction was in violation of the provisions of the Hepburn act, the cause stands as if the Chicago, Rock Island and Pacific Railroad Company had accepted the goods for shipment from Lawton, Oklahoma, to Gentry, Arkansas, and the appellant was the last carrier of the goods.

"Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier the burden of proof is on it to show that the loss did not occur on its line": *St. Louis etc. Ry. Co. v. Birdwell*, 72 Ark. 502, 82 S. W. 835. To the same effect, see *Kansas City South. Ry. Co. v. Embry*, 76 Ark. 589, 90 S. W. 15; *Midland Valley R. R. Co. v. Hale*, 86 Ark. 483, 111 S. W. 646.

In this case the undisputed evidence shows that the goods were delivered to the initial carrier, and there is nothing to rebut the presumption that they were received by appellant, the last carrier, and lost through its negligence. Hence, under the undisputed evidence as disclosed by the record, appellant was liable for the amount recovered.

The judgment being right upon the undisputed testimony, no prejudice could have resulted to appellant from any instruction given by the court: *St. Louis etc. Ry. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933.

Therefore it will not be necessary to discuss the correctness of the instructions given by the court, and the judgment will stand affirmed.

The Burden of Proof as Between Connecting Carriers to show who is at fault for a loss or injury to freight is considered in the note to *Beede v. Wisconsin Central Ry. Co.*, 101 Am. St. Rep. 392. For subsequent decisions on this question, see *Charles v. Atlantic Coast Line R. R. Co.*, 78 S. C. 36, 125 Am. St. Rep. 762, and cases cited in the cross-reference note thereto.

The Liability of an Initial Carrier for the torts or negligence of connecting lines is the subject of a note to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 604. Subsequent cases on this question are *McManus v. Chicago etc. Ry. Co.*, 138 Iowa, 150, 128 Am. St. Rep. 180; *Whitnack v. Chicago etc. Ry. Co.*, 82 Neb. 464, 130 Am. St. Rep. 692.

Contracts Limiting the Liability of Carriers in the transportation of freight are discussed in the note to *Chicago etc. Ry. Co. v. Calumet etc. Farm*, 88 Am. St. Rep. 74. Under the Missouri statutes, a carrier cannot contract for a through shipment to a point beyond its own line, and at the same time exempt itself from liability for the negligence of a connecting carrier: *Marshall etc. Co. v. Kansas City etc. R. R.*, 176 Mo. 480, 98 Am. St. Rep. 508. See, also, *Nashville etc. Ry. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955.

PARKER v. CARTER.

[91 Ark. 162, 120 S. W. 836.]

CONTRACTS not Signed by One Party.—A Written Contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. (p. 63.)

CONTRACTS—Statute of Limitations—Effect on Deed-poll.—A deed-poll, accepted by the grantee, is the contract of the parties, and the grantee's promise therein set out is governed by the provisions of the limitation regarding written instruments. (p. 63.)

COMPROMISE AND SETTLEMENT—What Included—Debt Barred by Statute.—Where a contract provides for a settlement of mutual debts of the parties, it does not include debts not enforceable because barred by limitation. (p. 64.)

PAYMENT—Cross-demand.—Before a Cross-demand or Setoff can constitute a payment, it is indispensable that an agreement to that effect shall be proved. (p. 64.)

ATTORNEY'S FEES—Statute of Limitation.—Recovery of an attorney's fee may be barred by the statute after three years. (p. 64.)

STATUTE OF LIMITATIONS—Written Acknowledgment—Essentials.—In order that a written acknowledgment shall be sufficient to remove the bar of the statute, it must import an unqualified acknowledgment of the debt as one that is due and binding. (p. 66.)

REFORMATION OF INSTRUMENT—Mistake—Foundation for Relief.—To entitle a party to reform a written instrument upon the ground of mistake, it must be clearly shown that the mistake was common to both parties, and that the instrument does not express the agreement as understood by either; and such mistake must appear beyond reasonable controversy. (p. 67.)

C. E. Pettit and Ratcliffe, Fletcher & Ratcliffe, for the appellant.

C. F. Greenlee, for the appellee.

¹⁶⁴ **FRAUENTHAL, J.** The plaintiff, H. A. Parker, instituted this suit against the defendant, H. A. Carter, on October 28, 1903, in the Monroe circuit court, alleging that the defendant was indebted to him in the sum of \$887.87 upon a promissory note, and also alleging that there was a long account existing between the parties, but giving no items and filing no statement of any account. He asked for judgment for \$887.87.

The defendant filed an answer, in which he denied the execution of any note, and denied that he was indebted to plaintiff on any note or on any account, and pleaded the statute of limitations against any such alleged indebtedness. He also alleged that plaintiff had on February 21, 1889, executed to him a note for \$400, upon which there was a balance unpaid of \$44.21.

Thereafter the plaintiff filed an amended complaint, in which he alleged that defendant was indebted to him for various items of attorney's fees, beginning in 1882 and extending to 1894; and also alleged that on February 14, 1898, he sold to defendant certain real estate in Brinkley, Arkansas, for the sum of \$2,000, which was paid in the following manner: Defendant conveyed to certain parties for plaintiff's benefit some lots in Brinkley, and of the balance he paid \$550 by check, and the remainder of \$565 was to be paid in the manner set out in a writing which ¹⁶⁵ was signed by plaintiff at the time of the execution of the deed by him and is as follows:

"This memoranda made and entered into this the 14th day of February, 1898, by and between H. A. Carter on one part and H. A. Parker of the other, as follows: Said Parker has this day sold the J. M. Folkes property to H. A. Carter for a certain sum in money and property. Now, H. A. Carter this day pays H. A. Parker \$550.00 in cash, and owes said

Parker a balance of \$565.00, which is to be paid at the end of the year; and note is to be given when Parker and Carter settle up their other matters. H. A. Parker is to execute deed to Carter. This agreement is signed in duplicate.

"H. A. PARKER."

This instrument is the writing upon which plaintiff instituted this suit. He alleged that this instrument was executed in duplicate, one being retained by him and the other by defendant. Plaintiff in the amended complaint also asked for an accounting between the parties. Upon the motion of the plaintiff the cause was transferred to the chancery court. The defendant denied every material allegation of the amended complaint, and pleaded the statute of limitations against each item of said alleged indebtedness.

The cause was tried by the chancery court upon the pleadings and depositions filed in the case; and that court found that, if plaintiff, who is an attorney at law, ever had a cause of action for the matters set out in the complaint and amended complaint, it was barred by limitation, and thereupon dismissed the same. And from that decree the plaintiff prosecutes this appeal.

It appears from the testimony that the defendant employed the plaintiff to attend to a number of suits and matters involved in litigation from time to time extending from 1882 or 1883 to 1893 or 1894. The plaintiff claims that for his services in attending to a great number of these suits the defendant had not paid him. The defendant testified that he had paid plaintiff for all his services as such attorney in all these matters. A great deal of testimony was taken relative to these items; but, however the preponderance of the testimony may be as to the respective contentions of the parties, it appears that the claims of plaintiff were separate and independent items of charges for these different services,¹⁶⁸ and that there was no running mutual account between the parties; and the last item of charge for said service was in 1894. On February 21, 1889, plaintiff borrowed from defendant \$400, and on that day executed his note to defendant for that sum due December 1, 1889, with ten per cent interest per annum from date till paid. On July 13, 1893, by agreement of both parties and at the direction of plaintiff, a credit of \$150 was indorsed upon the note in payment of attorney fees of the plaintiff.

Upon February 14, 1898, the plaintiff sold to defendant certain real estate in Brinkley, Arkansas, and on that day executed to him a deed, the descriptive part of which is as follows:

"Know all men by these presents: That we, H. A. Parker and May B. Parker, his wife, for and in consideration of the sum of two thousand dollars (\$2,000) to us in hand paid by

H. A. Carter, Sr., of which amount the sum of \$1,295 is paid in hand, and the residue is paid in property, to wit: Two houses and one lot in the town of Brinkley, which houses and lot are deeded to one L. J. Folkes on this date."

And at the same time the plaintiff drafted the writing set out above in said amended complaint in duplicate and signed the same. He testified that it was understood that defendant should also sign the said writing in duplicate, but by oversight he did not do so. The defendant denies that it was agreed or understood that he was to sign the writing. But it is undisputed that plaintiff delivered to defendant one of these written instruments duly signed by plaintiff, and that defendant accepted and took same and retained it from that day to the trial.

The plaintiff contends that this was the written evidence of the agreement between the parties, and, being accepted and acted on by the defendant, was a written contract binding upon him, although it was not actually signed by him; that his account for fees was sufficient to pay off the note executed by him to defendant, and that the defendant owes the amount represented by this writing. And it is upon this written instrument that the cause of action of the plaintiff is founded.

The defendant testified that he purchased the real estate from the plaintiff, for which he gave him the check for \$550, and conveyed certain property for his benefit, and that the balance of \$565 ¹⁰⁷ was to go in payment of the note which he held against plaintiff.

The preponderance of the testimony establishes that the above writing, signed by plaintiff in duplicate, was executed at the time of the execution of the deed, and that one of these written instruments was accepted by the defendant and retained by him, and that it was understood at the time by the parties that it was the written evidence of their agreement. The contract of the sale of the land was executed, and not executory, and was thus performed by the defendant taking possession of the land under the deed; and this writing was but the evidence of the manner of the payment of the consideration. It thereby became a contract between the parties founded upon a writing, though signed by only one of the parties. As is said in 1 Page on Contract, section 50: "A written contract by one party may be accepted by the other party assenting to it and acting upon it, even if he does not sign it."

A written contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. The contract or agreement is thus evidenced by the writing, and where the party accepts and adopts the writing as the evidence of the contract, he becomes bound by its terms.

And in a great many jurisdictions it is held that a deed-poll, when accepted by the grantee, becomes the mutual contract of the parties, and the promise of the grantee, therein provided for, is not a verbal one, so as to be governed by the statute of limitation respecting verbal contracts; but that the acceptance of the deed by the grantee makes it a written contract, and the obligations created by it are evidenced by a writing and governed by the provisions of the statute of limitation respecting written instruments: *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555, 19 South. 485; *Fowlkes v. Lea*, 84 Miss. 509, 36 South. 1036, 68 L. R. A. 925, 2 Ann. Cas. 466; *Elliott v. Saufley*, 89 Ky. 52, 11 S. W. 200; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756, 8 L. R. A. 604; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Goodwin v. Gilbert*, 9 Mass. 510; *Schumacker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Huff v. Nickerson*, 27 Me. 106.

The above writing, although signed alone by plaintiff, was intended by the parties as an evidence of the agreement therein set out, and was accepted as such and acted on by the defendant. It was therefore an instrument in writing governed by the provisions ¹⁶⁸ of the statute of limitations respecting written contracts. And any obligation assumed by defendant as shown by said writing was not barred at the time of the institution of this suit. But by the terms of the contract thus entered into by the parties on February 14, 1898, it was provided that there should be a settlement of the indebtedness due at that time by the parties, one to the other; but that settlement, under the agreement, could apply, and actually did apply, only to such indebtedness as was at that time legally enforceable and existing, and did not, and could not, apply to any debt at that time not enforceable because barred by limitation.

The plaintiff claims that he had performed services for the defendant as his attorney in the prosecution and defense of numerous suits and proceedings, amounting in the aggregate to a sum exceeding the amount that was due at that time, with interest upon the note given by him to defendant in 1889. But the preponderance of the testimony does not tend to prove that any of these items of charges for fees, except the gross item of \$150 of date July 13, 1893, was to go as a payment on said note, or that the defendant made any agreement of that kind. So that the charges in favor of plaintiff against defendant for fees constituted an independent account, which could only be used as a setoff and not as a payment. Before there can be a payment on an indebtedness, it is not only essential that there should be a delivery of the property by the debtor thereon, but there must also be an acceptance thereof by the creditor: 30 Cyc. 1180. Before a

cross-demand or setoff can constitute a payment, it is indispensable that an agreement to that effect shall be proved: *Hill v. Austin*, 19 Ark. 230; *Quinn v. Sewell*, 50 Ark. 380, 8 S. W. 132.

In this case the evidence does not prove that there was an agreement between the parties that these fees should go as a payment or as payments on said \$400 note. The last item of these fees was charged and was therefore payable in 1894; and each item became barred after three years. Therefore, on February 21, 1898, each of these items of fees claimed by plaintiff was barred by the statute of limitation: *Higgs v. Warner*, 14 Ark. 192; *McNeil v. Garland*, 27 Ark. 343; 25 Cyc. 1081.

The note for \$400 which was executed by plaintiff to defendant on February 21, 1889, was not barred on February 14, ¹⁸⁹⁸ 1898, for the reason that by the agreement of both parties a payment of \$150 was made thereon by plaintiff on July 13, 1893. That was the only payment made on the note; and as it bore ten per cent interest per annum from date until paid, there was more than \$565 unpaid thereon on February 14, 1898; and therefore it fully paid and extinguished the amount named in the said writing of February 14, 1898, as due to plaintiff.

It is contended that the following letter written by defendant to plaintiff was a sufficient written acknowledgment to make a new point from which the statute of limitation should run as to all the claims of plaintiff for said attorney's fees:

"Brinkley, Ark., April the 3d, 1900.

"H. A. Parker, Clarendon, Ark.

"Dear Sir: Your favor containing statement from you as regards our settlement, with statement as it were from beginning to end of the whole matter, as you suppose. I would say to you to come up and see me, and let us settle like gentlemen, as you know I have always tried to treat you right. I hold your statement and our settlement of July 23, 1893, which stands as a cr. on your note of borrowed money from me. And then I hold protested check for \$100 on Bank of Helena, Ark., dated March the 15, 1894, which I at that date give your note cr. for, and on the 18th of March I received notice of your check to me being protested, and I notified you either on the 18th or 19th that the check was protested. It was on the 20th. I have looked it up. Now, I would say, if you will come up, you and I will try and see what we can do. You stated some rather sarcastic things in your letter and assertions, but I have a few things to say as regards the whole matter, and it would in my opinion be better for us to meet and try and settle like gentlemen, as we have had dealings a long time. So let us meet and settle. I would have answered or rather written you sooner, but was

in Memphis when it came, and I have been sick; hardly able to be up now. So let me hear from you as regards the matters, and oblige.

"Yours, &c.

"Would say it was understood that we were to settle the matter between us when I bought the Fowlkes property of you.

"Yours, &c.

"H. A. CARTER."

¹⁷⁰ It is contended that because in this letter there appears a written agreement "to settle," this is sufficient to remove the statute bar. But this language in the letter is not equivalent to an agreement to pay. It is not a recognition of the debt claimed; it is an offer to adjust matters; and the tenor of the letter clearly shows that it is rather a denial of any indebtedness. In order that a written acknowledgment shall be sufficient to remove the bar of the statute, it must import an unqualified acknowledgment of the debt as one that is due and binding: *Beebe v. Block*, 12 Ark. 595; *Smith v. Talbot*, 11 Ark. 666; *Harlan v. Bernie*, 22 Ark. 217, 76 Am. Dec. 428.

It is contended by plaintiff that there was a mistake made in the amount of the balance as named in the above writing sued on, and that instead of \$515 it should have been \$745. He claims that the total amount of the consideration in said deed from him to defendant was \$2,000; that part thereof was paid by property, leaving \$1,295 as set out in said deed; that of this balance \$550 was paid by check, and thus left a remainder of \$745, instead of \$565.

But the defendant testified that the value placed on the property which defendant conveyed, together with the \$550 check, left the balance of \$565, and that there was no mistake in this amount. Nowhere in the testimony does it appear clearly what value was placed on the property conveyed by defendant. When the plaintiff instituted this suit on the above writing, he only claimed that it was for \$565; and nowhere in his pleadings does he set out that there was a mistake made in this amount; and he does not ask for a reformation of the written instrument in this particular.

When the plaintiff first gave his testimony in the case, he testified that the amount of \$565 as set out in this writing was correct, and it was only on being recalled, and ten years after the date of the execution of this instrument, that he for the first time claimed that there was a mistake made therein. If, under the pleadings in this case, it could be held that this written instrument could be reformed, we do not think that the proof is clear and decisive that a mutual mistake was made by both parties in the amount of this balance.

If a mistake was made, it may have been in the amount of \$1,295 named in the deed.

¹⁷¹ To entitle a party to reform a written instrument upon the ground of mistake, it must be clearly shown that the mistake was common to both parties, and that the instrument does not express the agreement as understood by either; and such mistake must appear beyond reasonable controversy: *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Goerke v. Rodgers*, 75 Ark. 72, 83 S. W. 837; *Arkansas Fire Ins. Co. v. Witham*, 82 Ark. 226, 101 S. W. 721; *Varner v. Turner*, 83 Ark. 121, 102 S. W. 1111; *Cherry v. Brizzolara*, 89 Ark. 309, 116 S. W. 668, 21 L. R. A., N. S., 508.

We have carefully examined the testimony in the case, and we are of the opinion that all the indebtedness claimed by the plaintiff against the defendant, and which is not set out in the written instrument dated February 14, 1898, was barred by the statute of limitation before the fourteenth day of February, 1898, and that this statute bar has not been removed; and that all indebtedness claimed by the plaintiff against the defendant under and by virtue of said written instrument was paid and extinguished by indebtedness due by the plaintiff to the defendant on said note.

It follows, therefore, that the decree of the chancellor in dismissing the complaint and cross-complaint was correct. The decree is affirmed.

If a Person Accepts and Adopts a Written Contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions, and to be bound by them: *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145; *Muscatine Water Co. v. Muscatine Lumber Co.*, 85 Iowa, 112, 39 Am. St. Rep. 284; *Allen & Currey Co. v. Shreveport W. W. Co.*, 113 La. 1091, 104 Am. St. Rep. 525.

If a Grantee Accepts a Deed and Enters into Possession of the Land Conveyed, he is deemed to have expressly agreed to do what is stipulated in the deed he should do, though he did not sign it: *Taylor v. Florida East Coast Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155; *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545.

BURKS v. HARRIS.

[91 Ark. 205, 120 S. W. 979.]

LOTTERY—Definition.—A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize. (pp. 69, 70.)

LOTTERY—Sale of Lands—Allocation by Purchasers by Lot—Privy of Vendor.—Where a number of parties join together and purchase lands, even with the intention of dividing it in an unlaw-

ful method, if the vendor is not a party to the scheme he is entitled to recover the agreed price, the unlawful scheme for the division not being part of the original contract of sale. (p. 70.)

LOTTERY—Sale of Lands—Allocation by Purchasers by Lot—Privity of Vendor.—The test to determine whether a plaintiff is entitled to recover in an action for the price of land sold in unselected lots to divers purchasers who are to make their selection by lot is the plaintiff's ability to establish his case without any aid from an illegal transaction; if his claim or right to recover depends on a transaction which is malum in se or prohibited by statute, and that transaction must necessarily be proved to make out his case, there can be no recovery. (pp. 70, 72.)

LOTTERY AND LOT.—A Broad Distinction exists between a division of property by lot and by lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made, and a determination had by lot as to which part shall go to each joint owner severally, without coming within the prohibition of the statute. (p. 72.)

Dick Rice, for the appellant.

McGill & Lindsay, for the appellees.

²⁰⁶ **McCULLOCH, C. J.** At a mass meeting of citizens of Bentonville, Arkansas, the plaintiff, W. A. Burks, proposed, on condition that the citizens of Bentonville should, within fifteen days from that date, purchase from him, at the price of fifty dollars per lot, two hundred lots, fifty by one hundred and fifty feet in size each, to be surveyed and platted out of a certain tract of land adjoining said city of Bentonville, to erect near Spring Park, on a tract of land known as "Spring Park Addition," a hotel building of certain dimensions and capacity, and to make certain other improvements on the premises so as to make the place an attractive resort. The lots were to be selected after the plat should be made, and the same were to be paid for as follows: One-half when the walls and roof of the hotel should be completed, and the balance when the whole improvements were completed. A committee was appointed by the assembled citizens to solicit purchasers in order to accept the plaintiff's proposition.

The committee secured a large number of subscribers or purchasers, each agreeing to purchase a certain number of lots at the price named, and out of these the plaintiff selected two ²⁰⁷ hundred, and they each executed to him an obligation in writing which, after reciting the plaintiff's undertaking with respect to erecting the hotel building, etc., is as follows:

"Now, therefore, in consideration of the above agreement and the benefits arising to the undersigned and the citizens of Bentonville, and the further agreement that the said W. A. Burks is to execute and deliver or cause to be executed and delivered a warranty deed conveying to J. W. Harriss one

lot, the particular location to be hereafter determined, each lot to be 50x150 feet, situate on the following described tract of land situate in Benton county, Arkansas, to-wit: the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 19, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 30, township 20, range 30, we, the undersigned, promise to pay the said W. A. Burks the sum of fifty dollars at the Fidelity Savings Bank & Loan Company, in the city of Bentonville, upon the following terms: One-half of said sum when the walls of the said hotel building and roof thereon shall be completed, the remaining half to become due and payable when the said hotel, the dam and the six cottages shall have been completed according to contract, and that this note shall bear interest at the rate of ten per cent. per annum from date when said payment shall fall due until paid."

The plaintiff then caused the tract of land in question to be surveyed and platted into three hundred and thirty lots, out of which number the committee selected two hundred, to be conveyed to the purchasers as soon as it should be determined what particular lot or lots each purchaser should receive. These lots were of unequal value, some worth practically nothing, and some worth double the price named.

The committee decided to distribute or apportion the lots to the respective purchasers by a chance, each purchaser to take the lot drawn by him, and this plan was accepted and carried out. The plaintiff did not propose this plan, but he acquiesced in it, and was present at the drawing. It was proposed and carried out by the committee who represented the citizens and purchasers. The plaintiff erected the proposed building and other improvements, and demanded payment from the purchasers of their respective obligations. He also executed and tendered to them deeds conveying the several lots apportioned to them in the drawing. Defendants Harriss, Armstrong, Crowell, Duckworth, ²⁰⁸ Bates, Stevenson, Porter, Maxwell, Hildebranth and Graham each declined to accept the lots so apportioned to them and refused to pay the price. The plaintiff instituted separate suits in equity against them, to recover the several amounts due, and to foreclose his alleged lien on the lots apportioned to them. These suits were consolidated and tried together and a decree was rendered dismissing the complaint for want of equity, and the plaintiff appealed.

The defense asserted by each of the defendants was, among other things, that the scheme for the sale and distribution was a lottery, in violation of the law. "A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize": 25 Cyc. 1633.

ful method, if the vendor is not a party to the scheme he is entitled to recover the agreed price, the unlawful scheme for the division not being part of the original contract of sale. (p. 70.)

LOTTERY—Sale of Lands—Allocation by Purchasers by Lot—Privity of Vendor.—The test to determine whether a plaintiff is entitled to recover in an action for the price of land sold in unselected lots to divers purchasers who are to make their selection by lot is the plaintiff's ability to establish his case without any aid from an illegal transaction; if his claim or right to recover depends on a transaction which is malum in se or prohibited by statute, and that transaction must necessarily be proved to make out his case, there can be no recovery. (pp. 70, 72.)

LOTTERY AND LOT.—A Broad Distinction exists between a division of property by lot and by lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made, and a determination had by lot as to which part shall go to each joint owner severally, without coming within the prohibition of the statute. (p. 72.)

Dick Rice, for the appellant.

McGill & Lindsay, for the appellees.

²⁰⁶ **McCULLOCH, C. J.** At a mass meeting of citizens of Bentonville, Arkansas, the plaintiff, W. A. Burks, proposed, on condition that the citizens of Bentonville should, within fifteen days from that date, purchase from him, at the price of fifty dollars per lot, two hundred lots, fifty by one hundred and fifty feet in size each, to be surveyed and platted out of a certain tract of land adjoining said city of Bentonville, to erect near Spring Park, on a tract of land known as "Spring Park Addition," a hotel building of certain dimensions and capacity, and to make certain other improvements on the premises so as to make the place an attractive resort. The lots were to be selected after the plat should be made, and the same were to be paid for as follows: One-half when the walls and roof of the hotel should be completed, and the balance when the whole improvements were completed. A committee was appointed by the assembled citizens to solicit purchasers in order to accept the plaintiff's proposition.

The committee secured a large number of subscribers or purchasers, each agreeing to purchase a certain number of lots at the price named, and out of these the plaintiff selected two ²⁰⁷ hundred, and they each executed to him an obligation in writing which, after reciting the plaintiff's undertaking with respect to erecting the hotel building, etc., is as follows:

"Now, therefore, in consideration of the above agreement and the benefits arising to the undersigned and the citizens of Bentonville, and the further agreement that the said W. A. Burks is to execute and deliver or cause to be executed and delivered a warranty deed conveying to J. W. Harriss one

lot, the particular location to be hereafter determined, each lot to be 50x150 feet, situate on the following described tract of land situate in Benton county, Arkansas, to-wit: the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 19, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 30, township 20, range 30, we, the undersigned, promise to pay the said W. A. Burks the sum of fifty dollars at the Fidelity Savings Bank & Loan Company, in the city of Bentonville, upon the following terms: One-half of said sum when the walls of the said hotel building and roof thereon shall be completed, the remaining half to become due and payable when the said hotel, the dam and the six cottages shall have been completed according to contract, and that this note shall bear interest at the rate of ten per cent. per annum from date when said payment shall fall due until paid."

The plaintiff then caused the tract of land in question to be surveyed and platted into three hundred and thirty lots, out of which number the committee selected two hundred, to be conveyed to the purchasers as soon as it should be determined what particular lot or lots each purchaser should receive. These lots were of unequal value, some worth practically nothing, and some worth double the price named.

The committee decided to distribute or apportion the lots to the respective purchasers by a chance, each purchaser to take the lot drawn by him, and this plan was accepted and carried out. The plaintiff did not propose this plan, but he acquiesced in it, and was present at the drawing. It was proposed and carried out by the committee who represented the citizens and purchasers. The plaintiff erected the proposed building and other improvements, and demanded payment from the purchasers of their respective obligations. He also executed and tendered to them deeds conveying the several lots apportioned to them in the drawing. Defendants Harriss, Armstrong, Crowell, Duckworth, ²⁰⁸ Bates, Stevenson, Porter, Maxwell, Hildebranth and Graham each declined to accept the lots so apportioned to them and refused to pay the price. The plaintiff instituted separate suits in equity against them, to recover the several amounts due, and to foreclose his alleged lien on the lots apportioned to them. These suits were consolidated and tried together and a decree was rendered dismissing the complaint for want of equity, and the plaintiff appealed.

The defense asserted by each of the defendants was, among other things, that the scheme for the sale and distribution was a lottery, in violation of the law. "A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize": 25 Cyc. 1633.

The constitution and statutes of this state make it unlawful to conduct a lottery, or to sell or otherwise dispose of lottery tickets, gift concert tickets, or the like: Const. 1873, art. 19, sec. 14; Kirby's Digest, secs. 1862, 1863. Contracts for the sale of tracts of land of unequal value, to be apportioned among the purchasers by lot, are held in many cases to be within the statute against lotteries; and it is immaterial that every purchaser is to receive some return: *Paulk v. Jasper Land Co.*, 116 Ala. 178, 22 South. 495; *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10; *Lynch v. Rosenthal*, 144 Ind. 86, 55 Am. St. Rep. 168, 42 N. E. 1103, 31 L. R. A. 835; *Den v. Shotwell*, 24 N. J. L. 789; *Seidenbender v. Charles' Admsrs.*, 4 Serg. & R. 151, 8 Am. Dec. 682.

It is insisted, however, that where it is no part of the original contract of sale that the lots shall be divided by chance, and the vendor does not direct or make himself a party to the unlawful distribution, the contract is not vitiated, and that a recovery may be had thereon. The principle thus stated in the contention is undoubtedly sound, for where a number of parties join together and purchase lands, even with the intention of dividing it in an unlawful method, the vendor is not a party to the scheme, and is entitled to recover the agreed price. In that case the unlawful scheme for the division by lot is not a part of the original contract of sale.

In *Martin v. Hodge*, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694, which involved to some extent the same principles which must control here, the court ²⁰⁹ said: "The test to determine whether a plaintiff is entitled to recover in an action like this or not is his ability to establish his case without any aid from an illegal transaction; if his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery."

Now, in applying that test to the present action, it becomes necessary to inquire particularly as to what the contract was between the parties. It will readily be observed that it was not a joint contract on the part of the subscribers or purchasers to purchase together a quantity of land to be subsequently distributed or apportioned among themselves according to a method of their own selection. If such were the case, each purchaser would be bound by the purchase, and would be obligated to accept and pay for his undivided part of the lands so purchased, and the vendor would not be concerned in the method of its apportionment or allotment between the several purchasers. The contract in this case is in writing and speaks for itself. Each subscriber or purchaser agreed to become the purchaser of a lot, to be there-

after selected, of given dimensions and for a certain stipulated price. There were two hundred of these subscribers, and they separately agreed in these contracts to purchase lots of the same dimensions and at the same price, but of unequal value. The sale to each purchaser was not complete until the lot was selected, and the method of selecting the lot was necessarily a part of the contract. It was necessary for the plaintiff to prove the distribution of each lot in order to show a completion of the contract and his right to recover thereon; for the purchaser did not agree to pay until the lot should be apportioned and set aside to him. Applying the test laid down by this court in *Martin v. Hodge*, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694, it was necessary for the plaintiff, in order to make out his case, to prove an illegal transaction whereby the lots were set apart and apportioned to the respective purchasers. While the evidence in this case does not establish the fact that the plaintiff selected the method of apportioning the lots, yet the contract itself necessarily made him a party to whatever method was selected, because, until the apportionment of the lots, the contract was not complete and susceptible of enforcement. The obligation ²¹⁰ which he accepted from the various purchasers contemplated that the distribution would be entirely by chance, and without reference to the actual value of the lots. It was not susceptible of the interpretation that a lawful method would or could be adopted whereby the lots were to be distributed. It could mean nothing else save that these lots of unequal value should be apportioned among the purchasers without regard to values, for each purchaser agreed to take a lot of the stipulated dimensions, no more, no less, and to pay the uniform price named, no more and no less. It was necessarily not in the contemplation of the parties at the time the contract was made that any regard to value should be had in the distribution of the lots, or that the values should be equalized in distributing them.

There is a decision of the supreme court of Iowa which, at first glance, appears to be in conflict with the views we have herein expressed; but on careful analysis of the facts of that case, we find that it is clearly distinguishable from this. There certain promoters engaged in an enterprise with a packing company to erect its plant at the city or town named, and entered into a contract with the owners of a tract of land that the same should be platted and sold to subscribers or purchasers at a uniform price, and that the same were to be distributed among the subscribers according to methods to be thereafter selected by the latter. The subscribers were procured, and the lots platted and conveyed to the promoters for distribution among the subscribers, and the latter agreed upon and carried out a plan of distribution by drawing,

similar to that adopted in the present case. The promoters had nothing to do with the adoption of the method of distribution. The court held that the contract was not vitiated by the agreement between the promoters and the purchasers for a distribution by chance. It is clear from the opinion, however, that the court treated the transaction as a purchase of the whole tract by the promoters, who held the title as trustees for the subscribers. The court said: "It thus appears that there must be some plan or scheme on the part of the promoters of the enterprise alleged to be unlawful for the sale or disposition of property by lot or chance before it can be said to have the character of a lottery. If the sale is without the purpose that the property, or any part of it, shall ²¹¹ be obtained by the purchaser through chance, and this does not result from the nature of the transaction, then it is not so tainted. The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery, or in evasion of the law": *Chancy Park Land Co. v. Hart*, 104 Iowa, 592, 73 N. W. 1059.

The facts of the present case do not fall within the rule announced in that case. Here there was no completed purchase of any particular lot, but, as we have already shown, the contract of purchase depended upon a subsequent method thereafter to be agreed upon for the distribution of the lots. In other words, it was not a purchase of an undivided tract and subsequent agreement of a division by chance, but it was a separate purchase by which each subscriber bought lots, the particular identity of which was to be determined by chance.

The correct distinction is, we think, drawn by the supreme court of Illinois in *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10, wherein it is said: "There is a broad distinction, however, between a division by lot and lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made and a determination had by lot as to which part shall go to each joint owner severally, without coming within the prohibition of the statute. The joint owners being seised of the whole estate before partition, and the object of the lot being to assign to each his particular portion, the whole having been previously divided into parts as nearly of equal value as possible, such partition would not constitute a lottery."

We are of the opinion that the contract of sale contemplated an unlawful method of performance, and that the decree of the chancellor was correct.

Affirmed.

Schemes for the Sale and Drawing of City Lots, in the Nature of Lotteries, were before the court in *Branham v. Stallings*, 21 Colo. 211, 52 Am. St. Rep. 213; *Lynch v. Rosenthal*, 144 Ind. 86, 55 Am. St. Rep. 168. Where the owner of land divides it into lots and offers

them for sale at public outcry, announcing that after the sale a drawing will be had at which each purchaser will be entitled to draw, and the lucky person will receive in addition to his purchase a certain lot not put up for sale, the scheme is in the nature of a lottery: *Whitley v. McConnell*, 183 Ga. 738, post, p. 223, and see authorities cited in the cross-reference note thereto.

The Rule of Pari Delicto is the subject of a note to *Hobbs v. Boatright*, 118 Am. St. Rep. 724.

GRIFFIN v. ANDERSON-TULLY COMPANY.

[91 Ark. 292, 121 S. W. 297.]

LOGS AND LOGGING—Right to Remove Trees Cut After Contract Expired.—Under a contract for the sale of growing timber whereby the grantee is authorized to cut and remove timber within a certain period, the title to timber cut by the grantee within that period, but not removed from the land, passes to the grantee, who has the right for a reasonable time thereafter to remove it. (p. 75.)

PLEADINGS—When Amendable to Conform to Proof.—Where an issue is raised on evidence, introduced without objection, outside the pleadings, the pleadings will be considered as amended by the court to conform to it. (p. 75.)

LOGS AND LOGGING—Measurement of Trees, Date of.—Where growing trees of a given diameter are sold, the measurement is that of the date of the contract and not of the cutting. (p. 76.)

EQUITY—Trial—Findings of Master.—In an equity suit the findings of fact by the master appointed for that purpose are entitled to the same conclusiveness as the verdict of a jury or the court sitting as a jury. (p. 77.)

J. R. Parker, for the appellants.

Brown & Anderson, for the appellee.

294 HART, J. The foundation of this suit is the following contract:

“For and in consideration of the sum of three thousand five hundred (\$3,500) dollars, cash in hand paid to us by L. W. Snyder, agent for Anderson-Tully Company, the receipt whereof is hereby acknowledged, we, T. K. Lee and J. P. Alexander, described herein as parties of the first part, bargain, sell, convey, transfer and warrant unto Anderson-Tully Company, known herein as parties of the second part, all of the cottonwood trees twenty inches in diameter and up at the stump now standing or located on the following described property, what is known as the Florence Plantation, Chicot County, State of Arkansas, commencing at west line of the Tecumseh Plantation, running to Adams place on the east, the levee is the north line, Mississippi River and Wailer place is the south line. The party of the second part, or assigns, shall have the full, free and undisturbed right of

entry on and into said lands for the term of five years from this date to cut, raft and carry away said trees sold to them. Parties of the second part shall have the right with their employés to go in and upon said land and to use and occupy same for such necessary and useful purposes, in order to cut and carry away said cottonwood timber. Also small trees necessary for rafting timber for towing. All the rights herein granted to said Anderson-Tully Company shall include their heirs and assigns.

"In witness whereof the parties have hereunto signed their names, this 8th day of May, 1902.

"Anderson-Tully Company, parties of the second part, agree and bind themselves not to hire any of T. K. Lee and J. P. Alexander's ²⁹⁵ (parties of the first part) plantation laborers, without first consulting parties of the first part, or their agents, and securing their consent thereto.

(Signed) "T. K. LEE.

"J. P. ALEXANDER.

"Witnesses:

"JOHN M. PARKER.

"H. W. LANGER."

A complaint was filed by the Anderson-Tully Company, a Michigan corporation, in the Chicot chancery court, against J. W. Griffin, T. K. Lee and J. P. Alexander Company, Limited, a Louisiana corporation, it being alleged that these defendants had purchased the lands mentioned in the contract since the date of its execution.

On the eighth day of May, 1907, a large number of the trees from said land had been felled and cut into logs; but the logs had not been removed from the land. The amount was estimated to be 400,000 feet. The plaintiff alleged that it had not been able to remove the same on account of high water, and the object of this action was to enjoin the defendants from interfering for a reasonable time with its servants and employés in removing the logs.

A temporary injunction was granted which by the final decree was made perpetual. The defendants answered, denying the title of the plaintiff to the logs remaining on the land at the date of the expiration of the contract, and by way of cross-complaint alleged that the plaintiff had cut a lot of timber which was under the size of the trees conveyed. They asked that the plaintiff be enjoined from removing any of the timber until their rights could be determined, and that a master be appointed to take an account of the amount of timber cut which was under the size mentioned in the contract.

By agreement of the parties to the suit, R. D. Chotard, the clerk of the court, was appointed special master to ascertain the amount of cottonwood timber cut on said land by plain-

tiff and appropriated to its use, which was not embraced in the terms of the contract above set forth. He was given power to summon witnesses and take all necessary proof to ascertain that matter.

The master reported that 250,683 feet of cottonwood logs, less than twenty inches in diameter at the stump at the date of the ²⁹⁶ execution of the contract, were cut upon the land described in the contract, and that the price of said logs was the sum of \$877.39. The report was confirmed by the court, and a decree was entered, in accordance with the report, against the plaintiff in favor of said defendants for said sum of \$877.39, with six per cent interest per annum thereon from the date thereof, viz., April 10, 1909, until paid.

Both the plaintiff and defendant introduced evidence tending to sustain their respective contentions, and both have appealed from that part of the decree against them.

This court decided in the case of *Indiana & Arkansas etc. Mfg. Co. v. Eldridge*, 89 Ark. 361, 116 S. W. 1173, that under a contract for the sale of growing timber, whereby the grantee is authorized to cut and remove timber within a certain period of time, the title to timber cut by the grantee within such period, but not removed from the land, passes to such grantee. Under this decision, the plaintiff owned all the trees embraced within the terms of its contract which had been severed from the soil and cut into logs at the date of the expiration of its contract, and had a right for a reasonable time thereafter to remove them. The evidence shows that at the time the final decree was entered these logs had been removed. Hence the question of whether the court was right in its decree as to the injunction passes out of the case. The logs belonged to the plaintiff, and it removed them before the final decree was entered. The appeal from that part of the decree is therefore fruitless, and the court will not consider whether it was right or wrong: *Wilson v. Thompson*, 56 Ark. 110, 19 S. W. 321.

Counsel for plaintiff urges that no issue was raised by the cross-complaint as to a violation of the contract by cutting timber under twenty inches in diameter. The following paragraph appears in the answer and cross-complaint:

"Defendants charge that said plaintiff has violated said contract with the defendants by cutting and carrying away about 400,000 feet of cottonwood trees that were less than twenty inches in diameter on the eighth day of May, 1902, the day of their contract; that said 400,000 feet of cottonwood timber is worth \$3,000."

The prayer of the answer and cross-complaint is as follows:

²⁹⁷ "Wherefore defendants pray that the writ of injunction heretofore granted be dismissed, set aside and naught

held, and that defendants be granted an injunction against plaintiffs from removing any of said cottonwood logs until the title of said logs is adjudicated by this court. Defendants pray that if the court refuses to dissolve said injunction granted to the plaintiffs, and also refuses to grant an injunction enjoining the plaintiffs from removing said logs, then the defendants pray the court to appoint a receiver or master to take an accounting of said logs and report the same to the court at its November term, 1907. Defendants further pray that if the court refuses to dissolve said injunction granted to the plaintiffs, the court require the said plaintiffs to give an additional bond in the sum of \$10,000. Defendants pray, upon a final hearing of this cause, that all of said cottonwood logs be turned over to them or the plaintiffs be made, by the judgment of this court, to pay full market value for same to defendants, the sum of \$6,000."

The defendants and cross-complainants asked for an accounting of the logs taken in violation of the contract, and for judgment for the amount so found. We think this was sufficient to raise the issue. Moreover, proof on this issue was introduced by both sides without objection. In such cases it is the uniform holding of this court that the pleadings will be considered as amended by us to conform to the proof: *Roach v. Richardson*, 84 Ark. 37, 104 S. W. 538, and cases cited; *White River Ry. Co. v. Batesville & Winerva Tel. Co.*, 81 Ark. 195, 98 S. W. 721; *Hurley v. Oliver*, 91 Ark. 427, 121 S. W. 920.

Counsel for plaintiff earnestly insist that the question of the size of the trees should be determined as of the date of the cutting, and not as of the date of the contract. In short, they urge that no regard should be taken of the growth of the trees from the time of making the contract until the time of cutting. In support of their contention, they cite the case of *Bryant v. Bates* (Ky. App.), 39 S. W. 428. In that case, without any discussion, the court said that plan of measurement was proper because there was no practicable way to ascertain the growth of the tree from the time of the contract and the time it might be cut under the contract. In that case the trees were oak, gum and ash, trees of slow growth, and the time of removal three ²⁹⁸ years. In the present case the time of removal was five years, and the trees were cottonwood, which grow at the rate of one or one and one-half inches each year. The language of the contract describing the trees sold is as follows: "All of the cottonwood trees twenty inches in diameter and up at the stump now standing or located on the following described property. [Here follows description of land.]" Thus it will be seen that the title passed, according to the plain and express terms of the contract, only to those trees which measured the required

size at that date, and not at the date of their severance. The identification of the trees by specifying their size tends to show that the intention of the parties was to include such only as at the time the contract was made answered the description. Their diameter at that time was capable of definite ascertainment. The parties, being timber-men, knew that cottonwood was of quick growth, and no doubt knew what would be its probable growth in five years. The soil was extremely rich, and on that account the growth would be quicker. It is not to be presumed that the owner intended to convey that growth unless he expressly did so by the terms of his conveyance. If the purchaser wished to be saved the trouble and expense of measuring and marking the trees at the time of the sale, it should have secured a clause in the contract fixing then the measurement at the time when cut or severed from the soil. This is in accordance with the well-established general rule of the construction of contracts, as well as with the majority of adjudicated cases on this particular subject: 28 Am. & Eng. Ency. of Law, 2d ed., p. 542, and cases cited; note to case of *McRae v. Stilwell*, 55 L. R. A. 524.

The record shows that at the April term, 1908, of the Chicot chancery court, by consent of all parties, R. D. Chotard was appointed master to determine what amount of cottonwood timber under the size specified in the contract had been cut by the plaintiff on the lands described therein. He was directed to summon witnesses and to take all necessary proof to ascertain that fact. Under such circumstances, his findings of facts are entitled to the same conclusiveness as is given the verdict of a jury or the findings of fact by a court sitting as a jury: *Paepcke-Leicht Lbr. Co. v. Collins*, 85 Ark. 414, 108 S. W. 511; *Greenhaw v. Combs*, 74 Ark. 336, 85 S. W. 768.

²⁹⁹ It is next objected by counsel for plaintiff that there is no evidence to sustain his findings as to a part of the timber. In other words, they contend that some of the timber was estimated twice.

G. F. Horner was one of the witnesses for the defendants. He testified that he made estimates of the amount of cottonwood under twenty inches in diameter on the land described in the contract twice. He said that the first time he only made an estimate of the timber on the north part of the land because at that time he thought the timber on that part was all that was in dispute. The second time he only measured the timber on the remainder of the land. The findings of the master as to the amount of timber on the land under twenty inches in diameter at the stump is warranted by his testimony and by the testimony of other witnesses tending to corroborate it. Of course, this evidence is contradicted by

the witnesses for the plaintiff. But because the finding of the master in this regard must be sustained under the rule above announced, it will not be necessary for us to set out the evidence on this point.

We find no prejudicial error in the record, and the decree is therefore affirmed.

Deeds to Timber are considered with reference to their interpretation and effect in the note to *Wilson etc. Co. v. Alderman & Sons Co.*, 128 Am. St. Rep. 868. As to within what time standing timber must be removed by the vendee thereof, see *Bardon v. O'Brien*, 140 Wis. 191, 133 Am. St. Rep. 1066.

MORGAN v. KENDRICK.

[91 Ark. 394, 121 S. W. 278.]

JUDGMENT—Conclusiveness.—A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action, so long as the judgment in the first suit remains unmodified. (p. 80.)

LIMITATION OF ACTIONS—Mortgage—Payment on Account.—The effect of Kirby's Digest, section 5399, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payment which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes an unrecorded mortgage, and constitutes no lien upon the mortgaged property as against such strangers, notwithstanding they have actual knowledge of the execution of such mortgage. (p. 81.)

MORTGAGES—Unrecorded—Effect.—An unrecorded mortgage is good and binding between the parties, and constitutes a valid lien on the property except as to the legal rights of third parties. (p. 81.)

MORTGAGES—Unrecorded—Effect of Subsequent Conveyance by Mortgagor.—The conveyance by a mortgagor to a third party with the fraudulent purpose of defeating the mortgage, and without an actual and bona fide consideration, would not relieve the property of the lien of a valid mortgage, although unrecorded. (p. 81.)

FRAUDULENT CONVEYANCE—Suspicious Consideration—Presumption.—Where a father conveyed land which he had mortgaged to his sons, retaining the deed and recording it after his mortgagee proceeded to sell the land, and as to the consideration set out in the deed declares his indifference whether it is paid or not, these circumstances make out a prima facie case of fraud. (p. 82.)

QUIETING TITLE—Foundation of Equitable Right.—Where land is sold in accordance with law and the provisions of a mortgage, it vests in the purchaser an equitable title, though no deed is made, and when the period for redemption is passed and suit brought, the court properly quiets the title and directs a deed to be made to the purchaser. (p. 82.)

Woodson Moseley and Taylor & Jones, for the appellants.

J. W. Crawford and T. M. Hooker, for the appellee.

³⁹⁵ FRAUENTHAL, J. The plaintiff below, J. J. T. Kendrick, instituted this suit on October 1, 1907, in the Cleveland chancery court for the purpose of confirming a sale of real estate made under and by virtue of a power of sale contained in a mortgage executed to him by W. J. Morgan, one of the defendants; and also ³⁹⁶ to cancel a deed executed by said mortgagor to his two sons, George and Frank Morgan, the other defendants herein. On January 24, 1896, W. J. Morgan for a valuable consideration executed to the plaintiff his note for \$563.95 due January 1, 1897, and bearing ten per cent interest per annum from date until paid, and on the same day to secure the payment of said note executed to plaintiff a mortgage on the land in controversy. The mortgage was duly filed for record in April, 1896. The plaintiff alleged that payments were made by the maker on the note as follows: January 15, 1901, one dollar; July 7, 1902, two dollars; and that on June 11, 1906, the plaintiff indorsed a memorandum of said payments on the margin of the record of said mortgage, which was then duly attested. In May, 1906, the plaintiff sold the land under the power of sale contained in the mortgage; and in making said sale he complied with the terms of said mortgage and all requirements of the law. The plaintiff became the purchaser at that sale, and, although the period for redemption had expired, he did not execute a deed to himself under the sale for the reason that he did not think he had that power. He credited the amount of the bid upon the note; and on November 1, 1906, instituted a suit in the Cleveland circuit court against the defendant, W. J. Morgan, for the balance of said note. In that suit said Morgan denied making the above payments and pleaded the statute of limitation. Upon a trial and verdict of a jury a judgment was rendered in that case in favor of the plaintiff and against the defendant W. J. Morgan for the sum of \$639.23 as the balance due on said note. On April 3, 1905, W. J. Morgan conveyed the said mortgaged land to his said two sons for the alleged consideration of \$400; and this deed was filed for record on June 19, 1906. The plaintiff seeks to set aside said deed on the ground of fraud.

The defendants in their answer denied all allegations of payments and of fraud, and claimed that by reason of the failure to indorse the alleged payments on the margin of the record of the mortgage until after the note appeared to be barred by limitation and until after the execution of said deed, the mortgage was invalid as to the defendants, George and Frank Morgan.

The chancellor found that the note was not barred by limitation; that the mortgage sale of the land was regular in all respects; ³⁹⁷ that the alleged conveyance made by the mortgagor to the other defendants was fraudulent. He entered a decree, canceling said deed and confirming the sale under the mortgage and quieting the title in plaintiff, and directed a commissioner of the court to execute a deed to plaintiff for the land.

In accordance with the pleadings the chancellor in said decree also reformed the description of a small portion of the land. From this decree the defendants have appealed to this court.

The sole defense in this suit is made by the defendants George and Frank Morgan, who claim an unencumbered title to the land by virtue of the conveyance from their father. Neither in the answer of the defendant W. J. Morgan nor in the brief of appellants is it contended that the said note secured by the mortgage is barred by the statute of limitation. The evidence sustains the finding of the chancellor that payments were made thereon by the maker as above set forth, and that on that account the note was not barred. That issue was also determined by the judgment of the Cleveland circuit court in the above-mentioned suit founded upon said note. As is said in the case of *National Surety Co. v. Coates*, 83 Ark. 545, 104 S. W. 219, "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified": 12 Cyc. 1215.

The judgment of the Cleveland circuit court involved the question as to whether said note was barred, and it therefore became conclusive against the defendant W. J. Morgan and *prima facie* evidence against the other defendants; and with the other testimony in the case fully sustains the finding of the chancellor that the note was not barred.

But the defendants, who are the grantees in said deed, contend that on April 3, 1905, when they obtained said deed, the plaintiff had not made any indorsement of the payments on the margin of the record of said mortgage; and that therefore their rights could not be affected by the payments. Section 5399 of Kirby's ³⁹⁸ Digest provides: "In suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Pro-

vided, when any payment is made on any such existing indebtedness before the same is barred by the statute of limitation, such payment shall not operate to revive said debt to extend the operations of the statute of limitation with reference thereto, so far as the same affects the rights of third parties, unless, the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

The effect of that statute, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payments which would stay the limitation is indorsed on the margin of the record of the mortgage, it becomes as to such third parties an unrecorded mortgage; and like an unrecorded mortgage it constitutes no lien upon the mortgaged property, as against such third party, notwithstanding he has actual knowledge of the execution of such mortgage: *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Jarratt v. McDaniel*, 32 Ark. 598; *Neal v. Speigle*, 33 Ark. 63; *Ford v. Burks*, 37 Ark. 91; *Dodd v. Parker*, 40 Ark. 536; *Martin v. Ogden*, 41 Ark. 186; *Wright v. Graham*, 42 Ark. 140; *Hill v. Gregory*, 64 Ark. 317, 42 S. W. 408.

But an unrecorded mortgage is still good and binding between the parties. It constitutes a valid lien on the property, except as to the legal rights of third parties: *Conner v. Abbott*, 35 Ark. 365; *Applewhite v. Harrell Mill Co.*, 49 Ark. 279, 5 S. W. 292; *Hampton v. State*, 67 Ark. 266, 54 S. W. 746; *Rheea v. Planters' Mutual Ins. Assn.*, 77 Ark. 57, 90 S. W. 850.

The mortgagor cannot defeat the binding lien of an unrecorded mortgage by placing the title to the property in another for his benefit, nor by giving the property away. As is said in the case of *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781: "As to one holding the property by a conveyance entirely voluntary, it would be presumed that the conveyance was made subject to the mortgage." The conveyance, therefore, by a mortgagor to a third party with the ³⁹⁹ fraudulent purpose of defeating the mortgage, and without an actual and bona fide consideration, would not relieve the property of the lien of a valid mortgage, although unrecorded: *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781.

Now, in this case it appears that the father conveyed to his two sons the mortgaged land. The deed was executed in April, 1905, but the evidence tends to prove that it was still retained by the father and undelivered; and after the mortgagee proceeded to make sale of the land under the mortgage in May, 1906, the father placed the deed on record on June

19, 1906. The two sons were young men who were members of the father's family, and the evidence does not show that they had any property. They knew of the mortgage which their father had executed to the plaintiff on the land, and knew that it was unpaid. The deed recites that the consideration of \$400 was paid for the land, but the defendants testified that as a matter of fact it was not paid. They claim that they had executed a note therefor, but they and their father testified that they had never seen the note since its execution, and did not know when it matured; and this testimony was given three years after its alleged execution. The note was not paid, and was not produced; and finally the father stated in his testimony: "If they pay me for it, it is all right; and if they never pay for it, it is all right, of course." No other person testified to seeing the deed prior to the date it was filed for record; and no other person testified as to the note. It was claimed that "about \$50" was paid along on the note, but no statement is made as to when or in what manner such alleged payments were made. The circumstances thus surrounding this deed and the alleged transaction between father and sons are sufficient to arouse suspicion and to throw doubt upon them as legitimate contracts. The circumstances of this case and the relation of the parties make out a *prima facie* case of fraud which impeaches the consideration of the deed, which has not been overcome by any testimony in the case: *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781; *Wilks v. Vaughan*, 73 Ark. 174, 83 S. W. 913; *McConnell v. Hopkins*, 86 Ark. 225, 110 S. W. 1039; 20 Cyc. 439.

The chancellor made a finding that this alleged conveyance by the father, W. J. Morgan, to his sons was not *bona fide*, but was colorable and fraudulent. The evidence sustains the finding ⁴⁰⁰ of the chancellor and the conclusion that the deed was in truth and in effect a voluntary conveyance. It therefore follows that this deed did not relieve the land of the valid lien which existed on the land by virtue of said mortgage, and that the conveyance from W. J. Morgan to his sons, George and Frank, is subject to said mortgage. And, inasmuch as the land has been sold under said mortgage and the period for redemption has expired, said deed should be removed as a cloud from the title to said land.

The land was sold in accordance with law and the provisions of the mortgage, and it therefore vested in the purchaser an equitable title, although no deed was made: *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063. The chancellor was therefore right in quieting the title to the land in the plaintiff and directing a deed to be made to him: *Kirby's Digest*, sec. 6318.

Finding no error in the decree of the Cleveland chancery court, it is in all things affirmed.

Unrecorded Conveyances are Valid against all persons except subsequent purchasers and encumbrancers in good faith for a valuable consideration. They are binding between the parties thereto: *Noyes v. Crawford*, 118 Iowa, 15, 96 Am. St. Rep. 363; *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550; *Lake v. Hancock*, 38 Fla. 53, 56 Am. St. Rep. 159; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209.

The Effect of Defectively Recorded Legal Instruments on the rights of third persons is the subject of a note to *Koch v. West*, 96 Am. St. Rep. 397.

MALONEY v. STATE.

[91 Ark. 485, 121 S. W. 728.]

FORGERY—Uttering—Definition.—Uttering a forged writing consists in offering to another a forged instrument with a knowledge of the falsity of the writing and with intent to defraud. (p. 85.)

FORGERY—Uttering—Nonessentials.—To constitute the offense of uttering, it is not necessary that the forged writing should have been actually received as genuine by the person to whom it is offered, or that the attempt to defraud should be successful. (p. 85.)

FORGERY—Fictitious Name.—To constitute forgery, the name alleged to be forged need not be that of any person in existence; it may be wholly fictitious. (p. 86.)

FORGERY—Fictitious Name—Inference.—When the jury find upon evidence that the name alleged to be forged was of a fictitious person, the inference arises that the person who uttered and published, as true, the instrument bearing the name, either forged it or knew it to be forged. (p. 86.)

FORGERY—Fictitious Name—Evidence.—It is competent for the proper officer of a bank to prove that no person bearing the name on a document alleged to be forged kept or had an account with or was a customer of such bank. (p. 86.)

FORGERY—Fictitious Name—Evidence.—It is not competent for the cashier of a bank which succeeded to the business of another bank on which a check alleged to be forged was drawn to prove that no person bearing the name on such check kept or had an account with or was a customer of the latter bank. (p. 87.)

EVIDENCE—Silence as Assent.—The silence of a defendant when a statement, damaging to him, is made in his presence, can only be used in evidence against him when it is shown that he heard the remark and the circumstances in proof naturally called for a reply. (p. 87.)

EVIDENCE—Absent Witness—Former Trial.—Before testimony of an absent witness given on former trial can be heard, it must be first shown that such witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found. (pp. 87, 88.)

Hal L. Norwood, attorney general, and C. A. Cunningham, assistant, for the appellee.

⁴⁸⁶ **FRAUENTHAL, J.** The defendant, Frank Maloney, was convicted of the crime of uttering a forged writing, and

sentenced to the penitentiary for a term of two years; and from the judgment of conviction he prosecutes this appeal. The indictment upon which he was tried, with the caption omitted, was as follows:

⁴⁸⁷ "The grand jury of Ouachita County, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, Frank Maloney, of the crime of uttering a forged writing, committed as follows, to wit:

"The said defendant, on the 9th day of April, 1909, in Ouachita County, Arkansas, did unlawfully, wilfully and feloniously utter and publish as true to Spence Wooley a certain forged and counterfeit writing on paper purporting to be a check on the Bank & Trust Company of Walnut Ridge, Arkansas, in words and figures as follows, to wit: 'Walnut Ridge, Ark., April 8, 1909, No. 614. Bank & Trust Company: Pay to the order of George Collins \$6.17, six seventeen (6.17) dollars, C. B. McDonald.'

"The said forged writing being then and there passed, uttered and published by the said Frank Maloney to the said Spence Wooley, with intent then and there feloniously to obtain possession of money, the property of said Spence Wooley, he, the said Frank Maloney, then and there well knowing the said paper to be forged and counterfeited; against the peace and dignity of the State of Arkansas."

The evidence tended to establish the following facts: On April 9, 1909, the defendant, in company with a person named Harris, entered the restaurant of one Spence Wooley in the city of Camden, Arkansas, and ordered supper. After finishing the meal he gave to Spence Wooley the written instrument or check set out in the above indictment, and requested him to cash same, and to take therefrom the amount necessary to pay for the supper. Not having sufficient money to cash same, Wooley carried it to Mr. Harper and requested him to cash it, which he declined to do. He then showed the check to a policeman, who suggested that he see if the party had the money at the bank. Wooley then returned to defendant, and told him that he was unable to get the check cashed. The defendant then stated that he only had fifteen cents, and asked his companion, Harris, for some money, who did not have it. About that time the policeman appeared and arrested the defendant. Wooley was not acquainted with defendant, nor with his companion, and had not seen either of them before. The cashier of the First National Bank of Walnut Ridge testified that his said bank became the successor ⁴⁸⁸ of the Bank and Trust Company of Walnut Ridge, Arkansas, in February, 1909, a short time before the alleged commission of this offense, and that the balances of deposits due all parties, as appeared on the books of the Bank and Trust Company, were transferred to the books of the First

National Bank; and that his said bank had no deposit in the name of C. B. McDonald, and had no customer by that name. There was no other testimony relative to C. B. McDonald, the alleged drawer of the check, or as to his alleged signature, and no testimony whatever as to George Collins, the alleged payee in the check.

It would appear from the testimony that there had been an examining trial of the defendant before a justice of the peace, and at that trial the party called Harris had been a witness. At the trial of the defendant in the circuit court the policeman, W. N. Ketchum, testified, over the objection of the defendant duly saved, that he had taken from the possession of Harris on said April 9th a little book, which book had been exhibited to the cashier of said First National Bank, and who stated that it was the kind used by the Bank and Trust Company. Over the objection of the defendant this witness, Ketchum, also testified that at the examining trial of defendant the party Harris testified that defendant signed a check while sitting in a hotel in Camden. There was no testimony as to where the person Harris was at the time of the trial in the circuit court. There was no testimony that any inquiry had been made for him or any effort to obtain his presence at the trial.

The defendant filed a motion in arrest of judgment on the ground that the indictment does not allege facts sufficient to constitute an offense. The crime of uttering a forged writing consists in offering to another a forged instrument with a knowledge of the falsity of the writing and with intent to defraud. Those essential elements of the crime are well charged in the indictment. To constitute the offense, it is not necessary that the writing should have been actually received as genuine by the party to whom the same is offered, or that the attempt to defraud be successful; the uttering is complete if the forged instrument is offered as genuine, or declared or asserted, either directly or indirectly, by words or by actions as good: Wharton's Criminal Law, 10th ed., sec. 708; 5 Ency. of Evidence, 865; ⁴⁸⁹ Elsey v. State, 47 Ark. 572, 2 S. W. 337; People v. Caton, 25 Mich. 388; State v. Horner, 48 Mo. 520; Smith v. State, 20 Neb. 284, 57 Am. Rep. 832, 29 N. W. 923; 13 Am. & Eng. Ency. of Law, 2d ed., 1102; 19 Cyc. 1388; Holloway v. State, 90 Ark. 123, 118 S. W. 256.

The instrument set out in the indictment was capable of working a legal injury. Although not indorsed by the alleged payee in the instrument, it had legal efficacy. The gravamen of the offense is the guilty intent which accompanies the attempt to defraud. As said by Mr. Bishop: "Since the offense of uttering is an attempt, it is complete when the forged instrument is offered; an acceptance of it is unnecessary, while yet it does not take away or diminish the crime":

2 Bishop's New Criminal Law, sec. 605. If one, with intent to defraud, offers a forged instrument to another which is capable of injury, he has committed this offense, although the person to whom it is offered might not accept it without a written assignment. But in the instrument set out in the indictment one might obtain a right or an equitable title without a written assignment: *Smith v. State*, 20 Neb. 284, 57 Am. Rep. 832, 29 N. W. 923; *Lawless v. State*, 114 Wis. 189, 89 N. W. 891; *Brazil v. State*, 117 Ga. 32, 43 South. 460. And the check could be transferred without a written assignment thereof so as to make the transferee the true owner thereof: *Heartman v. Franks*, 36 Ark. 501; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

It is urged by the defendant that there is not sufficient evidence to sustain the verdict, for the reason that it is not proved that the name of C. B. McDonald, affixed to the check as the alleged drawer, was a forgery. In a prosecution for uttering a forged writing, before there can be a conviction, the state must prove that the instrument offered was forged, and that the defendant knew it was forged. It is true that no witness testified that this was not the signature of C. B. McDonald; but if C. B. McDonald was a fictitious person, and such name was signed to the instrument, then it would be a forged writing. "To constitute forgery the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious": 13 Am. & Eng. Ency. of Law, 2d ed., 1088. It is for the jury to determine under the evidence whether the person whose name appears signed to the instrument is a real or fictitious person. If they should find upon evidence that the name was of a fictitious ⁴⁹⁰ person, then the inference arises that the person who utters and publishes such instrument as true either forged the same or knew it to be forged: *Williams v. State*, 126 Ala. 50, 28 South. 632; *Brewer v. State*, 32 Tex. Cr. 74, 40 Am. St. Rep. 760, 22 S. W. 41; *Davis v. State*, 34 Tex. Cr. 117, 29 S. W. 478; *State v. Vineyard*, 16 Mont. 138, 40 Pac. 173.

And it is competent to show that the person whose name is affixed to a check as drawer is fictitious by the evidence of the proper officer of a bank upon which such check is drawn that no person bearing such name kept or had an account with such bank or was a customer of such bank: 2 Greenleaf on Evidence, sec. 109; *Barnwell v. State*, 1 Tex. App. 745; *Williams v. State*, 126 Ala. 50, 28 South. 632.

But in the case at bar the official of the bank did not testify that the name of C. B. McDonald did not appear on the books of the Bank and Trust Company, the bank upon which the check was drawn, or that that bank never had such a customer. The witness, C. W. White, testified that he was cashier of the First National Bank, which had succeeded the

Bank and Trust Company; and while he also testified that the names of all depositors of the Bank and Trust Company with balances were transferred to the books of the First National Bank, and that the name of C. B. McDonald did not appear on these latter books, still this would not necessarily prove that such a person had not been a depositor of the Bank and Trust Company, for there may have been such a customer of that company, who, though not having a balance to his credit, may have issued this check, either in ignorance of the exact condition of his account or by way of overdraft. Nor was there any testimony introduced that diligent inquiry or search had been made for such person in that community and within the territory in which the Bank and Trust Company had business relations, and that such person was not known, in order to show that the name was of a fictitious person.

It therefore follows that the above testimony of the cashier was not sufficient to show that the name affixed to this check was fictitious, and thereby to raise the inference that it was forged and so known by the defendant who uttered it.

At the trial of the cause the court permitted the witness W. N. Ketchum to testify that at the examining trial of the defendant a party by the name of Harris was a witness, and ⁴⁹¹ that said Harris testified in the presence of defendant that the defendant signed a check in the hotel in the city of Camden; and also to other statements of Harris made at the examining trial tending to incriminate the defendant. Now, this testimony was admissible only on one of two grounds:

1. On the ground that this was a damaging statement made in the presence of the defendant, and because he did not then and there deny the same, his silence can be used as evidence against him. But, as is said in the case of *Bloomer v. State*, 75 Ark. 297, 87 S. W. 438, "to render such evidence competent, it must be shown that the accused heard the remark, and that the circumstances in proof naturally called for a reply on his part." The statements made by Harris were in the course of giving testimony in court. The circumstances did not call upon the defendant to deny them and there in the presence of the court make a reply; and under the statute of our state he was not even required to afterward take the stand as a witness and deny the statements. This testimony was not, therefore, under the circumstances of this case, admissible on the ground that the statements were made in the hearing of the defendant without reply or denial from him.

2. And this testimony was not admissible on the ground that it was proof of the testimony of an absent witness given on a former trial. Before such testimony can be heard, a sufficient foundation must be laid for its admission. It must be first shown that such absent witness is dead, beyond the

jurisdiction of the court, or upon diligent inquiry cannot be found: *Pope v. State*, 22 Ark. 372; *Shackelford v. State*, 33 Ark. 539; *Green v. State*, 38 Ark. 304; *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Harwood v. State*, 63 Ark. 130, 37 S. W. 304. The record in this case fails wholly to show that the whereabouts of Harris were unknown, or that he was out of the jurisdiction of the court, or that any inquiry whatever had been made for him. It follows, therefore, that this evidence as to the testimony and statements made by the party Harris was inadmissible. That its admission was highly prejudicial follows from the character of this alleged testimony by which the essential element of the charge against the defendant would be established. By this incompetent testimony the state attempted to prove that the defendant himself ⁴⁹² wrote the check, and himself forged the name of C. B. McDonald thereto; and which he thereafter uttered. The admission of this evidence was therefore erroneous.

The judgment of the Ouachita circuit court herein is reversed, and this cause is remanded for a new trial.

Battle, J., absent, and not participating.

The Uttering of Forged Instruments is the subject of a note to *Walker v. State*, 119 Am. St. Rep. 317.

It is No Defense to a Charge of Forgery that the name of the defendant is the same as the name of the person whose name he forges: *Edwards v. State*, 53 Tex. Cr. 50, 126 Am. St. Rep. 767. And the signing of a fictitious name may constitute forgery: See the note to *Arnold v. Cost*, 22 Am. Dec. 308; *Randolph v. State*, 65 Neb. 520, 91 N. W. 356; *Hanks v. State* (Tex. Cr.), 54 S. W. 587.

PITCOCK v. STATE.

[91 Ark. 527, 121 S. W. 742.]

CONTEMPT—Violation of Injunction After Notice.—Actual notice of the issuance of an injunction, without formal service of the writ upon him, is sufficient to put a defendant in contempt of the court by violating the terms of the writ, if the court possesses jurisdiction of the cause. (p. 92.)

CONTEMPT—Violation of Injunction Erroneously Issued.—If a court has jurisdiction of the parties and subject matter of the cause of action in which the injunction is issued, the fact that it is erroneously and improvidently issued does not excuse disobedience on the part of those who are bound by its terms. (pp. 92, 93.)

JUDGMENT—Want of Jurisdictional Foundation.—When the pleadings show on their face that the court is wholly without jurisdiction of the subject matter set forth therein, any preliminary order made or final judgment rendered is void. (p. 93.)

STATE—When cannot be Sued.—A sovereign state cannot be sued except by its own consent; and such consent is expressly withheld by the constitution, article 5, section 19. (p. 94.)

STATE—When cannot be Sued—Real Party in Interest.—The question whether a suit is one against a state is not necessarily determined by reference to the parties to the record. If the state is the real party in interest, though only its officers or agents are parties, then it is in effect a suit against the state, and falls within the rule of the constitution, article 5, section 19. (p. 94.)

CONTRACTS—Specific Performance—Injunction.—Wherever a contract is one of the class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if that is the only practical mode of enforcement which its terms permit. (p. 97.)

CONTEMPT—Violation of Injunction Where a Court has No Jurisdiction.—A judgment of contempt for violating an injunction which the court had no power to grant, in that the state was the real party in interest, will be quashed on appeal and the proceedings against the petitioner dismissed. (p. 97.)

APPEAL AND ERROR—State Decisis.—Decisions which become rules of property should never be overruled, whether they are right or wrong. (p. 97.)

APPEAL AND ERROR—State Decisis.—Decisions where no rule of property is involved and where the dignity and sovereignty of the state is concerned should, if incorrect, be overruled as speedily as possible by the appellate court. (p. 97.)

Hal L. Norwood, attorney general, and James H. Harrod, for the petitioner.

Murphy, Coleman & Lewis, for the respondent.

⁵²⁹ **McCULLOCH, C. J.** Certiorari to the chancery court of Pulaski county to review and quash the judgment of that court adjudging petitioner, J. A. Pitcock, to be guilty of contempt in disobeying an injunction.

On January 14, 1909, the Arkansas Brick and Manufacturing Company, a corporation, instituted suit in the Pulaski chancery court against appellant J. A. Pitcock, superintendent of the Arkansas State Penitentiary, and Geo. W. Donaghey, governor of the state, O. C. Ludwig, Secretary of State, Hal L. Norwood, attorney general, Jno. R. Jobe, auditor of state, and Guy B. Tucker, state commissioner of mines and agriculture, composing the board of commissioners of the Arkansas State Penitentiary, to restrain them from violating an alleged contract which had been entered into between them and the plaintiff for furnishing to the latter of the labor of state convicts. It is alleged in the complaint that on February 3, 1899, a written contract ⁵³⁰ was duly entered into between the Arkansas Chair Factory, a corporation, and the superintendent and financial agent of the state penitentiary, with the approval of said board of commissioners, whereby the convicts of the state were hired to said corporation at price of fifty cents per day for each man worked, for a period commencing on that day and ending January 1, 1909; that, according to the terms of said contract, it was agreed that forty able-bodied convicts were hired for the first year, and

as many thereafter as needed, not exceeding two hundred; that the board should furnish all necessary buildings to be used under the contract (except certain ones specified), and also clothe and feed the convicts; that prior to July 31, 1899, said Arkansas Chair Factory, with the consent of said board, assigned said contract to plaintiff; that on the last-named date said contract was by mutual consent of the parties amended so as to permit the working of convicts by plaintiff outside of the walls of the penitentiary in manufacturing, agriculture, railway building and other pursuits, and that said board should furnish to plaintiff three hundred able-bodied men on demand of the plaintiff after January 1, 1900, and that plaintiff should work not less than one hundred men at all times; that plaintiff complied with its part of the contract, and at great expense prepared to work said convicts; that the board of commissioners complied with said contract except that after January 1, 1901, they failed to furnish the number of convicts required by the contract, and only furnished a far less number; that since the first day of January, 1900, and up to the time of the commencement of this suit, the plaintiff has continuously demanded from said board the amount of convict labor called for by said contract, but that the board and superintendent at various times and under various pretexts failed to furnish the amount of labor so demanded, but that in each instance, when the requisite number were not furnished on demand, said board of commissioners represented to the plaintiff that it would subsequently make good the deficit thus caused by furnishing to said plaintiff such an amount of convict labor as to make it receive eventually the aggregate number of convicts called for by said contract, and that "in each instance the said superintendent and board expressly promised to make good said deficit and adopted resolutions to this effect, which were spread ⁵³¹ at length upon the minutes of said board, and the plaintiff could not other than rely upon said representations and promises, and for this reason it accepted the same"; that, "in reliance upon said representations and promises of the board, and believing that the state would carry out its contract with it in all respects, it was induced to make the large expenditures hereinbefore stated, which were absolutely necessary in order to prepare the proper facilities for making it profitable to the plaintiff to use the amount of labor due it under said contract, and which it fully expected would eventually be furnished to it"; that the said members of the board of commissioners, pretending to act as the board of penitentiary commissioners, had on the fourteenth day of January, 1909, made and were about to enforce a resolution in substance declaring said contract to be at an end, and directing the superintendent of the penitentiary to withdraw all convicts from the premises and works

of the plaintiff and place them on the state farm or within the walls of the penitentiary.

It is further alleged in the complaint "that the board had no authority in law to make said pretended order, and that the same is null and void; that the said board had no authority to take the said convicts from the plaintiff until the balance of the convict labor due to the plaintiff, as aforesaid, has been furnished to the plaintiff in full; that the said resolution was passed, not because of any default on the part of the plaintiff in carrying out the terms of said contract, and not because the board does not acknowledge the violation of said contract on its part as herein alleged, but solely on the ground that the board pretends to possess the arbitrary power of withholding said labor from the plaintiff on the theory that the state is not amenable to any legal proceeding against it, and that the members of the board can shield themselves by this protection in favor of the state."

The prayer of the complaint is as follows: "Premises considered, the plaintiff prays that a temporary restraining order be made, restraining the defendants, and each of them, from taking any action looking to the withdrawal of the convicts now in its possession, and particularly from taking from plaintiff's brick works any of the men now engaged in labor therein, and requiring said board of penitentiary commissioners, and the superintendent ⁵²² of said penitentiary, to carry out the terms of the agreement hereinbefore set forth—that is, to require said board and superintendent of the penitentiary to furnish the plaintiff a sufficient number of able-bodied convicts to repay it for the labor of the convicts so withheld, withdrawn and taken from it by the board of commissioners as set forth herein. Plaintiff prays that upon the final hearing a decree be entered as above prayed, and that the said order of the board directing the superintendent to take away from the plaintiff the convicts now held by it, and refusing to carry out the terms of the agreements before stated, be declared null and void."

It will be seen from the foregoing statement of facts that the contract, dated February 3, 1899, as amended on July 31, 1899, is the same contract which was the subject of litigation in the case of *McConnell v. Arkansas etc. Mfg. Co.*, 70 Ark. 568, 96 S. W. 559, and it is so pleaded in this action, it being alleged that the contract had, by the Pulaski chancery court, and by the supreme court on appeal, been adjudged to be valid and enforceable.

Upon the filing of said complaint, the same was presented to the chancellor at chambers, and he at once granted a temporary injunction in accordance with the prayer of the complaint, restraining said members of the board of commissioners and the superintendent of the penitentiary from withdrawing

said convicts. The injunction was duly issued by the clerk after execution of the bond by plaintiff in accordance with the statute and the order of the chancellor, and immediately served on all the members of the board; but the sheriff was unable to serve same upon appellant Pitcock until Monday morning, January 18, 1909. He was, however, duly notified of the issuance of the injunction by the sheriff, and by one of the attorneys for the plaintiff in a conversation over the telephone, immediately after the issuance of the injunction, and before he removed the convicts.

Immediately after the adoption of the resolution by the board of penitentiary commissioners, and regardless of the notice to him of the issuance of the injunction, Pitcock set about complying with the resolution, and within the succeeding three days withdrew all convicts from the plaintiff's works and premises, and returned same to state convict farm and to the walls of the penitentiary.

⁵³³ Upon the affidavit filed by the plaintiff setting forth the issuance and violation of said injunction, Pitcock was cited by the chancellor to appear and show cause why he should not be punished for contempt, and upon a hearing he was adjudged by the chancery court to be in contempt on account of having violated said injunction, and a fine of \$500 was imposed upon him. The record has been brought here by writ of certiorari to review the action of the chancery court in adjudging Pitcock to be in contempt and imposing the fine upon him.

It is earnestly insisted on behalf of appellant that the evidence introduced at the hearing does not sustain the finding of the chancellor that appellant was informed of the issuance of the writ of injunction prior to the service on him on January 18, 1909, or that he had violated the injunction after being notified thereof. We are convinced, however, from a careful consideration of the testimony adduced at the hearing, that Pitcock, after receiving actual notice of the issuance of the injunction, evaded the service of the writ by the sheriff, and intentionally violated its terms by withdrawing the convicts from the premises and works of said plaintiff, pursuant to the resolution adopted by the board of penitentiary commissioners. Actual notice of the issuance of the injunction, without formal service of the writ upon him, was sufficient to put him in contempt of the court by violating the terms of the writ, if the court possessed jurisdiction of the cause: Kirby's Digest, sec. 3984; 1 Joyce on Injunctions, secs. 247-249, 251; High on Injunctions, secs. 352, 353. We therefore treat as settled the fact that appellant Pitcock intentionally violated the injunction; and the only remaining question is whether or not the court had jurisdiction, for it is well settled

that errors of the court in issuing an injunction cannot be taken advantage of by one who has violated the injunction.

If the court had the jurisdiction of the parties and subject matter of the cause of action in which the injunction was issued, the fact that it was erroneously and improvidently issued does not excuse disobedience on the part of those who are bound by its terms: *Meeks v. State*, 80 Ark. 579, 98 S. W. 378.

In considering this question, the distinction must not be overlooked between the violation of a preliminary injunction ⁵³⁴ preserving the status quo of the subject matter of the litigation during the pendency thereof, and the final decrees of courts requiring the parties to do or not to do the things enjoined upon them by such decrees. In the latter cases, if the decree was rendered without jurisdiction, it can be disobeyed with impunity, for no one owes obedience to a void decree, as it is without any force whatever. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no right can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it and all acts flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers": *Rankin v. Schofield*, 81 Ark. 463, 98 S. W. 674. On the other hand, a court possesses the power of hearing and determining the question of its jurisdiction, and may, while so doing, require the parties to preserve the status of the subject matter: *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547; *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. Rep. 165, 51 L. ed. 319, 8 Ann. Cas. 265. However, when the pleadings show on their face that the court is wholly without jurisdiction of the subject matter set forth therein, any preliminary order made or final judgment rendered is void: *Willeford v. State*, 43 Ark. 62.

It becomes necessary, therefore, to inquire as to the alleged cause of action set forth in the complaint—whether any cause of action is set forth at all, and, if so, whether or not it falls within the jurisdiction of the chancery court.

The complaint alleges in substance that the state of Arkansas, acting through its authorized officers and agents, entered into a written contract with the plaintiff's assignor for the hire of convicts, that the said contract was subsequently assigned to plaintiff and amended in writing, and also was subsequently amended by a verbal promise and undertaking of the board of penitentiary commissioners, which was duly entered in writing on the minutes of the board, to the effect that the deficit in the number of convicts called for in the contract to be furnished to the plaintiff should be made good, so that the plaintiff should receive the aggregate amount of convict

labor specified in the contract. In other words, the complaint sets forth an alleged contract entered into with the penitentiary board, evidenced partly by the original and amended writings and partly by the ⁵³⁵ minutes of the board, to furnish the aggregate amount of convict labor provided for in the written contract. These allegations can only be construed to mean that the board agreed to continue to furnish convict labor to plaintiff until the aggregate amount specified in the contract should be supplied. The only difference between this case and that of *McConnell v. Arkansas etc. Mfg. Co.*, 70 Ark. 568, 69 S. W. 559, is that the latter was a suit to prevent an attempted rescission and breach of the written contract of February 3, 1899, as amended in writing on July 31, 1899, while the present suit is one to restrain an attempted breach of said amended contract as further amended subsequently by the alleged additional agreement of the penitentiary board, entered on the minutes thereof, to make good the deficit in the aggregate amount of convict labor agreed to be furnished. The contract and each of the alleged amendments thereto were based on the same character of consideration, viz., the mutual undertakings of the contracting parties. The present suit, as was the *McConnell* case, is plainly one to restrain an attempted breach by the penitentiary board of a contract alleged to have been entered into by that board for the state of Arkansas whereby convict labor should be furnished to the plaintiff; the question at issue in each of the cases being whether or not the contract was a valid and subsisting one, and whether such suit was one against the state.

The first and only question necessary for us to determine in this case is whether or not this is a suit against the state; for, if it is, then the chancery court was wholly without jurisdiction to proceed, and all orders and judgments attempted to be rendered therein were void: In the *Matter of Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216. A sovereign state cannot be sued except by its own consent; and such consent is expressly withheld by the constitution of this state: Art. 5, sec. 19.

The question whether a suit is one against a state is not necessarily determined by reference to the parties to the record. If the state is the real party in interest, though only its officers and agents are parties, then it is in effect a suit against the state, and falls within the rule of prohibition: *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 29 L. ed. 185; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, 29 L. ed. 805; In the *Matter of Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. Rep. 699, 35 L. ed. 363; *Fitts v. McGehee*, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. ed. 535; *Farmers' ⁵³⁶ National Bank v. Jones*, 105 Fed.

459; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. Rep. 128, 27 L. ed. 448.

In *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. Rep. 269, 43 L. ed. 535, Mr. Justice Harlan, speaking for the court, said: "As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession of, or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such a possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state."

In *Farmers' Nat. Bank v. Jones*, 105 Fed. 459, Judge Caldwell said: "As a state can perform its functions through officers and agents only, it was soon perceived that, if these officers and agents of the state were liable to be sued and coerced to comply with the judgments and decrees of a federal court, the whole scope and purpose of the amendment would be nullified. . . . It is now settled that the jurisdiction in such cases is dependent upon the real, and not the nominal, parties to the suit, and it is now clear, both upon principle and authority, that a suit against the officers of a state to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is in fact and legal effect a suit against the state, though the state itself is not named a party on the record."

In the *Ayres* case (123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216), Mr. Justice Matthews, speaking for the supreme court of the United States, said: "A bill, the object of which is, by injunction, indirectly to compel the specific performance of the contract by forbidding all these acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state. In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of ⁵³⁷ its contract, the suit is still, in substance, though not in form, a suit against the state."

And again, in the same case, it is said: "Where the contract is between the individual and the state, no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to

enforce its specific performance by compelling those things to be done by the defendant which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the constitution."

In actions against officers of the United States, the same principle has been announced: *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 L. ed. 599; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. Rep. 650, 46 L. ed. 954; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 24 Sup. Ct. Rep. 820, 48 L. ed. 1134; *Naganab v. Hitchcock*, 202 U. S. 473, 26 Sup. Ct. Rep. 667, 50 L. ed. 1113.

In *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 L. ed. 599, which was a suit filed against Belknap, a commodore in the United States Navy and commandant of the United States Navy Yard at Mare Island, California, to restrain him from using caisson gates, which, it is charged, were an infringement of letters patent granted by the United States to the plaintiff, the court held that it was a suit against the United States, and could not be maintained. In discussing the question, the court said: "No injunction can be issued against the officers of a state to restrain or control the use of property already in the possession of the state, or money in its treasury when the suit is commenced; or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party."

The doctrine of these cases is reaffirmed by the supreme court of the United States in the recent case of *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 29 Sup. Ct. Rep. 458, 53 L. ed. 742.

The only distinction found in these cases is that where the suit is against an officer to prevent him from doing an unlawful act to the injury of the complaining party, such as the taking or trespass upon the property belonging to the latter, the former cannot shield himself behind the fact that he is an officer of the state; and also where the officer refuses to perform ⁵³⁸ a purely ministerial act, the doing of which is imposed upon him by statute. In either of such cases a suit against such an officer is not a suit against the state.

In determining whether a suit is against the state, it is unimportant whether the contract sought to be enforced, or the breach of which is sought to be enjoined, is or is not a valid one. The fact that it is a valid contract does not justify the suit against the state, and that question has no place in an inquiry as to whether or not a suit is against the state. "An injunction restraining the breach of a contract is a negative specific enforcement of the contract. The jurisdiction of

equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of the class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit": 4 Pomeroy's Equity Jurisprudence, sec. 1341; *McDaniel v. Orner*, 91 Ark. 171, 120 S. W. 829.

This court in the *McConnell* case (70 Ark. 568, 69 S. W. 559) held that that was not a suit against the state because the penitentiary board had executed a valid and then subsisting contract with the plaintiff, but was attempting without legal authority to break it by a refusal to perform it. That distinction is untenable. The penitentiary board is created by statute as the agent of the state to manage and provide for working the convicts of the state. That board has the power to make contracts for the state, and it is the sole agent of the state in the performance of such contracts. The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does is for the state. The state can, under the present statute, make and perform contracts with reference to the management of convicts only through the agency of this board. Therefore, an injunction against the board restraining it from violating a contract necessarily results in requiring the board, and through it the state, to specifically perform its contract.

The alleged contract was one merely to furnish the labor of convicts. The board, acting for the state, retained custody and control of the convicts, and were to permit them to labor ⁵³⁹ for the plaintiff for a stipulated price. A withdrawal of the convicts from the premises of the plaintiff was not a taking or trespass upon the latter's property. It was only a refusal to perform the alleged contract which plaintiff seeks to restrain.

It is with great reluctance that we have concluded to review the *McConnell* case and overrule the doctrine therein announced, but a majority of the judges are of the opinion that the decision was wrong, and contrary to the great weight of authority. The overruling of a decision has the unfortunate tendency of rendering the laws of the state less certain. Decisions which become rules of property should never be overruled, whether they are right or wrong. But where, as in this instance, no rule of property is disturbed, and the dignity and sovereignty of the state is involved, we conceive it to be our duty to correct the mistake of the court as speedily as possible by overruling a former decision which we have become thoroughly satisfied is erroneous and contrary to the recognized rules established by the other courts of the country.

No one can have a vested right to sue the state. The state can either extend or withhold the right. All who contract with the state must do so with full knowledge that they must rely solely upon the legislative branch for performance of the contract and for satisfaction of the state's just obligations. Even the privilege of suing the state, when once extended, does not afford the basis of a vested right to sue or to prosecute to termination a suit once commenced; and such privilege may be withdrawn without disturbing any vested right, even after suit has been commenced: *Beers v. Arkansas*, 20 How. 572, 15 L. ed. 991.

The plaintiff cannot complain because the court overrules its former decision, even though that decision permitted the plaintiff to maintain its suit similar to the one now before us.

The judgment of the chancery court, adjudging the petitioner to be in contempt of that court, is therefore quashed, and said proceedings against the petitioner are dismissed.

HART, J., Concurring. A majority of the judges think that the allegations of the complaint which was the basis of the injunction, for a disobedience of which Pitcock was fined, bring this case squarely within the principles of *McConnell v. Arkansas etc. Mfg. Co.*, 70 Ark. 568, 69 S. W. 559; and that the ⁵⁴⁰ decision here, if that case is to stand, must be an affirmance. I do not think so. In the *McConnell* case there was a valid contract, made pursuant to our statutes regulating the hiring out of convicts, between the board of penitentiary commissioners, as the agents and representatives of the state, and the Arkansas Brick and Manufacturing Company. The effect of the holding in the *McConnell* case was that the board could not abrogate that contract, such power being vested alone in the legislature, and they were enjoined from so doing. The instant case, to my mind, is plainly distinguishable. The contract shows by its terms that it has expired. The allegations of the complaint amount to no more than an attempt by judicial construction to extend the terms of the contract exhibited with it. In short, the thing asked to be done and performed by the penitentiary board are the very things which, when done and performed, would constitute a performance of the contract as its terms are construed by the successors to the Arkansas Brick and Manufacturing Company. In other words, the case resolves itself into a suit for a specific performance against the state. My attention has been called to no case, and I have been unable to find any, which gives the courts jurisdiction to entertain such a suit. Such a view is contrary to the principles of state sovereignty upon which our government is founded, and which must endure as long as the state itself. Because the expression of a majority of the judges as above indicated as to the effect of the *McConnell*

case is, in my judgment, an unwarranted extension of the principles at issue in that case, and because I believe the McConnell case to be wrong in principle, I have voted to overrule it.

WOOD, J., Concurring. I concur in the judgment, but dissent from the opinion. Why should the "McConnell case" (70 Ark. 568, 69 S. W. 599) be overruled? The doctrine of that case is sound "to the core." That case is not only unlike this, but it is not even of kin. In that case the contract was in existence, having yet seven years to run. In the present case the contract had expired. The allegations of the complaint do not disclose any new contract, but only set up the old, and certain promises by the board to carry out its provisions which were never fulfilled. And now, after the contract has expired, this effort is made to have the time for its performance extended by judicial construction, and to have⁵⁴¹ the various promises that were made to fulfill the old contract carried out. The allegations do not show any contractual relations between the state and the brick company.

In my opinion, time was of the essence of the old contract, and any promises made on the part of the board to comply with its provisions which remained unfulfilled when that contract expired died with it, and the officers in withdrawing the convicts after the contract had expired were but discharging their duty according to law, and, of course, were representing the state. The chancery court, therefore, so far as the enforcement of the provisions of that contract is concerned, is wholly without jurisdiction to "hear, determine and decree in reference to such matter, and any decree it might make would be void, and could not legally operate on anyone, nor could anybody be punished for disobeying it." The court was without jurisdiction of the state, a necessary party. One of the essentials of jurisdiction is that the court have before it the proper parties: Willeford v. State, 43 Ark. 62. See, also, Rankin v. Schofield, 81 Ark. 463, 98 S. W. 674. Therefore, I have concurred in the judgment because the allegations of the complaint do not state a cause of action to give the chancery court jurisdiction. But, on the contrary, the complaint, on its face, shows that the court had no jurisdiction of the state, the real party in interest.

But, if it be true that the present case cannot be distinguished from the McConnell case, then the decree of the chancellor was clearly right, and should be affirmed. As the only living member of this court who concurred fully in the views so well expressed in the McConnell case, I challenge the statement of the opinion in the present case that the decision in the McConnell case is erroneous and contrary to the recognized rules established by the other courts of the country.

Let us see. In the McConnell case the board of penitentiary commissioners, under a statute expressly authorizing it (sections 3855, 3856 of Kirby's Digest), on July 31, 1899, entered into a contract with the brick company whereby the board was to furnish the company after January 1, 1900, and until January 1, 1909, three hundred able-bodied convicts. The parties had entered upon the performance of the contract. The brick company, as alleged in its complaint and as confessed by the demurrer, "had expended ⁵⁴² for buildings, machinery, etc., for the purpose of equipping said plants so that it might comply with the terms of its contract, about \$300,000." The board had furnished the convicts.

On the thirteenth day of August, 1901, after the contract had been in force about twenty months, the state officers, constituting the board of penitentiary commissioners, passed a resolution annulling and setting aside the contract and ordering the superintendent of the penitentiary "to withdraw from said brick company all convicts in their employ, and turn them back into the walls of the penitentiary, subject to the further orders of the board." It was confessed by the demurrer that the brick company had fully carried out the contract on its part. The statute under which the board was authorized to make the contract did not give it power to rescind it, and there was no other statute giving it such power. So the action of the board in setting aside the contract and its order directing the superintendent "to withdraw all convicts in the employ of the brick company" was purely arbitrary.*

The brick company brought suit against the members of the board, and against the superintendent and the financial agent of the penitentiary, to have the resolution attempting to set aside the contract declared null and void, and to restrain them from taking any action to prevent the due performance of the contract under the void order, and "particularly from taking from the Arkansas Brick and Manufacturing Company any of the men then engaged in labor therein, and to require the superintendent, McConnell, to proceed with the execution of the contracts and the furnishing of the labor as therein agreed upon."

The appellants (defendants in that case) contended that, in passing the resolution setting aside the contract and making the order directing the superintendent to withdraw the convicts, the board was acting for and representing the state, and that the state was therefore a necessary party. In response to that contention we said: "The power and authority to make a contract is one thing, but the power to abrogate it is quite another thing, and the latter power is, in this government, possessed by neither the state nor any of her citizens. The state can only speak through the legislative department, which is the mouthpiece of the sovereign; and the legislature

can lawfully pass no law ⁵⁴³ impairing the obligation of contracts. It is and has been the law from time immemorial that a public agent acting without the scope of his authority without authority of law cannot shield himself behind the sovereign, the state, but where injury is thereby done to private citizens, the officer or agent is a trespasser, and personally liable in damages."

We further said, quoting from the supreme court of the United States: "Such a defendant, sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense, but is bound to establish it; and, as the state is a political corporate body, which can act only through agents and command only by laws, in order to complete his defense, he must produce a valid law of the state which constitutes his commission as its agent and warrant for his act": *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 29 L. ed. 185.

The judges who rendered the decision in the *McConnell* case were of the opinion that the board of penitentiary commissioners exceeded their powers in attempting to set aside the contract, and that their acts in so doing were wrongful, and such as to render them liable as individuals for any damages directly resulting to others from such acts: *Nicks' Heirs v. Rector*, 4 Ark. 251; *Rice v. Harrell*, 24 Ark. 402; *O'Conner v. Auditor*, 27 Ark. 242; *Simpson v. Robinson*, 37 Ark. 132; *Parham v. McMurray*, 32 Ark. 261; *State v. Newton*, 33 Ark. 276; *De Yampert v. Johnson*, 54 Ark. 165, 15 S. W. 363; *St. Louis etc. Ry. Co. v. Hackett*, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881. See, also, *Hawkins v. United States*, 96 U. S. 689, 24 L. ed. 607; *Whiteside v. United States*, 93 U. S. 247, 23 L. ed. 882.

The legislature itself could not rescind or set aside the contract and deprive the brick company of the benefit thereof unless that power was expressly reserved in the act conferring upon the board the authority to make the contract: *Woodruff v. Berry*, 40 Ark. 251; *Berry v. Mitchell*, 42 Ark. 243.

The board certainly had no authority except what the legislature had given them. The legislature had not even attempted to vest them with power to destroy or impair the obligations of the contract which they were authorized to make. The supreme court of the United States has quite recently decided that: "The ⁵⁴⁴ attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereignty or governmental capacity, and is an illegal act, and the officer is stripped of his official character, and is subjected in his person to the consequences of his individual conduct": *Ex*

parte Young, 209 U. S. 123, 28 Sup. Ct. Rep. 441, 52 L. ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764.

In the McConnell case we were of the opinion that the facts brought the case strictly within the general doctrine announced by Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. ed. 204, to the effect that a state officer will be restrained from executing an unconstitutional statute of the state, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the constitution and would work irreparable damage and injury to him. In *Pennoyer v. McConaughy*, 140 U. S. 1. 11 Sup. Ct. Rep. 699, 35 L. ed. 363, complainants sought to restrain the defendants, officials of the state, from violating, under an unconstitutional act, the complainants' contract with the state, and thereby working irreparable damage to the property rights of the complainants. The court held that such a proceeding was not a suit against the state, and said that the general doctrine of the "great and leading case of *Osborn v. Bank of United States*," as above stated, "has never been departed from."

If officers acting under an unconstitutional statute can be restrained from committing acts of wrong and injury to the vested rights of a complainant under a contract with the state, for a much stronger reason will officers be restrained from invading and destroying the rights of another under a contract with the state where such officers are acting without any color of authority whatever. This they were doing in the McConnell case. The withdrawal of the convicts which the brick company had in its possession, and which the board were attempting to do under their void resolution and order, would have meant an irreparable loss to the brick company, as the facts show, of many thousands of dollars. The brick company had a property right in the labor of the convicts.

It would make this opinion too long to review all the cases in this country supporting the doctrine announced in the McConnell case. It had long been an established doctrine in this state before that case was decided. In *Crawford v. Carson*, 35 Ark. 545 565, we said: "The prohibition against suing the state or any officer representing her, in chancery, must be confined to such suits as seek to charge the state with some liability or duty, or to hold her or her officers as trustees of effects in their hands. Such and such only was the object of the statute. It would open the way to intolerable tyranny to exempt officers of the state from injunctions to restrain them from illegal though colorable acts of authority."

The suit in the McConnell case was not, as the court now holds, a suit against the state to enforce the specific performance of her contract. Not at all; but it was a suit against the officers to restrain them from illegal and unauthorized acts to

the injury of the rights of the brick company under the contracts, acts which were not only wrongful, but without even any color of authority. "The injunction," says the court in the McConnell case, "is not against the state, but against the defendants to restrain them from going beyond their powers. No order of the court can be against the state, nor against the defendants to compel them to perform those duties as officers and agents of the state." Mr. Rose, in his Code of Federal Procedure, says: "The distinction running through all the cases is between preventive and affirmative relief; between those cases in which state action is sought to be restrained by proceedings against state officers and those in which some affirmative, though legal and proper, act of the state is sought to be compelled. The eleventh amendment does not shield state officers in the performance of unlawful acts, though prescribed by state law; but it protects the state against compulsion in the performance of its sovereign functions, against the enforcement of a liability *ex contractu* or *ex delicto*, against direct proceedings for the recovery of property held by the state through its officers." "The cases," says he, "in which by mandamus or other writ state officers have been compelled to perform certain acts at the suit of individuals injured are no exception to this rule, since the foundation of the relief is the wrong of the officers in disobeying or maladministering the state law, and not the wrong committed by the state": 1 Rose's Code of Federal Procedure, pp. 50, 51, and numerous cases cited.

This is precisely the distinction we made in the McConnell case, and the failure of my brother judges to observe it in the ⁵⁴⁶ present case has caused the court to fall into the error of overruling the McConnell case and the case of Crawford v. Carson, 35 Ark. 565, on the same point, although the latter is not expressly mentioned.

The chief justice in his opinion says: "The board does not perform merely ministerial acts; what it does involves judgment and discretion, and all that it does is for the state." I can never subscribe to that doctrine. The board was not representing the state at all when they passed the resolution annulling the contract and ordering the convicts taken away from the brick company.

"No principle is more firmly established than that when an officer exceeds his authority, his acts are individual acts only, and do not bind the state. The state is liable only to the extent of the power actually given its officers, and not to the extent of their apparent authority": Woodward v. Campbell, 39 Ark. 580; Woodruff v. Berry, 40 Ark. 251; Pulaski County v. State, 42 Ark. 118; St. Louis Ref. & W. G. Co. v. Langley, 66 Ark. 48, 51 S. W. 68; Mechem on Public Officers, secs. 511, 663; Throop on Public Officers, secs. 21, 551, 576.

The board had the discretion to make or not to make the contract. They had discretion in fixing the terms of the contract. But, after these terms were defined and agreed upon between the board and the brick company, and the contract was entered into, the board no longer had any discretion in the matter of furnishing the number of convicts called for by the contract. The duty of the board to furnish the number of convicts named in the contract, and of the superintendent, who was the subordinate of the board, was purely ministerial in character.

Suppose the legislature had provided that when the board makes a contract to let convict labor they shall furnish the labor of not less than three hundred able-bodied convicts. Would anyone contend that after the board had made a contract for the number of convicts as prescribed by the statute, the duty of the board to furnish the number of convicts named would be a matter of judgment and discretion? Well, the legislature, instead of prescribing the number of convicts to be let by the contract, has left the matter of designating the number open to the discretion of the board. But, after the board has exercised that discretion and designated the number in the contract they make, then the legislature did not leave it to their discretion and judgment to withhold all or any part of the number called for in the contract. ⁵⁴⁷ After the board had designated three hundred as the number to be let by contract, under the statute authorizing them to make the contract, the legal effect was precisely the same as if the legislature itself had designated that as the number that the board should furnish. And the simple act of furnishing the number of convicts called for by the contract was a ministerial duty imposed by law. So the litigation in the McConnell case was "with the officers, not the state": *Rolston v. Missouri Fund Commrs.*, 129 U. S. 390, 7 Sup. Ct. Rep. 599, 30 L. ed. 721.

Chief Justice Chase in *Mississippi v. Johnson*, 4 Wall. 475, 18 L. ed. 837, has given a definition of a ministerial duty that has never since been improved. He says: "A ministerial duty, the performance of which may, in proper cases, be required by judicial process, is one in regard to which nothing is left to discretion. It is a simple definite duty, arising under conditions admitted or proved to exist and imposed by law." Our own court, through Mr. Justice Smith, defines a ministerial act as follows: "One which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done": *Ex parte Batesville & Brinkley R. Co.*, 39 Ark. 82; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65. See *Throop on Public Officers*, sec. 535, and cases cited in note.

Since the contract fixed the precise terms as to the number of convicts to be furnished, and this duty under the statute was purely ministerial, it follows that from any and every viewpoint the doctrine of the McConnell case is right, and should not have been overruled.

The doctrine conforms to that class of cases which hold that "where a suit is brought against defendants, who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the state, or for compensation in damages, or in a proper case where the remedy at law is adequate, for an injunction to prevent such wrong and the injury, or for a mandamus in a like case to enforce upon the defendant the performance of a plain legal ⁵⁴⁸ duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state": Mr. Justice Lamar in *Pennoyer v. McConnaughey*, 140 U. S. 1, 11 Sup. Ct. Rep. 699, 35 L. ed. 363, and citing *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Litchfield v. Webster County*, 101 U. S. 773, 25 L. ed. 925; *Allen v. Baltimore & Ohio Ry. Co.*, 114 U. S. 311, 5 Sup. Ct. Rep. 925, 962, 29 L. ed. 200; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623, and *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 29 L. ed. 185, from which we have quoted. Other more recent cases are *Scott v. McDonald*, 165 U. S. 107, 17 Sup. Ct. Rep. 262, 41 L. ed. 648; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418, 42 L. ed. 819; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. Rep. 785, 37 L. ed. 689; *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. Rep. 770, 42 L. ed. 137; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. Rep. 398, 47 L. ed. 584, and *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. Rep. 441, 52 L. ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764. The facts in the McConnell case do not fit the doctrine of *In re Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216, and that line of cases, but they do fit the line of cases followed by us as above indicated.

I am unable to see how the "dignity and sovereignty of the state are involved" in a suit to restrain her officers from exceeding their powers, and arbitrarily setting aside a contract, and destroying valuable rights thereunder. Nor do I think that the dignity and sovereignty of the state are involved in a suit to compel an officer to perform merely ministerial duties under a contract made under the authority of the statute. Such is the McConnell case, as the judges who rendered the decision viewed the facts and the law. The doctrine there

announced erects the same high standard for honesty and good faith in the conduct of public officers as that required by the law of private individuals in their dealings with each other. If I am correct in my views, this doctrine should remain the law in Arkansas forever.

"Battle, J., Dissenting. The contract involved in this case is the same as that held to be valid in *McConnell v. Arkansas etc. Mfg. Co.*, 70 Ark. 568, 69 S. W. 559. But this is denied by saying that the contract adjudged to be valid in the *McConnell* case has expired. I do not think so. The board of commissioners of Arkansas State Penitentiary failed often to comply with that contract by furnishing the Arkansas Brick and Manufacturing Company with the labor of convicts as it had agreed to do, and upon each of such failures and during the life of the contract promised to furnish the company with such labor until it had furnished all it had contracted to do, and adopted resolutions to that effect, and caused them to be spread at length upon its minutes. These promises were based upon valuable considerations, and did not constitute new contracts but a continuation of the old by an extension of the time of its performance. The labor to be furnished under the promises was to be in performance of the original contract, which could not expire until it was performed in the manner promised. If I am correct in this conclusion, the board is enjoined and restrained by the decree in the *McConnell* case from in any manner canceling or annulling the contract as thus extended and 'from refusing and failing to execute and carry out' its terms. The board in this case is the same as in that, the membership being different.

"I dissented in the *McConnell* case on the ground that that suit was, in effect, a suit against the state, which could not be sued. But the court held differently, and its judgment in that case has passed beyond its control, and become final, and I think should be enforced in this case. The parties have rightly acted upon the faith of it, and should not suffer on account of confidence in the judgment of the court."

The Fact That an Injunction is Erroneously or Improvidently Issued, the court having jurisdiction, cannot be urged as a defense in proceedings for contempt in violating the injunction: *Ex parte Cash*, 50 Tex. Cr. 623, 123 Am. St. Rep. 865; *Franklin Union No. 4 v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; *State v. Fredlock*, 52 W. Va. 232, 94 Am. St. Rep. 932; *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435. But a person committed for contempt in disobeying an injunction which the court had no jurisdiction to issue is entitled to his discharge on habeas corpus: *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296; *Ex parte Lake*, 37 Tex. Cr. 656, 66 Am. St. Rep. 848.

A State cannot be Sued, Either Directly or Indirectly, by making one of its officers defendant: *General Oil Co. v. Crain*, 117 Tenn. 82, 121 Am. St. Rep. 967; *Alabama Industrial School v. Addler*, 144 Ala. 555, 113 Am. St. Rep. 58; *Elmore v. Fields*, 153 Ala. 345, 127 Am. St. Rep. 31. As to when public officers are subject to suit, although they assume to be acting for a state or the United States, see the note to *Sanders v. Saxton*, 108 Am. St. Rep. 830.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PEREIRA v. PEREIRA.

[156 Cal. 1, 103 Pac. 488.]

HUSBAND AND WIFE—Contract Limiting the Sum to be Paid in the Event of His Giving Cause for Divorce.—A contract between a husband and wife whereby she agrees to dismiss a pending suit for divorce and to condone the cause thereof, and that, in the event of his subsequently giving her a cause for divorce and her prosecuting and maintaining a suit therefor, he will pay, and she will accept, a specified sum in full satisfaction of her property rights, is against public policy, and will not be enforced against her. (pp. 108, 110.)

HUSBAND AND WIFE—Separate and Community Property—Profits Realized from an Established Business and the Capital Employed Therein.—If, at the time of his marriage, the husband has an established business and a definite amount of capital employed therein, and he subsequently continues to do business, realizing large profits, it will be presumed that some of the resulting profits were due to the capital, and constitute his separate property, and that this amount is at least equal to the usual interest on a long and well-secured investment. The balance may be regarded as community property. (pp. 111, 112.)

DIVORCE, Division of Community Property upon.—The trial court, in a proceeding for divorce, has a discretion, subject to the revision of the appellate court, respecting the amount of community property which will be awarded the wife. (p. 112.)

APPEAL AND ERROR—Divorce—Division of Community Property, When cannot be Reviewed.—Where an appeal is taken by the husband from that part of the decree of divorce dividing the community property, the appellate court cannot make a more favorable division to the wife, she not having appealed, but if a new trial is granted to him, then the trial court, upon such trial, may make such apportionment of the community property as may then appear to be just. (p. 112.)

DIVORCE—Property Rights, Fixing of by the Interlocutory Decree.—Under the amendment of the Civil Code of California by which the power of the court to grant a final decree of divorce is postponed until one year after the granting of the interlocutory decree, the property rights of the spouses and their right to the

custody of their children may be fixed by the interlocutory as well as the final decree, and this course is preferable. (p. 115.)

DIVORCE—Property Rights, Fixing in the Appellate Court.—Where, in a suit for divorce, the court, in determining the amount of community and separate property, did not allow enough for the increase of the separate property after the marriage, and it appears that such property was employed in business, and there was no evidence respecting the amount of profits due thereto, the appellate court may, at the request of the wife, assume that the profits so realized were the sum which that amount of capital would have earned at legal interest, and after deducting this sum from the community and adding it to the separate property, divide the former between the spouses in the same proportion in which it was apportioned by the trial court. (pp. 115, 116.)

Arthur J. Dannenbaum and Meyer Jacobs, for the appellant.

Snook & Church, Charles S. Wheeler and J. F. Bowie, for the respondent.

² SHAW, J. The plaintiff obtained an interlocutory judgment of divorce on the ground of extreme cruelty. This judgment also declared that the plaintiff should have three-fifths of the community property when the divorce became final, that she should thereafter have custody of her minor child by the marriage, and it provided for temporary alimony to her and for the custody of the child during the time that would elapse ³ between the interlocutory judgment and the final judgment. The defendant appealed from this interlocutory judgment within sixty days after the rendition thereof. This appeal is presented upon the judgment-roll and upon a bill of exceptions containing the evidence.

It is conceded that the evidence was sufficient to justify the divorce and the award of the custody of the child to plaintiff. The claim of the appellant is that the court erred in the finding as to the amount of the community property and in excluding evidence relating thereto.

1. The first point to be noticed is the ruling of the court declaring void a contract between the parties relating to their property and the division thereof and in refusing to enforce or consider it in that connection. We are of the opinion that the court properly refused to consider this contract on the ground that it was plainly against public policy. The present action was begun on January 21, 1905. A previous action of divorce on the ground of extreme cruelty consisting in large part of the same acts assigned in the present complaint was commenced by the plaintiff against the defendant on September 23, 1904. After that action was begun the parties became reconciled, resumed marital relations, and on November 1, 1904, the plaintiff dismissed the action. On November 4, 1904, in pursuance of negotiations begun before the dismissal but after the reconciliation, the contract in question was executed.

It was dated November 1st and it recites that the previous action was then pending. Therein the plaintiff expressly waived the cause for divorce alleged in said complaint and agreed to dismiss the action. The contract further provided that none of the relatives of either party should settle in, be invited to, or visit the home without the consent of both parties; that if the husband should thereafter so conduct himself as to give the wife a new cause of action for divorce, and she should establish the same in a subsequent action against him for divorce or maintenance, the husband should thereupon pay to the wife \$10,000, which should be a full satisfaction, settlement and discharge of all claims of the wife in such action "for alimony, costs, counsel fees, support, maintenance of herself, homestead, homestead right, property and benefit of every kind and character." It also declared that "in the event of the institution of such subsequent action ⁴ all claims and demands by her or on her part in or to any moneys, property rights, or property, community or otherwise, now or hereafter owned or acquired by" the defendant, other than said \$10,000, "are hereby forever settled, liquidated, relinquished, released, waived and abandoned, and no claim, demand or monetary or property benefit or relief shall ever be claimed, asserted or sought in, by or by reason of said subsequent action, should it be instituted, except only to the extent aforesaid."

The Civil Code provides that the husband and wife may enter into any engagement with the other respecting property which they might enter into if not married, subject to the law as to fiduciary relations in general (sec. 158); and that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation, but that they cannot by contract otherwise alter their legal relations, except as to property: Sec. 159. There was in this contract no agreement for separation, and, hence, the agreement to pay \$10,000 cannot be upheld as a provision for the support of the wife on a separation, as provided in section 159. The real effect of the contract to pay the \$10,000, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong. The evidence and findings show that the defendant was then possessed of property worth about \$77,000, was engaged in a very lucrative business, and was receiving an income of about \$11,000 a year which he had every reason to believe would continue. By this contract, if valid, he was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce, secure in the protection of his contract that \$10,000

would satisfy all her claims against him of a pecuniary nature or in relation to the community property. If he should, after its execution, be moved by evil impulse to commit anew the offenses against his wife which first gave her cause for divorce or other acts having the same legal effect, the existence of a valid contract of this sort could not but encourage him to yield to his baser inclinations, and inflict the injury. As it ⁵ was obviously adapted to produce this result, it is to be presumed that this was one of the inducements which made him desire its execution. The law does not countenance such agreements. "Any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, . . . is void as contra bonos mores": *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801, quoting *Phillips v. Thorp*, 10 Or. 494; *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548. In *Seeley's Appeal*, 56 Conn. 203, 14 Atl. 291, the court says: "Inasmuch as the state rests upon the family and is vitally interested in the permanency of a marriage relation once established, it, for the promotion of public welfare, and of private morals as well, makes itself a party to every marriage contract entered into within its jurisdiction, in this sense, that it will not permit the dissolution thereof by the other party thereto. Its consent in the form of a decree of its court passed after hearing in due process of law is a prerequisite for a divorce. . . . Courts will not enforce any contract which is the price of consent by one party to the marriage relation to the procurement of a divorce by the other." And, in reference to a similar agreement to that in the case at bar, the court in the case just cited said: "Presumably each party saw in that agreement an individual advantage; to him, in that he possibly paid her less thereby than the judgment of the court upon hearing would compel; to her, in that he refrained therefor from answering the allegations of her petition by proof, and thus possibly permitted a divorce which he could have prevented."

Before the contract was made, or its terms agreed to, the parties had made up their former differences and had become reconciled. It shows by its terms that it is not an agreement to settle property rights accruing by reason of a marital offense already perpetrated and complete as a cause for divorce. There is therefore no force in the claim, as applied to this case, that it is competent evidence, or valid as a settlement of such rights, even if it were conceded that such an agreement might under some circumstances be permitted to stand. The court also found that this contract was procured by the husband through undue influence and by fraud. Our conclusions upon the point that it was against public policy ⁶ makes it unnecessary to consider the sufficiency of the evidence to sustain these findings.

2. The court found that the community property of the parties was of the value of \$57,664.77. It is claimed that this is not sustained by evidence.

There is practically no conflict on the subject, there being no witness to that point except the defendant. The findings state that this property consisted of the real estate on which the defendant carried on business, which was of the value of \$45,000, and certain money on hand, making up the remainder. The evidence shows that the plaintiff and defendant intermarried on April 19, 1900. At that time the defendant was, and he ever since has been, carrying on a saloon and cigar business, then producing a net income of about \$5,000 annually. He owned the cigar and saloon stock and fixtures, worth in all about \$15,500, and had, besides, some \$6,000 in cash. Soon after the marriage he bought the home wherein the parties afterward lived, paying \$2,700 therefor, and he afterward expended thereon \$2,300 in improving it. This home is adjudged to be his separate property and plaintiff is given no interest in it. A year and a half after his marriage he bought the property in which he was carrying on business at the price of \$40,000. He paid in cash therefor \$5,000, and afterward, out of his income, he paid the balance of the price and accumulated the cash on hand at the time of the trial, in addition, amounting to over \$12,000. His net income at the time of the trial was about \$11,000 a year. From the time of his marriage to the time of trial he allowed his wife \$75 a month to run the house and she made her own clothes. There is an unexplained discrepancy between the total amount of his income less the household expenses and his total gains. He must have received more than he was willing to disclose, if his net income over household expenses amounted to as much as the money which he admits he has received, not allowing anything for his personal expenses.

The court may have believed that he had other property which he had succeeded in concealing. There was some justification for this inference, for he was caught in the act of attempting to conceal \$7,761 of the cash on hand by means of a New York draft which he had carried in his pocket for the four months preceding the trial. It appears, however, that the decision of the court was made upon the theory that all of his gains received after marriage, from whatever sources, were to be classed as community property, and that no allowance was made in favor of his separate estate on account of interest or profit on the \$15,500 invested in the business at the time of the marriage. This capital was undoubtedly his separate estate. The fund remained in the business after marriage and was used by him in carrying it on. The separate property should have been credited with some amount as profit on this capital. It was not a losing business, but

a very profitable one. It is true that it is very clearly shown that the principal part of the large income was due to the personal character, energy, ability and capacity of the husband. This share of the earnings was, of course, community property. But without capital he could not have carried on the business. In the absence of circumstances showing a different result, it is to be presumed that some of the profits were justly due to the capital invested. There is nothing to show that all of it was due to defendant's efforts alone. The probable contribution of the capital to the income should have been determined from all the circumstances of the case, and as the business was profitable it would amount at least to the usual interest on a long investment well secured: *Bogges v. Richards' Admr.*, 39 W. Va. 567, 45 Am. St. Rep. 938, 20 S. E. 599, 26 L. R. A. 537; *Trapnell v. Conkling*, 37 W. Va. 242, 38 Am. St. Rep. 30, 16 S. E. 570; *Penn v. Whitehead*, 17 Gratt. 573, 94 Am. Dec. 478; *Glidden v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98. We think the court erred in refusing to increase the proportion of separate property and decrease the community property to the extent of the reasonable gain to the separate estate from the earnings properly allowable on account of the capital invested.

It is true that the disposition of the community property by the superior court, in all particulars, including matters committed to its discretion, is subject to revision in this court on appeal: *Civ. Code*, sec. 148; *Eslinger v. Eslinger*, 47 Cal. 62; *Brown v. Brown*, 60 Cal. 579; *Strozyński v. Strozyński*, 97 Cal. 189, 31 Pac. 1130. In each of these cases the ^s supreme court increased the wife's share of the community property from one-half, as given by the trial court, to three-fourths. But the wife has not appealed, and we cannot, upon the husband's appeal, change the judgment by increasing the share of community property given to the wife. The only error, in respect to community property, which we can consider upon this appeal by the husband, is the error in classing as community property that part of the gains which was derived from the "issues and profits" of his separate property (*Civ. Code*, sec. 163), the amount of which we cannot determine. It will be necessary to remand the case for a retrial of this issue. The court below will be free, upon such new trial, to apportion a larger share of the community property to the plaintiff, or to divide it between the parties in such shares as it shall deem just, under all the circumstances. The present division seems fair in point of fact.

3. The appellant further claims that, under the amendment of 1903 to sections 131 and 132 of the Civil Code, the court has no power, at or before the time of rendering the interlocutory judgment of divorce, to make any inquiry, finding, or decree with respect to the property rights of the parties,

or with respect to any other subject connected with the divorce, except the right of the complainant to a divorce. Section 131 on this point is as follows: "In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce." Section 132 provides that when "one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to a complete disposition of the action. . . . The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either." As these provisions were made after the other sections of the code had been in force for many years, it was to be expected that the new provisions would not in all respects be consistent in language with other sections on the same subject. In section 146 the code speaks of a disposition of the community property "in case of the dissolution of the marriage." In section 147 the code declares that "the court, in rendering a decree of divorce, must make such order for the disposition of the community property and of the homestead as in this chapter provided"; and in section 90 it declares that marriage is dissolved only by the judgment of a court of competent jurisdiction declaring a divorce. From these provisions it is argued by the appellant that the court's power to make a disposition of the property rights of the parties exists only at the time when the divorce judgment becomes final, and that any act attempted to be accomplished before that, in the way of a trial or interlocutory judgment declaring the property rights or the rights to the custody of children, is *coram non judice* and void.

We do not think that the code provision requires such a narrow construction. When the history of legislation on the subject and the conditions existing at the time of the adoption of the amendment of 1903 are considered, the purpose, meaning and effect of that amendment are not difficult to discover. While the law deems it necessary to provide that a divorce may be granted when conditions are such as to make the marriage relation intolerable, it is nevertheless true that the

policy of the law does not favor the dissolution of marriages. It has been generally believed that many divorces were sought, not in good faith, but because a roving fancy had found another affinity more attractive, and that a dissolution was often desired solely for the purpose of forming a new marital connection. With the design of providing conditions under which it would be understood that ardent passions of this character must perforce have time to cool before a new marriage relation could be actually formed, the legislature, in 1897, enacted a law in effect providing that no marriage should be entered into by any divorced person until at least one year had elapsed after the decree of divorce was rendered: Stats. ¹⁰ 1897, p. 34. It had become customary to avoid the provisions of this act by the expedient of going to an adjacent state for the purpose of entering into a new marital relation. This court was compelled to hold that marriages contracted in another state were valid in this state, although they were entered into within less than a year after a divorce had been granted in this state to one of the parties: Estate of Wood, 137 Cal. 129, 69 Pac. 900. The purpose of the amendment of 1903 was to carry into effect the object attempted to be attained by the statute of 1897. To do this the expedient was adopted of delaying the final judgment in divorce cases for the period of one year after it was judicially ascertained that a divorce should be granted. By thus making the right to a divorce ineffective for the period of one year, it became impossible for the parties to contract a valid new marriage anywhere until at least a year after the trial of the action of divorce had taken place. Except so far as was necessary to accomplish this object, it was not the intent of the statute to change in any respect the practice and procedure in actions for divorce. We do not doubt that the court has the same power now that it has always had to try and determine the issues between the parties in a divorce action with respect to property and custody of children, and that this may, and generally should, be done at the same time as the issues with respect to the cause for divorce are tried and determined. Unquestionably the court would have power under the present law, as it always has had the power under previous laws, to postpone the trial and decision of the property rights and custody of the children to any reasonable time after the rendition of the judgment of divorce, whether interlocutory or final. The amendment has not changed its power in this respect. It is proper in all actions for divorce to try the entire action at the same time as the issues respecting divorce are tried, and to give an interlocutory judgment declaring the rights of the parties with respect to property and children.

We commend the action of the court below in this case in declaring, in its interlocutory decree concerning the property, that the rights therein specified should become final at the time the decree of divorce became final. We are not called upon here to determine whether the adjudication of property rights would or would not have been final at the ¹¹ expiration of six months from the time of the entry of the interlocutory decree, if no appeal had been taken, and the parties had, before the expiration of one year and after the expiration of the six months, by mutual consent, procured an order from the court annulling the interlocutory decree of divorce; or whether such annulment would have had the effect of setting aside the decree relating to property rights and children. These questions are not involved in this case, and it will be well to leave them for future disposition in some case where they are directly presented. In the present case the court determined all the issues in one trial and rendered an interlocutory judgment declaring the rights of the parties upon all the issues, and providing that the same should in all respects become final only at the time when the decree of divorce became final, in the meantime allowing temporary alimony. We see no objection to this practice, and commend it as not only within the power of the court, but as a proper method of the exercise of that power.

The judgment as to the amount and value of the community property and as to the disposition thereof between the parties is reversed and the cause is remanded for a new trial and judgment upon that issue alone. In all other particulars the judgment is affirmed.

Angellotti, J., Sloss, J., Henshaw, J., Lorigan, J., and Melvin, J., concurred.

On the thirtieth day of July, 1909, the court in bank filed the following opinion and modification of the judgment:

The COURT. Since the filing of the opinion in this case, the plaintiff has asked that, instead of remanding the case for a new trial of the issues as to the property, the judgment be modified in regard thereto, and has filed a written consent that the defendant be allowed, as part of his separate estate, out of the cash on hand, interest at the rate of seven per cent on the \$15,500 found to be the capital invested in his business. This removes the objection to directing a modification of the judgment. The defendant introduced no evidence to show that the capital invested was entitled to a greater return than legal interest, and in the absence of such evidence, the burden ¹² of proof being upon him, that would be the utmost he could claim. The wife would have been entitled to an opportunity to prove, if she could, that it earned a smaller proportion of the profits than legal interest, and,

she being the respondent, it was for that reason considered necessary to order a new trial for that purpose. Her consent aforesaid avoids this necessity and leaves the case in such condition that a modification of the judgment will end the litigation with justice to both parties: *Fox v. Hale & Norcross S. Mfg. Co.*, 122 Cal. 219, 54 Pac. 731.

Interest at seven per cent on the \$15,500 from April 19, 1900, the date of the marriage, to November 3, 1905, the time of the trial, amounts to \$6,012.70. Deducting this from \$12,139.03, found to be the cash on hand at the time of the trial, leaves \$6,126.33, as the part of the cash belonging to the community. The plaintiff's three-fifths of this is \$3,675.86 and the defendant's two-fifths is \$2,450.47.

It is ordered that the judgment be modified by changing the respective statements of the shares of each in the cash on hand therein, so that the part relating to the plaintiff's share shall read as follows:

"2d. The sum of three thousand six hundred and seventy-five and 86/100 dollars (\$3,675.86), in cash, being three-fifths of the sum of \$6,126.33 in cash found by the supreme court to be community property of the plaintiff and defendant; and that no interest in defendant's separate property be awarded to plaintiff."

And so that the part relating to the defendant's share shall read as follows:

"2d. The sum of two thousand four hundred and fifty and 47/100 dollars (\$2,450.47), in cash, being two-fifths of the sum found to be community property as aforesaid."

And that as so modified the judgment stand affirmed, the plaintiff to recover all costs.

A Contract to Facilitate the Procurement of a Divorce is against public policy and void: Donaldson v. Eaton & Estes, 136 Iowa, 650, 125 Am. St. Rep. 275; *Appleby v. Appleby*, 100 Minn. 408, 117 Am. St. Rep. 709; *Palmer v. Palmer*, 26 Utah, 31, 99 Am. St. Rep. 820. Any agreement conditioned on the obtainment of a divorce, or intended or calculated to facilitate its obtainment, is without validity: *Barngrover v. Pettigrew*, 128 Iowa, 533, 111 Am. St. Rep. 206. Thus an agreement by a wife to confirm a gift of a note to her husband if he will not oppose her action for a divorce is void, and does not affect her right to recover the note or the amount of it: *Johnson v. Johnson's Committee*, 122 Ky. 13, 121 Am. St. Rep. 449.

As to What is Community Property, see the note to *Nilson v. Sargent*, 126 Am. St. Rep. 99.

WILLIAMS v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

[156 Cal. 140, 103 Pac. 885.]

COSTS, Statutory Control of.—The right to recover costs is purely statutory, and, in the absence of statute, no costs can be recovered by either party. (p. 117.)

COSTS in Action of Claim and Delivery—Amount Paid Surety Company.—The amount paid to a surety company in an action of claim and delivery for furnishing the plaintiff's bond is not taxable in his favor as part of his costs in the event of his recovery. (pp. 117, 118.)

Haines & Haines, for the appellant.

T. J. Norton, M. W. Reed and J. Wade McDonald, for the respondent.

¹⁴⁰ HENSHAW, J. This was an action of claim and delivery for the recovery of specific personal property or its value. To obtain possession of the property pending the action, plaintiff proceeded under the provisions of the code, filed an undertaking in twice the estimated value of the property, and, under this undertaking, took the property into possession. He secured his bond from a surety company, as authorized by section 1056 of the Code of Civil Procedure, and in his memorandum of costs and disbursements included the item of forty-three dollars and seventy-five cents premium charge paid for the bond. On motion of defendant the court, in taxing the costs, struck this item from the bill, and from its order so doing plaintiff appeals. The sole question presented, therefore, is whether the reasonable charge paid to a surety company for a replevin bond, procured pendente lite by a plaintiff ultimately successful, is or is not a proper item in a cost-bill.

¹⁴¹ The right to recover costs is purely statutory, and, in the absence of a statute, no costs can be recovered by either party: *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 219, 54 Pac. 731. Section 1023 of the Code of Civil Procedure is the statute which gives the right of the recovery of costs. Section 1033 prescribes the procedure for their recovery, and defines what costs and disbursements are recoverable. That section declares, in effect, that one may recover disbursements necessarily incurred in the action. The right accorded to a party, upon filing a proper bond, to take into possession the personal property in dispute, is a privilege accorded him by law. It is not a necessity to his cause of action. And while a replevin bond is a necessity, if he so desires to take possession, the filing of such an undertaking by a surety company is likewise not a necessity, but a special privilege accorded under the statute. The cases are numerous where specific items charged as costs have been disallowed for lack

of statutory authority, and no authority in the statute can be found for the allowance of an item such as this. So far as the adjudicated cases are concerned, it will be found that the premiums paid for an appeal bond and for a supersedeas bond were allowed in the circuit court in *Edison v. American Mutoscope Co.*, 117 Fed. 192, it being declared that, under authority for taxing legitimate and proper disbursements rendered necessary by rules of practice, "these premiums seemed to be such disbursements." On the other hand, in *Re Hoyt*, 119 Fed. 987, it is held that the amount paid as a premium on such a surety bond cannot be taxed as costs, since permission to give such a bond by a surety company is a privilege and convenience, and not a necessity. To the same effect is *The Willodene*, 97 Fed. 509, *Lee Injector Mfg. Co. v. Pemberthy I. Co.*, 109 Fed. 964, 48 C. C. A. 760, *Somerville v. Wabash R. Co.*, 111 Mich. 51, 69 N. W. 90, and *Wadleigh v. Duluth St. Ry. Co.*, 92 Minn. 415, 100 N. W. 104, 363.

If it shall seem desirable that such costs shall be permitted, it will be an easy matter for the legislature to make provision to that end. In the present condition of the law the order appealed from is affirmed.

Lorigan, J., and Melvin, J., concurred.

The Right of Litigants to Costs is wholly statutory, and for the court to allow costs it is necessary to point to some specific provision of the statute giving the right: In *re Donges' Estate*, 103 Wis. 497, 74 Am. St. Rep. 885. This rule is recognized in the recent case of *Schmelzel v. Board of County Commrs.*, 16 Idaho, 32, 133 Am. St. Rep. 89, where the expenses of jurors are denied as costs.

SWAN v. WALDEN.

[156 Cal. 195, 103 Pac. 931.]

A TENANCY by the Entireties was a Modification of a Joint Tenancy, and arose where an estate was conveyed to a husband and wife under circumstances which would have created a joint tenancy if the conveyance had been made to two persons other than a husband and wife. (p. 119.)

A TENANCY by the Entireties Could not, at the Common Law, be Destroyed by a conveyance to either of the spouses. (p. 120.)

TENANCY by the Entireties Does not Exist Under the Laws of California specifying the modes of ownership of property by several persons. (pp. 120, 121.)

TENANCY by the Entireties, When not Created by a Conveyance to a Husband and Wife.—A conveyance to a husband and wife "as joint tenants with fee to the survivor" does not create a tenancy by the entireties. (pp. 120, 121.)

HOMESTEAD.—Land Held by a Husband and Wife as Joint Tenants may be made a homestead by her declaration claiming it as such, executed in the mode prescribed by law. (pp. 122, 123.)

HOMESTEAD.—A Conveyance Made by a Husband Alone of Land Held by Him and His Wife as Joint Tenants, but which has been dedicated by her as a homestead, is void. (p. 123.)

Halsey W. Allen and Henry W. Nisbet, for the appellant.

Leonard & Surr, for the respondent.

¹⁹⁵ HENSHAW, J. This is an appeal from the judgment and from an order denying a motion for new trial. The action was for the partition of lots 3, 4, and 5 in block L in the city of Redlands. While defendants Edward Walden and Louella, his wife, appellant herein, were the admitted owners of these lots under deeds hereinafter to be considered, Louella made a declaration of homestead on lots 3 and 4, where she and her husband resided. Subsequently, the homestead never having been abandoned, the husband executed a deed of grant of all of his interest in the lots to plaintiff Swan. Judgment passed for plaintiff, and Louella Walden appeals, urging: 1. That the estate held by herself and her husband in the lots was a tenancy by the entirety; that, consequently, ¹⁹⁶ the husband was without power to convey and his deed was, therefore, void; 2. That by reason of the valid homestead upon lots 3 and 4 the husband was unable to convey any interest or estate affecting those lots.

1. On the first proposition appellant contends for the existence of the common-law tenancy by entirety. This tenancy was a modification of the joint tenancy and arose where an estate was conveyed to a husband and wife under circumstances which would have created simply a joint tenancy if the conveyance had been made to any two people other than a husband and a wife. The estate was still, at common law, a joint tenancy, but because of the disabilities of the wife, the common law regarding the husband and wife as one, by construction the courts erected a modification of the tenancy. The modification was that while such estates had, like a joint tenancy, the quality of survivorship, they differed in the essential respect that neither spouse could convey his or her interest so as to affect the right of survivorship in the other. In the eye of the law the spouses were not seised of moieties, but of entireties: 1 Washburn on Real Property, 6th ed., p. 562. Thus, while in the case of a joint tenancy a severance of any of the unities, as a conveyance by one of the joint tenants to a third person, terminated the joint tenancy and transformed the new estate into a tenancy in common, this could not be done in a tenancy by entirety, owing to the fiction of the law that, in the latter tenancy, each held an undivided right to the whole and not, as in a joint tenancy,

a right to an undivided half. Of course, it was well settled, and is well settled, where a tenancy by entirety is recognized, that neither spouse can so destroy the character of the estate as to prevent the survivor becoming sole owner: *Frost v. Frost*, 200 Mo. 474, 118 Am. St. Rep. 689, 98 S. W. 527; *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422, 34 N. E. 999, 22 L. R. A. 42.

In this state, however, the reason which obtained at common law, and which forced the courts into the declaration of a tenancy by entirety, has no existence whatsoever. The right of the wife to hold property and to contract is fully recognized and upheld. With the ending of the reason for the rule, the rule itself should cease. The spirit of our laws makes against the recognition of such an estate. Besides the ¹⁰⁷ compulsion of the common-law theory, there was an added protection to the wife when property was conveyed to the spouses under these circumstances. It was her clumsy equivalent to the modern homestead. She could not be disturbed in her possession, in her title, nor in her enjoyment, and if she survived, the fee vested absolutely in her. But in this state the code declares (Civ. Code, sec. 682) that the ownership of property by several persons is either: 1. Of joint interest; 2. Of partnership interest; 3. Of interests in common; and 4. Of community interest of husband and wife. And it further declares (Civ. Code, sec. 164) that in case of a conveyance to a married woman and to her husband, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument. In effect, then, this is a refusal upon the part of our law to recognize estates other than those named in section 682 of the Civil Code. Moreover, in those states where tenancy by entirety is recognized, the trend of decision is to treat such estates as a simple joint tenancy, unless the language of the instrument forbids such interpretation: *Stewart on Husband and Wife*, sec. 310; *Tiedeman on Real Property*, sec. 244; *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422, 34 N. E. 999, 22 L. R. A. 42. An inspection of the deeds by which the Waldens took discloses clearly that the estates conveyed were designed to be estates in joint tenancy. Thus the grant of lots 3 and 4 was "to Edward Walden and Louella Walden, husband and wife, as joint tenants with fee to the survivor." Lot 5 was granted "to Edward Walden and Louella Walden, husband and wife, during their joint lives, as joint tenants, and afterward to the survivor in fee simple absolute. . . . The intention of this grant being to constitute a joint tenancy in said land in the said Edward Walden and Louella Walden." In Indiana, where tenancies by entirety are recognized, it is said: "Husband and wife, notwithstanding tenancies by entirety

exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression 'convey and warrant to Daniel S. Wiggins and Laura Bell Wiggins in joint ¹⁰⁸ tenancy'": *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422, 34 N. E. 999, 22 L. R. A. 42. It is held, therefore, upon this proposition: 1. By the laws of this state, tenancy by entirety is not recognized; and 2. If it were, the deeds in question do not create such a tenancy, but a simple joint tenancy.

2. The second question to be answered may be thus stated: May land, held in joint tenancy by husband and wife, be impressed with a homestead at the instance of the wife, the sole objection to the validity of the homestead being the nature of the tenancy in which the land is held? As early as 1855, this court decided, in *Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121, that under the homestead act as it then existed, a homestead could not be carved out of land held in joint tenancy or by tenancy in common, the reason given being that it required the title of all the tenants to constitute an ownership in the land, and that there was, therefore, no part of it which he (the homesteader) had the power to set apart as his own so as to constitute the homestead, and no mode had been provided under the homestead act for the ascertainment and separation of the particular estate sought to be impressed by the homestead. In that case the homestead was attempted to be declared by the husband, who held in joint tenancy with two strangers to his family. Immediately following this was decided the case of *Giblin v. Jordan*, 6 Cal. 416, where the tenancy in common was that of the husband, the wife, and a daughter. Here also the husband had attempted to impress the land, or his estate therein, with a homestead, and a distinction was sought to be drawn between the situation thus presented and that of the *Fleischacker* case. But this court declared that it was at a loss to find a distinction, saying: "The defendants are as much tenants in common as though they were entire strangers to each other, and the estate of the wife and child cannot be impressed with the character of a homestead simply because they have resided upon the premises." These decisions were adopted and followed in a long line of cases, unnecessary here to cite, until in *Seaton v. Son*, 32 Cal. 483, where the father, being in the exclusive possession of property, and believing that he was the sole owner thereof, declared a homestead, and it proved that he held legal title, not to all, ¹⁰⁹ but to an undivided seventeen-eightieths, and that the title to the remaining eightieth was in another person, notwithstanding

the fact that the father was in the exclusive possession of all the property, the court felt compelled to hold the homestead invalid. This harsh rule led to the adoption by the legislature in 1868 (Stats. 1867-68, p. 116) of a statute declaring that, "Whenever any party entitled to a homestead under the laws of this state shall be in exclusive occupation of any parcel or tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, such party so selecting and claiming shall be entitled to such homestead, and to all rights and exemptions provided by the general law, . . . although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein," and the validity of homesteads declared under the indicated circumstances has been established: *Cameto v. Dupuy*, 47 Cal. 79; *Rousset v. Green*, 54 Cal. 136. Moreover, by force of this statute it was held in case of cotenancy that the husband's interest, if he was residing upon the property under conditions fulfilling the requirements of the statute, could be impressed with a homestead at the instance of the wife: *Higgins v. Higgins*, 46 Cal. 259. Saving, however, in the cases mentioned, this court, which was the first to declare that a homestead could not be impressed upon land held in cotenancy, has, though somewhat reluctantly, felt impelled to adhere to its decisions as a rule of property under the doctrine of *stare decisis*, and such uniformly has been its decisions, to the last recorded case of *Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999. But in all the cases that have been adjudicated, the precise question presented by this case has never before arisen. Generally speaking, the cases have been like that of the *Fleischacker* case in 5 Cal. 244, 63 Am. Dec. 121, where the husband had sought to declare the homestead and where his inability to do so has been based upon the fact that the metes and bounds of his holding could not be delimited because of the nature of the tenancy, and, therefore, it could not be said that the whole land or any specific parcel was impressed by the homestead, since it was legally impossible to impress his cotenants' interests with this characteristic. The same reasoning, as we have noted, was applied in *Giblin v. Jordan*, 6 Cal. 416, where,²⁰⁰ of course, by his own declaration the husband could not impress the homestead character upon his wife's separate property or upon his daughter's property, in which sense they stood in the position of strangers. But the case which is here presented is different in this respect. Here the wife seeks to impress the whole land with the homestead characteristic. This she may do as to her own interest, which is her separate property, and this she may do as to her husband's interest, since she has the power to declare a homestead upon the husband's separate property, though he has no such power

over hers. The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it. There is no occasion for segregation or partition or delimitation of boundaries, since the homestead attaches to all of the estate and all of the land. The reasons which, in the view of this court, made it legally impossible for the husband to declare such a homestead when there was a cotenancy between himself, his wife, or third persons, does not exist in the peculiar instance of the case at bar. We have seen in *Higgins v. Higgins*, 46 Cal. 259, that where the wife has no interest in the property, she may, if her husband, a cotenant, be in the exclusive possession of it, declare a homestead upon his estate. How much more readily should the rule apply in this case, where the whole estate and all of the land may, at the instance of the wife, be made subservient to the homestead rights? In this respect the finding of the court that the wife was not in the exclusive possession of the land within the contemplation of the statute of 1868 is meaningless. Her husband certainly was in such possession, precisely as in the *Higgins* case.

For which reasons we hold that the homestead declared by the wife was valid, and, as a necessary consequence, the deed of the husband alone, made after the declaration, was inoperative and void.

The judgment is therefore reversed, with directions to the trial court to enter a new judgment in conformity with the above.

Lorigan, J., and Melvin, J., concurred.

Hearing in bank denied.

In the Subsequent Case of *Fanning v. Green*, 156 Cal. 279, 104 Pac. 308, the same court held that under the Civil Code of the state it must be presumed, where a conveyance is made to a husband and wife, that she takes the undivided one-half of the land as her separate estate; that if the consideration for the conveyance is shown to have consisted of community property, a gift to her may be presumed, this presumption being *prima facie* only, except in favor of purchasers and encumbrancers in good faith; that in a controversy between the husband and the legal representatives of the wife, the presumption may be rebutted; that the mere fact that the husband directed the conveyance to be made in the name of his wife as well as of himself does not necessarily compel the conclusion that a gift to her was intended, and that he may be permitted to testify that he did not intend the gift of any interest whatever to her.

Estates by Entireties are still recognized in many of the states: *Reed v. Reed*, 109 Md. 690, 130 Am. St. Rep. 552; *Donovan v. Griffith*, 215 Mo. 149, 128 Am. St. Rep. 458; *Jones v. W. A. Smith & Co.*, 149 N. C. 318, 128 Am. St. Rep. 661; *Jordan v. Reynolds*, 105 Md. 288, 121 Am. St. Rep. 578. Neither the husband nor the wife can so

destroy the character of an estate held by them as tenants by entirety as to prevent the survivor from becoming the sole owner: *Frost v. Frost*, 200 Mo. 474, 118 Am. St. Rep. 689; *Jones v. W. A. Smith & Co.*, 149 N. C. 318, 128 Am. St. Rep. 661.

Tenancy by Entireties Grows Out of the unity of husband and wife, and is unlike that of joint tenants, who are each seised of an undivided moiety. Each of the spouses is seised of the whole, and not of undivided moieties: Dickey v. Converse, 117 Mich. 449, 72 Am. St. Rep. 568; *Allen v. Lyon*, 216 Pa. 604, 116 Am. St. Rep. 791.

A Homestead may Exist in Land held by a husband and wife as joint tenants: Lininger v. Helpenstell, 229 Ill. 369, 120 Am. St. Rep. 264. And in some states a homestead may be had in property held by a husband and wife as tenants in common: *Grace v. Grace*, 96 Minn. 294, 113 Am. St. Rep. 625; but a contrary rule seems to prevail in some states: See the notes to *Wolf v. Fleischacker*, 63 Am. Dec. 122; *McCoy v. Brennan*, 1 Am. St. Rep. 594.

HARPER v. GOLDSCHMIDT.

[156 Cal. 245, 104 Pac. 451.]

STATUTE OF FRAUDS—Party to be Charged, Who is.—The party to be charged, within the meaning of the statute of frauds, is the party against whom the contract is sought to be enforced, whether vendor or vendee. (pp. 126, 127.)

STATUTE OF FRAUDS—Specific Performance Against Vendee.—Where the statute of frauds requires the contract or some memorandum thereof to be made by the party to be charged or his agent, a contract for the sale of land, signed by the vendor only, cannot be enforced against the vendee, unless his conduct has amounted to such performance or part performance as to relieve the contract from the necessity of his signature. (p. 128.)

SPECIFIC PERFORMANCE Against Vendee Who Paid Part of the Purchase Price, and received a receipt therefor, but did not sign it nor any contract or memorandum, cannot be enforced because of the statute of frauds. In such case there is no part performance of the contract to take it out of the statute. (p. 130.)

STATUTE OF FRAUDS, Presenting by Demurrer.—Whenever it appears on the face of a complaint that the agreement sued upon is within the statute of frauds and fails to comply with its requirements, the defendant may take advantage of the defect by demurrer. (p. 130.)

T. E. Gibbon and G. W. Crouch, for the appellant.

Bert F. Mull and E. B. Coil, for the respondent.

246 HENSHAW, J. This action was brought by plaintiff for the specific performance of a contract for the sale of realty, which contract, as pleaded in the complaint, was evidenced by the following written memorandum or receipt:

“Los Angeles, Cal., Jan. 11, 1907.

“Received of H. H. Goldschmidt one hundred dollars, part payment on lot numbered 3, block — Harper’s Magnolia

Place. Terms; Total price five thousand two hundred and fifty dollars; balance to be paid as follows: \$1400.00 cash on delivery of contract, less \$250.00 discount as Com. on sale, \$1250.00 in 6 months from date—\$1250.00 12 months from date, \$1250.00 18 months from date, and interest at seven per cent semi-annually.

"This receipt is issued subject to the conditions in the regular form of contract and deed given for lots in the here-in-mentioned tract.

"GEO. C. PECKHAM & CO.,
"By GEO. C. PECKHAM."

Plaintiff averred the tender to defendant of the contract mentioned in the receipt and the due performance of all of the terms and conditions upon her imposed by the contract, with defendant's refusal to accept the contract and to pay the moneys due thereunder. A general demurrer to this complaint was interposed and sustained. From the judgment which followed plaintiff appeals.

The principal question presented upon the appeal is whether, under the circumstances here indicated, a vendee who has not signed the contract of sale and who has done no more than pay one hundred dollars upon the purchase price, accepting a receipt therefor, can be compelled specifically to perform. Appellant answers this question by saying that under our statute of frauds and the sections of the code relating to specific performance, and the decisions of this court construing the statute and the code, specific performance should be decreed. Respondent makes answer that under our statute of frauds, and the sections of the code dealing with specific performance, and the decisions of this court expounding the statute and the code, no action will lie and the defendant is not bound. That such a contrariety of ²⁴⁷ opinion should exist upon a proposition which should be well settled, not only excites surprise, but demands an exposition of it resolving all uncertainty.

Upon the statute of frauds appellant points out that section 1091 of the Civil Code reads as follows: "An estate in real property, other than an estate at will, or for a term of years not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or his agent thereunto duly authorized"; that section 1971 of the Code of Civil Procedure prescribes that: "No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument, in writing, subscribed by the party creating, granting, assigning, surrendering, or de-

claring the same, or by his lawful agent thereunto authorized by writing." From the language of these sections he argues that when in section 1973 of the Code of Civil Procedure and in sections 1624 and 1741 of the Civil Code it is declared that contracts within the statute of frauds are invalid unless they or some note or memorandum of them, "be in writing and subscribed by the party to be charged, or by his agent," the "party to be charged" is the vendor and not the vendee. And it is said that such is the construction put upon the statute in this state by the cases of *Joseph v. Holt*, 37 Cal. 254, *Rutenberg v. Main*, 47 Cal. 213, and *Scott v. Glenn*, 93 Cal. 168, 32 Pac. 983, while elsewhere this construction receives support; as in Wisconsin (*Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497), in Nebraska (*Gardels v. Kloeke*, 36 Neb. 493, 54 N. W. 834), in Michigan (*Mull v. Smith*, 132 Mich. 620, 94 N. W. 183), in Montana (*Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695), and in New York (*Boehly v. Mansing*, 52 Misc. Rep. 382, 102 N. Y. Supp. 171).

Upon the proposition that specific performance is a road open to the vendor under the circumstances here presented, it is said that the vendee who has not signed may prosecute such an action against the vendor who has signed. This being admitted, reference is made to section 3386 of the Civil Code. ²⁴⁸ which declares that: "Neither party to an obligation can be compelled to specifically perform it, unless the other party thereto has performed or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance"; and to such authorities as 1 Wharton on Contracts, section 2. where it is said: "The parties to a contract, therefore, must both be bound"; and the language of our adjudications, such as that in *Doe v. Culverwell*, 35 Cal. 291, where the well-established principle is enunciated, that, "To be obligatory on either party, a contract must be mutual and reciprocal in its obligations." Upon these principles, it is argued that as the contract is admitted to be enforceable against the vendor, and as it could not be so enforceable without mutuality of obligation, it must be equally enforceable against the vendee.

The English statute of frauds and perjuries of Charles II. to which the similar statutes of all our states owe their origin, used the phrase "party to be charged" in precisely the same manner and to the same effect as it is now used in our sections of the code. A glance at the English cases will establish that the "party to be charged" did not mean the vendor, nor yet the vendee, but it meant the person charged in court with the performance of the obligation—the party defendant: 1 Sugden on Vendors, c. 4, sec. 3, par. 2; *Thornton v. Kempster*, 5 Taunt. 786; *Allen v. Bennett*, 3 Taunt. 169; *Seaton*

v. Slade, 7 Ves. Jr. 265. It was not the vendor alone whom the statute of frauds and perjuries sought to protect, but the vendee equally. For, as is well said by Ruffin, C. J., speaking for the supreme court of North Carolina: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by some means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract of which the sale of land is the subject, in respect of a party—that is, either party—who does not charge himself by his signature to it, after it has been reduced to writing": *Simms v. Killian*, 34 N. C. 252.

In 1830 the state of New York changed the language of the English statute and enacted the following: "A contract ²⁴⁹ for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration in writing, be subscribed by the lessor or grantor, or by his lawfully authorized agent." In 1850 the state of California passed an act concerning fraudulent conveyances and contracts (Stats. 1850, c. 114, p. 267), which declared: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." This was an express and admitted adaptation of the New York statute. In turn a similar statute was adopted by the states of Wisconsin, Nebraska, Michigan, and Montana—all of the states upon whose decisions appellant leans to support his contention. It must be apparent that the language of the courts in construing a statute which requires only that the contract shall be signed by the vendor can have no weight either by way of reasoning, or authority, in a case where a statute requires that the contract must be signed by the party to be charged. Such is the situation touching the last two of the cases from this state, relied upon by appellant. *Joseph v. Holt*, 37 Cal. 254, was decided under the law expressed in the statutes of 1850. Its language is: "To take a contract for the sale of land out of the statute of frauds a mere note or memorandum in writing subscribed by the vendor or his agent, containing the names of the parties and a summary statement of the terms of the sale, . . . is all that is required." This language is strictly true with reference to the statute as it then stood. So, in *Rutenberg v. Main*, 47 Cal. 213, the same remark is applicable to the court's language when it states: "The statute only requires that the memorandum of sale of real prop-

erty shall be signed by the vendor, or his agent: Act Concerning Fraudulent Conveyances, secs. 8, 9."

As an essential of every contract there must be an agreement and meeting of minds. Thus the agreement must precede the signature to the contract, however speedily thereafter such signature may follow. Before the statute of frauds, an oral agreement could be proved against either party. The ²⁵⁰ statute of frauds in no way interfered or attempted to interfere with the antecedent oral agreement, but, in effect, declared a rule of evidence that such agreement could not be proved unless the essentials of it had been reduced to writing and signed by the party to be charged. By the English statute the party to be charged was either of the parties against whom enforcement of the contract was sought, but by the statute of California until the reversion to the English statute, which took place in 1873-74, and by the statutes of New York, Wisconsin, and the other states whose law in this regard is like the early law of California, the statute of frauds was satisfied if the vendor of the property alone signed the contract. There was no such requirement as to the vendee, and consequently, against him, proof of its acceptance could rest in parol. Hence, the repeated declarations from the courts of those states—like the declarations above quoted from the early decisions of this state—to the effect that the statute is satisfied if the memorandum be signed by the vendor. The statute was satisfied because all that it required was that the vendor alone should sign; hence the inapplicability of the decisions of those states to our existing law: *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164. But in all of the states, like California to-day, where the statute requires the signature of the party to be charged, when effort is made to charge the vendee, it is uniformly held that the signature of the vendor plaintiff is not sufficient, but that the signature of the defendant vendee is absolutely essential, saving in the exceptional class of cases where the conduct of the vendee has amounted to such a performance or part performance of the contract as to relieve the contract from the necessity of his signature.

Nor is there any weight to the objection of lack of mutuality which follows this interpretation of the law. Such objection was made early by Lord Chancellor Redesdale in *Lawrenson v. Butler*, 1 Schoale & L. 13. It was considered a valid objection by Chancellor Kent in *Clason v. Bailey*, 14 Johns. 484, but, as pointed out in *Vassault v. Edwards*, 43 Cal. 458, the courts refused to hold it tenable. Says Parsons (*Parsons on Contracts*, secs. 9, 10): "The difficulty, therefore, cannot be that the contract is not mutual, but that one of the parties has not obtained the evidence which the statute requires him ²⁵¹ to produce to bind the other." In 8

Chitty on Contracts (Am. ed.), 4, note, it is said that the reason why a party may sue on a contract, although it may be void against him for want of his signature under the statute of frauds, is that the signature is prescribed as "necessary evidence of a contract," and not as an essential or constituent part of the engagement itself. In equitable theory the requirement of mutuality of remedy is satisfied when the nonsigning plaintiff enters suit, since by the very bringing of his action he binds himself to abide by the decree of the court in chancery and so empowers that court to decree specific performance against him. The commencement of his action is his offer to perform, and the precise situation is met and covered by the provisions of section 3388 of the Civil Code, which declares that, "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance": *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970. The decision of this court in *Scott v. Glenn*, 98 Cal. 168, 32 Pac. 983, must be construed by the light of this principle of mutuality of remedy, where the party not signing seeks the aid of the court. In *Scott v. Glenn*, the action was by the nonsigning vendee to recover the portion of the purchase price paid by him on the vendor's failure to perform. The vendor, by cross-complaint, alleged due tender of the deed, and demand and refusal of the payment of the balance due, and asked judgment that plaintiff be compelled to accept the deed and pay the balance of the purchase price. It was there insisted that the contract was void against the vendee plaintiff because not signed by him. The court said that the vendor was the party to be charged, as he was in the original action, and that his signature to the contract, taken in connection with the delivery thereof to the vendee and a partial payment thereunder, bound both parties. This was sufficiently accurate, perhaps, for the circumstances of the case, but, in fact, while by the original action the vendor who had signed was the party to be charged, by the cross-complaint the vendee, who had not signed, was the party to be charged, and since the vendee had sought the aid of the court for a recovery growing out of this contract, he made the remedy mutual ²⁵² and bound himself by his action to abide the judgment of equity upon the whole matter.

But where, as in this case, the contract is wholly executory, and the evidence of it amounts to nothing more than a receipt signed by the vendor, and the alleged part performance is nothing more than the payment of a small amount of money by the nonsigning vendee, and the acceptance of a

receipt therefor, no case can be found which holds such to be sufficient part performance to relieve from the statute of frauds. In precise point upon this matter is *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164. The statute of Kansas, in which state the case arose, is identical with our own. The necessity of the signature of the party to be charged was pointed out, together with the inapplicability of the decisions of states such as New York and Wisconsin, whose laws differ from our own. It was shown that the statute is satisfied and the nonsigning defendant is held where the contract has been executed upon the part of the vendor, or lessor, by the giving of a deed or lease which has been accepted by the vendee or lessee: *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Wilkinson v. Scott*, 17 Mass. 249; *Wood on Frauds*, secs. 222, 223. In such a case the contract has been wholly executed by the one party, and the acceptance of the deed or lease is consistently held to be a sufficient part performance to charge the other party. So, also, in case of executory contracts, where the nonsigning vendee enters into possession, or exercises dominion in other ways over the land, it is held that this amounts to such a part performance as will bind the nonsigning vendee. But where the act of the vendee is no more than the payment of a small amount of the purchase price, and the acceptance of a receipt for that amount, leaving all of the rest of the contract executory, both upon his part and upon the part of the vendor, no case has been pointed out which holds such acts to amount to a part performance which will bind the vendee. "His refusal to complete the contract after paying part of the purchase money is no fraud upon the seller but his loss": *Fry on Specific Performance*, sec. 567. It is held, therefore, that in this case there was no such part performance as the law contemplates.

The questions here presented arose properly, and were properly decided upon demurrer. "Whenever it appears upon ²⁵³ the face of the declaration, bill or complaint that the agreement sued upon is within the statute of frauds, and fails to comply with the requirements thereof, the appropriate mode of taking advantage of the defect is by demurrer": 9 Ency. of Pl. & Pr., p. 704, and cases.

For the foregoing reasons the judgment appealed from is affirmed.

Melvin, J., and Lorigan, J., concurred.

That the Court Did not Intend, in the principal case, to deny the enforcement of a contract when sought by the person not signing as against one who did sign it is apparent from the subsequent case of *Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689, wherein it was held that one having an optional right or privilege under a writing to purchase land by electing to exercise the option within the time

limited binds himself by the contract and removes any objection to its specific enforcement on the ground of its want of mutuality; that a provision in such contract whereby the vendor agrees upon notice of the acceptance of the option to make a conveyance on demand, does not render the contract inequitable by entitling the vendee to indefinitely postpone his demand for a deed, and thus delay performance on his part, for such demand must be made within a reasonable time, and what is such time is a question of fact, to be determined upon the circumstances of each case; that where the consideration which the vendee by his option undertook to pay for the land was fair and adequate, the question of the adequacy of the consideration paid for the option is immaterial; that the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to specific performance of such right, and when exercised relates back to the time of the giving of the option, so as to cut off rights acquired with knowledge of its existence; and that a homestead declared by a wife on the separate property of her husband, with knowledge of a pre-existing optional agreement for its sale executed by him, is subject to such agreement, and it is not material whether the option is exercised before or after the declaration of homestead is filed.

A Writing, to Satisfy the Statute of Frauds, must be signed by the party to be charged, but it need be signed by him only: *Schneider v. Anderson*, 75 Kan. 11, 121 Am. St. Rep. 356; *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495; *Hall v. Misenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474. The signing of a contract for the sale or purchase of real property by the vendor only satisfies the statute of frauds, if the contract is accepted by the purchaser: *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42; *Brodhead v. Reinhold*, 200 Pa. 618, 86 Am. St. Rep. 735. And specific performance of an option for the sale of land may be enforced in equity against the person signing it, although it is not signed by the other party: *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881.

MOORE v. TROTT.

[156 Cal. 353, 104 Pac. 578.]

DEED to be Delivered After Death, When Transfers Title Leaving a Life Estate in the Grantor.—A transfer of title in fee, subject to a life estate in the grantor, is effected by a deed delivered by him to a third person, with instructions for its delivery to the grantee at the grantor's death, provided the delivery is absolute and the instrument is placed beyond the power of the grantor to recall or control in any event. (p. 133.)

DEEDS—Delivery, Test of.—The test of an effective delivery is the absolute relinquishment of the right of recall by the grantor in his instructions to the party charged with the duty of making the delivery. (p. 134.)

DEED, Delivery of—Instructions in Writing, Controlling Influence of.—Where a deed is by the grantor given to a third person with written instructions concerning its delivery, the effect of the transaction depends upon the construction of the writing, and it is

purely a question of law whether there has been a delivery or not. (pp. 134, 135.)

DEED—Instructions Respecting Delivery, When Prevented from Becoming Operative on the Grantor's Death.—If a conveyance is signed and acknowledged, and sent to the depository with a statement in writing that it is to be delivered in case the grantor does not return from the hospital, where he is going to have an operation performed, that it is to be placed in the depository's safe, and in case the grantor should die to be immediately handed to the grantees, and the grantor, after being operated upon, returns to his own home and subsequently dies without resuming possession of the conveyance, it is not effective for want of unconditional delivery. (p. 136.)

DEEDS, Belief of the Grantor in the Delivery of.—The fact that a grantor dies believing a conveyance signed by him had been delivered does not give it validity, where the delivery was not sufficient, because he had not parted with the power to control or recall the instrument. (p. 136.)

DELIVERY OF DEED to a Depository, Effect of.—The depository to whom a conveyance is delivered by the grantor, to be delivered to the grantee after the former's death, becomes the agent and fiduciary of both parties. If the prescribed condition is performed, he is obliged to deliver the deed to the grantee. If it is not performed, he must return it to the grantor. (p. 136.)

DELIVERY OF DEED not Aided by Declarations of the Grantor to Third Persons.—Where a conveyance is deposited by the grantor, with written instructions respecting the disposition to be made of it by the depository, anything said by the grantor to third persons expressive of his intentions and wishes cannot modify the reciprocal rights and duties of the depository and grantee as fixed by the written instructions. (p. 136.)

DEEDS, Presumption of Delivery of, When cannot Prevail Against Evidence of Instructions.—The fact that a conveyance is found in the possession of the grantee does not give rise to a presumption of its delivery, where the evidence shows that such conveyance, though signed by the grantor, was given to a depository with instructions respecting it, which, as a matter of law, show that the grantor did not part with the right to recall it in his lifetime. (p. 136.)

William Shipsey and P. F. Dunne, for the appellant.

C. U. Armstrong, T. A. Norton, Sullivan & Sullivan and Theo. J. Roche, for the respondents.

354 BEATTY, C. J. This is an action to quiet title to certain lands formerly the property of Patrick Moore, deceased. The plaintiff is Moore's widow and administratrix, and the defendant, Mrs. George Trott, is the person named as grantee of said lands in two deeds which, on the tenth day of May, 1906, were mailed by Moore to P. O. Tietzen, cashier of the bank at Santa Maria, under cover with the following letter:

"Arroyo Grande, May 10th, 1905.

"Mr. P. O. Tietzen.

"Dear sir and friend, I am sending you some deeds to lands that I have made to be delivered to the parties in case

of my not returning from the California Hospital Los Angeles where I am going for to have an operation performed I also enclose you 1000 shares of Pinal stock to be turned over to Annie Gray for the purpose of paying for her education at Berkley and would like very much if you would take charge of it for her and see that she gets it all right. The deeds that I am sending you, you will please lock them in your safe and in case I should die to immediately hand them to the parties named telling them to put them of record as soon as possible.

"The other Pinal reipt for stock I think is in your bank if so send it to me to the California Hospital and I will endorse and return to you as security for my indebtedness to your bank. I am going to start to-day and I presume I will be there one or two days before they operate on me so if you mail that other certificate to me I will endorse and return it to you. ³⁵⁵ you will please keep to yourself the names of the parties named in those deeds until you deliver them. After I pass in my checks and take flight for the other world from whence none return.

Yours,

"PAT MOORE."

Immediately after mailing this letter Moore went to Los Angeles, where the contemplated operation was performed. Toward the end of May he was able to return to his home at Arroyo Grande and to transact various business matters there and in San Luis Obispo, where he went to attend the June session of the board of supervisors, of which he was a member. But his health rapidly declined and on the 18th of June he died without ever having communicated to Tietzen any other instruction, oral or written, than those contained in his letter of May 10th. On June 22d Tietzen delivered the two deeds in question to Mrs. Trott, who filed them for record on the 23d. The sole question in the case is whether these deeds were so delivered as to pass the title to the lands in controversy to the defendant, Mrs. Trott, or whether they remained inoperative for want of delivery.

It was found by the superior court "That at the time said Patrick Moore delivered said deeds to the said P. O. Tietzen as herein found he parted with all dominion over said deeds, and each of them, and reserved no right to recall or any way control said deeds or either of them. That said deeds were delivered absolutely." Upon this and other sufficient findings judgment was entered in favor of the defendants, and plaintiff appeals from the order denying her motion for a new trial, her principal contention being that the finding here quoted is not sustained by the evidence.

It has been thoroughly established as the law of this state by a series of decisions commencing with *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338, that a valid

transfer of a fee simple estate, subject to a life estate in the grantor, may be effected by means of a deed delivered by the grantor to a third party with instructions to deliver it to the grantee at his, the grantor's death, provided always—and this is the essential condition of the validity of such transfers—that the delivery is absolute so that the deed is placed beyond the power of the grantor to recall or control it in any event. ³⁵⁶ The finding of the superior court, it will be seen, fully supports its conclusion in favor of the validity of this transfer to Mrs. Trott, and it only remains to inquire whether the evidence in the record sustains the finding.

Moore at the time of his death was over seventy-one years of age. His first wife had died childless and the plaintiff, to whom he had been married about two years, was without issue. His relation to the defendant was that of an old and intimate friend of herself and her parents. Annie Gray was a member of his own household, and the other persons named as grantees of different portions of his lands in the deeds placed with Tietzen were intimate and valued friends. Of his long-cherished design to make each of them a sharer in the estate he might leave at his death there can be no doubt, and it is equally clear from the evidence that he died in the belief that his purposes in this regard were fully effected by the deeds he had executed and the instructions concerning them contained in his letter to Tietzen. But it is not enough that a man shall desire and intend that a stranger to his blood shall have and enjoy his real property after his death, for unless he complies with the legal requisites of a valid transfer his wishes and intentions are unavailing and his purpose is defeated. If, like Patrick Moore, he is unwilling to make a testamentary disposition which, if unrevoked, will pass the estate at his death, he must deliver his deed absolutely and beyond his power to recall in any contingency, to a custodian whose duty it will be to keep it as long as the grantor lives, and then to deliver it to the grantee. Were these deeds so delivered? If Patrick Moore on his return from Los Angeles had demanded their return could Tietzen have been justified in refusing to return them? If he could not have refused, it matters not that no such demand was made. The test of an effective delivery in such cases is the absolute relinquishment of the right of recall by the grantor in his instructions to the person charged with the duty of making the delivery. The transfer, or attempted transfer, of the estate being entirely gratuitous, the person named as grantee has no right beyond that which is voluntarily conferred, and the extent of that right is to be determined in every case where specific instructions are given by what passes between the grantor and his selected agent. The agent is of course bound to do ³⁵⁷ what his instructions require

him to do—no more, no less—and when, as in this case, his only instructions are in writing, the effect of the transaction depends upon the true construction of the writing. It is, in other words, a pure question of law whether there was an absolute delivery or not.

What, then, is the proper construction of Moore's letter? It seems very plain that Tietzen is authorized to deliver the deeds only "in case of my not returning from the California Hospital where I am going for an operation," and the implication that if he does return the deeds are to be at his disposal is clear. But counsel for respondent contends that a different intention is revealed by subsequent clauses of the letter. He relies greatly upon the direction to lock the deeds in Tietzen's safe "and in case I should die to immediately hand them to the parties," etc. We think that this, so far from being inconsistent with our construction of the first part of the letter, is only corroborative of it. If Moore's intention had been to part with the deed absolutely he would not have directed their delivery "in case I should die," for he was sure to die at some time. He would more naturally have said when I die. It is apparent that he was not without some hope of obtaining relief more or less permanent from the contemplated operation, and if he had returned from Los Angeles believing himself restored to health and had demanded a return of the deeds from Tietzen, we can conceive of no ground upon which the demand could have been resisted. The concluding part of the letter to Tietzen, which counsel agree must be read without any period after the words "until you deliver them," neither aids nor weakens our construction of the first part. The direction to "keep to yourself the names of the parties named in those deeds until you deliver them after I pass in my checks," etc., while they certainly do consist with the idea of that death which is certain to come to every man, were entirely appropriate as referring exclusively to death as the result of the operation about to be performed.

Aside from the letter to Tietzen which, as above stated, contained the only instructions ever given him as to the disposition of the deeds, it was shown by the testimony of numerous witnesses that Moore wished the persons named as grantees in his deeds to have the property therein described, and that his relations to those parties, and his condition and circumstances ³⁵⁸ made them the reasonable and meritorious objects of his bounty. There is, moreover, no reason to doubt that he died believing that his deeds in the hands of Tietzen would be sufficient to accomplish his purpose, but his purpose is defeated by the fact that the delivery was not absolute. A technical but inflexible rule of law governing the transfer

of real property prevents his intention from being carried out.

We have examined the cases cited by respondent, but do not deem it necessary to review or even to cite them by title. Some of them are cases of delivery of deeds in escrow, which have but little application to a case of this character. In such cases the depository of the deed becomes the agent and fiduciary of both parties. If the prescribed condition is performed, he is obliged to deliver the deed to the grantee; if it is not performed, he must return it to the grantor. *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 432, and *Keyes v. Myers*, 147 Cal. 702, 82 Pac. 304, were cases of delivery in escrow. Such cases as *Gaston v. Portland*, 16 Or. 255, 19 Pac. 127, in which it is held that the instructions under which a deed is delivered in escrow may be partly in writing and partly in parol, have no application, for the additional reason that in this case all the instructions were in writing. What Moore said to third persons expressive of his intentions and wishes cannot be held to modify the reciprocal rights and duties of Moore and Tietzen as defined by the letter of instructions. Such cases as *Crocker v. Hall*, 154 Cal. 527, 98 Pac. 269, and *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645, merely hold with respect to gifts of personal property that the intent with which the donor transfers the absolute control of the property to his donee is a question of fact to be proved like other questions of fact by the surrounding circumstances, including the declarations of the donor. They might be in point if the question here was as to Moore's intention to give the land to Mrs. Trott. But of that there is no question. The only question is whether he did what was necessary to carry out his intention, and that depends upon the instruction he gave to Tietzen.

Counsel for respondent urges with apparent seriousness the proposition that the deeds to Mrs. Trott having been found in her possession, there is a presumption of delivery to her at their date, which is not rebutted by the evidence in the ³⁵⁰ case. We think this presumption is not only overthrown by the evidence, but that the specific findings of the court show that the only delivery was that made by Tietzen after Moore's death.

The order of the superior court denying a new trial is reversed.

Sloss, J., Angelotti, J., Shaw, J., Melvin, J., and Henshaw, J., concurred.

Rehearing denied.

What Constitutes a Delivery of a Deed is the subject of a note to *Brown v. Westerfield*, 53 Am. St. Rep. 554. Conveyances to take effect after the grantor's death are discussed in the note to *Wilson*

v. Carrico, 49 Am. St. Rep. 219. Where a deed is given by the grantor to a third person to be delivered to the grantee on the death of the grantor, it is effectual as a conveyance if the grantor parts with all dominion over it and retains no right to recall it: Seibel v. Higham, 216 Mo. 120, 129 Am. St. Rep. 502; Martin v. Martin, 76 Neb. 335, 124 Am. St. Rep. 815; Griswold v. Griswold, 148 Ala. 239, 121 Am. St. Rep. 64; Grilley v. Atkins, 78 Conn. 380, 112 Am. St. Rep. 152; Culy v. Upham, 135 Mich. 131, 106 Am. St. Rep. 388. But the delivery in such a case must be absolute and unconditional. If a grantor executes a deed and delivers it to a person other than the grantee to hold, upon the understanding that if she recovers from her present sickness she is to have the deed back, and if not it is to be delivered to the grantee named, and such depository retains the deed until the grantor's death, there has not been, and thereafter cannot be, a valid delivery to the grantee, and the deed is a nullity: Williams v. Daubner, 103 Wis. 521, 74 Am. St. Rep. 902. See, also, Osborne v. Ealinger, 155 Ind. 351, 80 Am. St. Rep. 240.

GRIERSON v. GRIERSON.

[156 Cal. 434, 105 Pac. 120.]

DIVORCE—Allegation of Desertion, When Sufficient.—An allegation that on or about a date specified the defendant, disregarding his marital vows, willfully and without cause deserted and abandoned the plaintiff against her will and without her consent is sufficient. It will be inferred that the desertion continued from the date named to the filing of the complaint. (p. 138.)

DIVORCE—Desertion Resulting from Cruelty not Committed for That Purpose.—A husband's acts of cruelty may amount to desertion, where they drive his wife from home, though that is not shown to have been his intention in committing them. (p. 138.)

DIVORCE—Cruelty Connected With Intemperance.—In a suit for divorce on the ground of extreme cruelty, the plaintiff may allege instances of voluntary intoxication in connection with other matters as constituting acts of cruelty, and in so doing does not plead two separate causes for divorce. (p. 139.)

DIVORCE—Cruelty—Corroboration of Evidence of.—Where a wife testifies on the trial of her suit for divorce that her husband frequently spoke harshly to her, and that she believed her life to be in danger, she is corroborated by the testimony of another witness, to the same effect, though he further states that he had never personally seen the husband in a mood to hurt anyone. (p. 139.)

DIVORCE—Finding With Respect to the Defendant's Temperament, When Unnecessary.—It is not material that the court did not find upon the allegation that the defendant was a highly nervous and excitable man, for a finding in accord with the allegation could not excuse him for not treating his wife decently. (p. 140.)

Julian H. Biddle, for the appellant.

Will M. Beggs, for the respondent.

⁴²⁵ MELVIN, J. This is defendant's appeal from an interlocutory judgment of divorce and from the order denying the motion for a new trial.

The judgment was in favor of plaintiff upon two causes of action, the first for desertion and the second for extreme cruelty. Appellant urges as grounds for reversal: 1. That ⁴³⁶ the demurrer was improperly overruled; and 2. That the findings are not supported by the evidence. The first cause of action is briefly, but, we think, fully stated. The gist of it is in the following language: "That on or about the first day of July, A. D. 1904, the said defendant, disregarding the solemnity of his marriage vow, willfully and without cause, deserted and abandoned plaintiff, and has continued to live separate and apart from plaintiff, against her will, and without her consent." We find no merit in the theory that the pleading fails to assert how long the desertion continued. The language quoted means, when fairly interpreted, that the desertion dating from about July 1, 1904, continued to the time of the filing of the complaint. It can mean nothing else and would be given no additional force if words had been appended to the effect that the desertion lasted longer than the reasonable period mentioned in section 124 of the Civil Code. Nor was it necessary that the pleading should contain an added averment that in the abandonment of the plaintiff defendant remained away from her without sufficient cause, because the words "willfully and without cause" in the quoted paragraph of the complaint clearly modify the words "has continued to live" as well as the verbs "deserted" and "abandoned."

Appellant's counsel cites *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249, to support the view which he apparently holds that unless a defendant's acts of cruelty show an intention upon his part to drive his wife from the home, he may cure the results of a milder degree of cruelty, although it was sufficient to send her into temporary exile, by urging her to return to him. There is an expression in the closing paragraph of the learned vice-chancellor's opinion in that case which, at first glance, might be taken as a statement of such a rule. Closer examination of the case, however, will bring to mind the fact that the writer of the opinion was discussing the duty of the offending party in seeking reconciliation if he would escape the conclusion that his wife lived separate and apart from him by his own desire. There is nothing in that opinion, however, which supports the theory that the wife must in every case accept the advances of her husband. But even if there were such a rule, it would have no application here, for the court below found in this case ⁴³⁷ that the husband's conduct amounted to desertion, and, as was said in *McVicar v. McVicar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249, it is not necessary "that the husband should entertain, in connection with his acts of cruelty, any settled purpose to drive

his wife from him. It is enough if such is the natural consequence of his acts." The court having found, in effect, that his cruelty was (to quote again from *McVicar v. McVicar*) of such "intensity as to amount to desertion," it is unnecessary for us further to discuss the rule which seems to exist in New Jersey when the cruelty justifies merely temporary absence on the part of the wife.

There was a demurrer to the second count of the complaint on the ground that two causes of action, one for habitual intemperance and the other for extreme cruelty, are improperly united. *Haskell v. Haskell*, 54 Cal. 262, is cited in the brief to support the statement that "intemperance cannot be pleaded to support cruelty." Such is not the doctrine of that case. It was there held that "habitual intemperance" and "extreme cruelty" are separate grounds of divorce, and that the pleading of certain instances of voluntary intoxication in connection with other matters as constituting acts of cruelty cannot, in the absence of a finding of cruelty by the court of trial, be regarded as a sufficient allegation of a cause of action for habitual intemperance. The second count contains allegations of excessive drinking of liquor coupled with other acts which, in themselves, would amount to extreme cruelty: *Delatour v. Mackay*, 139 Cal. 621, 73 Pac. 454. This part of the complaint is obviously drawn with the design of charging, and we think it does clearly allege, a cause of action for extreme cruelty. The demurrer to the second count was properly overruled.

The findings that on various occasions defendant spoke harshly to plaintiff and that plaintiff believed her life to be in danger are sufficiently sustained by the testimony of plaintiff supported by that of her brother in law. The force of the latter's corroboration is not broken in the least by his testimony: "Personally I have never seen him [defendant] in a mood to hurt anyone." This statement immediately following the declaration that the witness had never seen the appellant with a deadly weapon obviously meant that Mr. Downing had never seen Grierson ready to perform any act of personal ⁴³⁸ violence; but that the latter did speak harshly to his wife and that Mrs. Grierson was afraid of him are facts that may be derived from the testimony of both witnesses.

Appellant's counsel calls our attention to the omission of the superior court to find on paragraph 6 of the complaint. That paragraph is as follows: "That the defendant is a highly nervous and excitable man, frequently drinks, and when in that condition is dangerous; said defendant has so frequently threatened to kill plaintiff and the said child, that plaintiff is afraid that he will carry said threat into execution." The court specifically found that it was not true that defendant threatened to kill his wife or child, and

this is, of course, a finding adverse to the allegation that she was afraid he would carry said threat into execution. Obviously plaintiff could not be afraid that an unuttered threat would be executed. The court found in accordance with nearly all of the substantial allegations of a preceding paragraph of the complaint "that frequently . . . the defendant would become intoxicated, and would reel around the yard and house so that neighbors and strangers could see his condition," and "that on many occasions the defendant, while intoxicated, would lie down in the house with his pipe in his mouth, and while the pipe was lit and full of live coals, the defendant would go to sleep, thereby endangering plaintiff's life, and the home and property of the parties hereto." These findings seem to cover all the other allegations of paragraph 6, except, perhaps, the one that "defendant is a highly nervous and excitable man," and that, we think, was an immaterial allegation. The obligation is upon all men, whether they be nervous, phlegmatic, excitable, or habitually calm, to treat their wives decently. While courts might, in some cases, be inclined to show more charity toward nervous, excitable men than toward other less mercurial of temperament, we think that these characteristics, when alleged as in this complaint, would neither intensify nor excuse the defendant's acts.

The judgment and order are affirmed.

Henshaw, J., and Lorigan, J., concurred.

Desertion as a Ground for Divorce is the subject of a note to *Pfannebecker v. Pfannebecker*, 119 Am. St. Rep. 617.

Cruelty as a Ground for Divorce is the subject of a note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 69. This question is also discussed in the notes to *Poor v. Poor*, 29 Am. Dec. 674; *Morris v. Morris*, 73 Am. Dec. 619.

WRIGHT v. COUNTY OF SONOMA.

[156 Cal. 475, 105 Pac. 409.]

CONTRACT, Express, not Created by Mere Notice from One Party to Another.—The fact that the owner of a well notifies the county or its officers not to take water therefrom, and that if the notice is disregarded he will demand fifty dollars for each day on which water is so taken, does not, on the subsequent taking of water, result in an express contract to pay therefor at the rate specified. (p. 142.)

CONTRACT, Quantum Meruit, When not Recoverable in a Suit upon.—If the plaintiff sues to recover fifty dollars for each day water was taken from his well, he cannot recover on a quantum meruit, there being nothing in the complaint or evidence tending to

show that the plaintiff sought to recover the reasonable value of the water. (p. 142.)

T. J. Butts, for the appellant.

Clarence F. Lea and G. W. Hoyle, for the respondent.

⁴⁷⁶ ANGELLOTTI, J. This is an appeal by plaintiff from a judgment for defendant and from an order denying his motion for a new trial, in an action to recover the sum of eight thousand six hundred dollars for water taken by defendant, by one of its road commissioners, for the purpose of sprinkling a public highway, from a well bored by it in said public highway.

The plaintiff is the life tenant of the land traversed by that portion of said highway on which said well is situated, subject to such rights therein as are possessed by defendant and the public by reason of the fact that the same constitutes a public highway. Defendant took and used water for sprinkling said highway from June 10, 1903, to October 8, 1903—one hundred and twenty days—and on fifty-two days, from May 10, 1904, to July 12, 1904. Plaintiff's claim is based solely on the theory that there was an express contract for the payment by defendant to plaintiff of the sum of fifty dollars for each day on which water was taken by it from said well, there being no allegation in the complaint as to the reasonable value of the water taken, or any allegation of damage to plaintiff by reason of such taking. In view of the findings based on evidence without conflict, there can be no dispute as to the facts material on ⁴⁷⁷ the issue of express contract, and those facts completely disprove the theory of any such contract. About May 27, 1903, defendant's road commissioner commenced the construction of said well, and, the same having been completed, commenced to take water therefrom for the purpose of sprinkling said highway, all without the consent of plaintiff. Plaintiff and others interested in the land thereupon, on June 10, 1903, notified such road commissioner, in writing, that he was forbidden to take any water from said well, and that in case he disregarded such notice, the owners "hereby demand" fifty dollars per day for each and every day on which he removed water in violation of the notice, "as compensation for the taking of said water." The well was bored and the water used for sprinkling purposes, with the knowledge of the board of supervisors of Sonoma county, solely under the bona fide claim that the county had the lawful right to so take and use the water. On June 20, 1903, plaintiff commenced an action in the superior court of Sonoma county to obtain a decree enjoining said road commissioner from taking said water. On September 22, 1903, the superior court rendered judgment in said cause that plaintiff

take nothing by his action. An appeal was taken by plaintiff from said judgment to the supreme court, and on May 11, 1904, the supreme court rendered a decision holding that defendant had no right to take or use said water, and directing the entry of judgment by the lower court in favor of plaintiff: *Wright v. Austin*, 143 Cal. 236, 101 Am. St. Rep. 97, 76 Pac. 1023. The road commissioner and law officers of the county had knowledge of this decision within a few days after the opinion was filed, but the remittitur from the supreme court was not returned and filed in the clerk's office of Sonoma county until July 11, 1904. There is no claim that any water was taken subsequent to July 12, 1904.

It appears too clear for question that there was no express contract between the parties for the use of this water. There was never any assent on the part of plaintiff to the use by defendant of such water on any terms, and all water taken was taken against the will and without the consent of plaintiff. The notice given by plaintiff and his co-owners expressly forbade the use of the water at all. The provision therein to the effect that the owners demand fifty dollars for each and ⁴⁷⁸ every day on which the notice to refrain from taking water is violated cannot be construed as a proposition to sell water at that rate. It amounted to no more than a notice of the amount of damage that the owners would claim for the taking of the water without their consent. And the taking of the water by defendant under the circumstances shown, even after the decision of the supreme court in regard to the relative rights of the parties became known to it, cannot be held to show any acceptance by it of the proposition to sell the water for a specified price. The cases cited by learned counsel for plaintiff in this regard are all cases in which the conduct of the party was such as to afford reasonable evidence of his consent to a proposition theretofore made.

So far as any right to compensation for water actually taken is concerned, which is the only right asserted in this action, as was said by the learned trial judge, "the only claim open to plaintiff was for the reasonable value of the water." No such claim has been asserted, the plaintiff, both in his complaint and throughout the proceeding, relying exclusively on his claim that there was an express contract for fifty dollars for each day on which water was used from said well.

The judgment and order denying a new trial are affirmed.

Sloss, J., Shaw, J., Lorigan, J., Melvin, J., and Henshaw, J., concurred.

To Constitute a Contract there must be an offer and an acceptance, express or implied: *Strasburg R. R. Co. v. Echternacht*, 21 Pa. 220, 60 Am. Dec. 49; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329.

FINNELL v. FINNELL.

[156 Cal. 589, 105 Pac. 740.]

VENDOR'S LIEN, When Exists.—One who sells and conveys real property to another acquires at the time of the sale, unless he waives his rights, a vendor's lien on such property for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien is valid against all persons except purchasers and encumbrancers in good faith and for value. (p. 146.)

VENDOR'S LIEN, Release of.—A vendor's lien is personal, and may be waived or released without consideration and without writing, and when once waived is gone forever. (p. 146.)

VENDOR'S LIEN, Implied Release of.—If a vendor does anything manifesting an intention on his part not to rely on his lien, such as taking security without an express agreement that he may still have the lien, it ceases to exist. (p. 146.)

A VENDOR'S LIEN is Presumed to Exist and to Continue, unless an intention on his part that it shall not exist is clearly manifested by his acts or declarations, and the burden of proof is on the vendee or his successors to show such intention. (p. 146.)

VENDOR'S LIEN.—The Nonexistence of a Vendor's Lien is not inferable from the mere fact that the parties did not contemplate its assertion in the first instance. The act manifesting an intention to waive it must be one substantially inconsistent with its continued existence. (pp. 147, 152.)

VENDOR'S LIEN.—Absence of Knowledge on the Part of the Vendor that he has a lien, or the absence of any intention to rely upon it, though he knows it exists, is not equivalent to a waiver thereof. (pp. 147, 152.)

NOTICE TO AGENT, When not Imputed to Principal.—The mere fact that the officers of a bank acting as limited agents for a vendee in inducing him to make a purchase of property, know that he intends to mortgage it to such bank to secure pre-existing indebtedness cannot be held to be notice to the vendor, so as to amount to his implied waiver of his vendor's lien. (p. 148.)

VENDOR'S LIEN—Waiver, Asking for Mortgage Which is not Given.—The fact that the vendor of land asks a mortgage thereon for the unpaid part of the purchase price, and that such mortgage was not given, does not manifest his intention to waive his vendor's lien. (p. 148.)

CORPORATION, When Charged With Notice of a Vendor's Lien.—If the vendee of lands owing part of the purchase price conveys them to a corporation of which he is president and sole beneficial stockholder, in consideration of the issuing of the whole capital stock to himself and dummy directors and stockholders, the corporation is chargeable with notice of the vendor's lien. (p. 150.)

VENDOR'S LIEN, Whether Waived by Inaction.—The right of the vendor to enforce his lien continues, unless waived, so long as he can commence and maintain an action for the purchase price, and where a promissory note has been given for such money, the lien may be enforced at any time within the period in which an action can be maintained on the note. (p. 150.)

VENDOR'S LIEN, Laches in Enforcing.—Where there is an express statute of limitations, mere delay in commencing a suit for a period less than that of the statute is never a reason for dismissing the proceeding. There must be in addition to mere lapse of time some circumstances from which the defendant or some other person

may be presumed, or even a matter of time that it may be reasonably supposed that said judgment will issue if the remedy is allowed.

VENDOR'S LIEN—Evidence of Want of Knowledge.—In a suit to enforce an alleged vendor's lien, evidence that the vendor did not know of the pendency of the suit, know that he was entitled to such lien is not admissible for the purpose of proving that he had waived it or was never attached thereto, or that he acted wholly upon the financial responsibility of his vendee.

WITNESS—Attorney at Law.—An attorney at law may state as a witness the circumstances of a conversation between himself and others as to the formation of a corporation, where he was not acting as attorney for anyone at the time.

GARRET W. McLENDON, for appellant Finnell Land Co.

CHARLES W. SLICK and W. P. JOHNSON, for appellant John Finnell, Jr., administratrix.

Theodore A. Bell and Bell York & Bell, for the plaintiff and respondent.

ANGELLOTTI J. This action was brought by plaintiff on October 14, 1914, to enforce an alleged vendor's lien upon 22,400 acres of land in Tehama county, sold by plaintiff to John Finnell, Sr., his father, on October 15, 1890, the amount due on account of the purchase price being \$92,000, with interest at six per cent per annum from October 15, 1892, evidenced by a promissory note given by John Finnell, Sr., to plaintiff October 15, 1890, which, by its terms, was payable October 15, 1900. John Finnell, Sr., having died prior to judgment, the defendant John Finnell, Jr., administrator of his estate, was substituted in his place as defendant. Defendant Finnell Land Company, a corporation, the present owner of the land, was alleged to have acquired it from John Finnell, Sr., with full knowledge that he had not paid to plaintiff the amount due on account of the purchase price. Judgment went for plaintiff, directing the sale of the land and the application of the proceeds to the payment of plaintiff's claim, aggregating with interest \$121,180.95 and costs, and also in favor of the Finnell Land Company to the extent of providing that, if it pay the amount due plaintiff, or if the land be sold under the judgment, it be subrogated as a judgment creditor of the administrator of the said John Finnell, Sr., its judgment being payable in due course of administration, for the amount so paid or for which said land may be sold. This is an appeal by the Finnell Land Company from those portions of the judgment which make the amount found due plaintiff a lien on said premises, and require the sale thereof to satisfy the same, and also from an order denying its motion for a new trial.

On October 15, 1900, plaintiff was the absolute owner in fee of the land involved, being tracts I, J, K, and L of the Rancho de los Sauces, according to a survey and map thereof made by L. V. Healey and E. N. Eager. This land constituted a part of 15,839.37 acres which had previously been acquired by John Finnell, Sr. The 4,250 acres had been conveyed to plaintiff by John Finnell, Sr., by deed dated September 17, 1882, and acknowledged January 17, 1883. On October 15, 1890, plaintiff, by a good and sufficient grant, bargain, and sale deed, sold and conveyed this land to John Finnell, Sr., for a consideration of \$127,500, and also the stock thereon for \$4,000. John Finnell, Sr., gave to plaintiff his check on the James H. Goodman & Company Bank of Napa for the \$4,000 for the stock, and also ⁵⁹³ a check on account of the purchase price of the land for \$3,412.80, both of which checks were indorsed over to the bank by plaintiff to satisfy an indebtedness due from him. He further gave plaintiff personal property of sufficient value to make the amount actually paid by him on account of said purchase price \$3,500. Plaintiff then owed John Finnell, Sr., \$32,000, evidenced by his notes, and these notes had been transferred by John Finnell, Sr., to the bank, and this indebtedness was assumed solely by John Finnell, Sr. This left \$92,000 due on account of the agreed purchase price, and, as the findings sufficiently supported by testimony establish, not in payment for the land, but purely to evidence the amount still owing, John Finnell, Sr., gave to plaintiff his note of October 15, 1890, payable October 15, 1900, said note providing for interest at six per cent per annum, payable annually. The interest was paid annually up to October 15, 1902. No part of the principal sum of \$92,000 has ever been paid, and no part of the interest accruing since October 15, 1902. At the time of the transaction plaintiff asked John Finnell, Sr., if he would not give him a mortgage to secure the payment of the note, but John Finnell, Sr., after consultation with Mr. George E. Goodman, president of the bank, and following his advice, refused to do so, and plaintiff never received any security of any kind for the payment of the note. The evidence amply supports the conclusion of the trial court to the effect that the conveyance by plaintiff to John Finnell, Sr., was not made as a part of a family settlement and compromise, but that it was an out-and-out sale, as fully so as one made to a stranger would have been. The evidence shows that plaintiff had concluded to sell this land, and communicated his intention to Mr. Goodman and Mr. Noyes, another officer of the bank. The bank and Mr. Goodman were creditors of Finnell, Sr., in large amounts, and Mr. Goodman suggested that plaintiff had better sell to his father and not "to anyone else in their way," so he told Goodman and Noyes

he would do so if they arranged it, but he would not go to his father himself about the matter. "They went ahead and made the trade," acting as his agents, it may be conceded, for the purpose of effecting a sale. Plaintiff actually paid Noyes a commission of over \$2,000 for arranging the sale. ⁵⁸⁴ There was nothing to compel the conclusion that in thus dealing with his father he was simply surrendering to him something that had been previously given to him by way of a family settlement or advance, in return for the promise of his father that he should receive certain money in lieu thereof.

Unless plaintiff waived his rights in that behalf, he acquired at the time of this sale to his father a vendor's lien on the property so conveyed by him, for so much of the price as remained unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien was valid against everyone claiming under the buyer except a purchaser or encumbrancer in good faith and for value: Civ. Code, secs. 3046, 3048. Whatever may be said against the policy of allowing such a secret lien, not evidenced by any writing or public record, our legislature has seen fit to look with favor upon it, and to continue in force the old equity rules in regard thereto. As was said in *Fisher v. Shropshire*, 147 U. S. 133, 143, 13 Sup. Ct. Rep. 201, the principle on which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. Our law, recognizing this as a just principle, gives to every vendor, in the vendor's lien declared by section 3046, security for and a means of enforcing payment of the consideration, so far as it can do so without injury to the rights of bona fide purchasers or encumbrancers for value.

The right thus afforded of enforcing payment of the consideration against the property conveyed is a personal one, and it may be waived and relinquished without consideration and without a writing (see *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807), and when once waived is gone forever. It is thoroughly settled that if the vendor do any act manifesting an intention on his part not to rely on the lien thus given by law for the payment of the purchase money, such as taking security therefor, without an express agreement that he may still have his vendor's lien, the lien will not exist: *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. Rep. 201, 37 L. ed. 109; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Lee v. Murphy*, 119 Cal. 364, 15 Pac. 549, 955. But the lien is presumed to exist, and is an incident of the transaction of sale in all cases unless the intention of the vendor that it shall not exist be clearly manifested by his acts or declarations, and ⁵⁸⁵ the burden of proof is on the vendee or his successors to show such intention: See 2 *Jones on Liens*, sec. 1064; *Selna v. Selna*, 125 Cal. 357, 73 Am. St. Rep. 47, 58

Pac. 16. The act manifesting such an intention must be one substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance: *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. Rep. 201, 37 L. ed. 109.

The trial court found that it is not true that at the time of the conveyance, and up to shortly before the commencement of the action, plaintiff relied wholly for the payment of the consideration on the personal responsibility of his father, John Finnell, Sr. This finding is attacked as not being supported by the evidence, but in view of what we have said, we do not regard it as a material finding. The question in this connection is not what were the secret thoughts or expectations of plaintiff as to where he was to get this purchase money, but whether he had done any act or made any statement that manifested his intention to abandon any right given him by law to enforce his claim against the land, and to look solely to his father personally for payment—in other words, had he done or said anything that was inconsistent with the retention of a lien and amounted to a waiver thereof. As was said in *Moshier v. Meek*, 80 Ill. 79, speaking of such a lien, “this lien, in equity, is created without the express agreement of the parties, and even when they do not know that such a lien exists or is created by operation of law.” In *Houston v. Dickson*, 66 Tex. 79, 1 S. W. 375, the court, after saying that the lien may be waived by such facts as show that the vendor relies on other security, or relinquishes his right to the security which the law gives him, said: “But the absence of knowledge that the law gives him such a security, or a mere secret intention not to claim it, does not affect the right”: See, also, 2 *Jones on Liens*, sec. 1064.

It was further found, substantially, that it is not true that at the time of the conveyance it was understood and agreed that no lien existed or was reserved, and it is not true that plaintiff ever waived all liens against said land or any part thereof. If this finding, which is attacked by appellant, is sufficiently supported by evidence, it effectually disposes of all claims to the effect either that a vendor's lien never existed in favor of plaintiff, or that there had been a waiver of any ⁵⁹⁶ right to a lien. We are satisfied that it cannot be held here that the finding is not sufficiently sustained by the evidence. Admittedly, there was nothing to indicate any express agreement of the parties, written or parol, relative to the matter, and appellant is compelled to rely upon the circumstances of the transaction as showing an agreement or understanding that no vendor's lien should exist, and that all right to such a lien should be waived. As we have already said, the trial court was fully justified in finding that the

transaction of October 15, 1890, between plaintiff and his father was not one in the nature of a family settlement and compromise, and also that the note was not taken as a substitute for the purchase money, so that whatever force might properly be given to such a circumstance, if found, is a matter of no concern here. It is claimed that the evidence shows that plaintiff knew that his father intended to mortgage the land to the James H. Goodman & Co. Bank in order to take up plaintiff's notes to him which he had transferred to such bank, which mortgage was in fact executed by the father about six months afterward, and that this knowledge put him on notice that the intended use of the property by the father was such as was absolutely inconsistent with the creation of a vendor's lien on the property. Plaintiff had no actual knowledge of his father's intention to mortgage this land, but it is claimed that the knowledge of Mr. Goodman and Mr. Noyes in this behalf must be imputed to him by reason of the fact that they were his agents. We do not consider this claim well based under the circumstances. They were his agents for a very limited purpose, simply that of inducing Mr. Finnell to purchase the land from his son, and they appear to have been interested in accomplishing this, not alone on account of plaintiff, but principally on account of the bank, whose agents they also were, so that this property should not go into the hands of a stranger, but should be, with the other portions of the rancho, a part of the property of Finnell, Sr., with whom the dealings of the bank were very extensive and involved very large sums of money. The understanding between them and Finnell, Sr., "that the land should be holden for the amount of money that he [plaintiff] owed," evidenced by the mortgage subsequently given, was one urged and assented to by them solely as agents of the bank, and had no connection whatever with the subject matter of their agency ⁵⁹⁷ for plaintiff. The matter of obtaining the necessary funds wherewith to make the purchase from plaintiff was a transaction wholly between the purchaser and the bank, with which plaintiff had nothing whatever to do. We are satisfied that the knowledge of Goodman and Noyes as to the means by which the indebtedness due the bank from the purchaser was to be secured cannot be held to indicate any assent on the part of plaintiff to a waiver of any of his rights in the matter of the enforcement of his claim for the balance of the purchase money. The fact that plaintiff asked his father to give a mortgage as security for the balance of the purchase money and that his father declined to do so certainly does not show any disposition on plaintiff's part to waive any security given him by the law. It shows, to the contrary, that he did desire to obtain, if possible, a written contract of security, and the utmost shown by his subsequent willingness to convey without

obtaining this is that he withdrew his demand for such a contract, not that he waived anything given him by the law.

The appellant Finnell Land Company acquired the property from John Finnell, Sr., by a deed dated May 29, 1900, and has ever since been the owner thereof. The trial court found that it purchased the land and took the deed therefor "with the full knowledge that the said John Finnell, deceased, had not paid plaintiff the residue of said purchase money."

The Finnell Land Company was organized as a corporation under the laws of this state on May 24, 1900, with a capital stock of \$650,000, divided into 6,500 shares of the par value of \$100 each. The evidence quite clearly establishes that it was formed at the instance of Mr. Goodman and the other officers of the J. H. Goodman & Co. Bank, to which Finnell, Sr., owed very large amounts of money, aggregating several hundred thousand dollars, to enable him and them to more readily control the real property of Mr. Finnell, of which the land involved here constituted a part, with a view to its sale and the settlement of the claims of the bank and Goodman. The original directors were John Finnell, who was president of the corporation, and four of his sons, not including the plaintiff. On May 29, 1900, Finnell, Sr., proposed in writing to the directors to convey to the company, free of encumbrance, all of his land, being about 15,841 acres, in consideration of the issuance of ^{was} all of the stock, 6,500 shares, as follows: To John Finnell, Jr., ten shares; to James Finnell, ten shares; to Simpson Finnell, ten shares; to Bush Finnell, ten shares; to George E. Goodman, 2,000 shares, and to John Finnell, Sr., 4,460 shares. This offer was accepted by the directors, and the deed was thereupon delivered and the stock issued. It is found, in accord with an allegation of appellant's answer, that "all of said persons to whom the said shares were issued other than John Finnell, were nominal owners thereof, but the beneficial and equitable owner, and the only person having any interest in said shares, was the said John Finnell, who owned the entire capital stock of said corporation, to wit, sixty-five hundred (6,500) shares, from May 29, 1900, until October 26, 1900, when he transferred said sixty-five hundred (6,500) shares as hereinafter found." The transfers of October 26, 1900, here referred to, were specifically described in subsequent findings, being one of 4,500 shares, together with certain personal property, to the James H. Goodman & Co. Bank in satisfaction of an indebtedness of \$147,742.80 due said bank from him, and one of 2,000 shares and certain personal property to said George E. Goodman in satisfaction of an indebtedness of over \$350,000. On September 8, 1902, said George E. Goodman transferred his 2,000 shares to Simpson Finnell, a brother of plaintiff, who has ever since been the owner thereof, and the Goodman Bank still

owns the other 4,500 shares. The evidence shows that each of the directors of appellant other than John Finnell, Sr., including said Simpson Finnell, knew, at the time of the transaction by which it acquired the land, that plaintiff had not been paid the balance of the purchase price, and that he held the note of John Finnell, Sr., therefor. The evidence further shows that both George E. Goodman, individually, and the James H. Goodman & Co. Bank, through its president and other officers, had the same knowledge through all the proceedings in relation to the formation of the corporation and the transaction by which this property was conveyed to appellant, and ever since. Under these circumstances we do not see how it can be doubted that the Finnell Land Company took the land from Finnell, Sr., with the full knowledge that John Finnell, Sr., had not paid the plaintiff the residue of the purchase ⁵⁰⁰ money. It is obvious that if at the time of the conveyance the corporation was practically simply John Finnell, Sr., as the finding in regard to the ownership of the stock establishes, and that no other person had any interest in the property of the corporation, it necessarily had all the knowledge in regard to the right of plaintiff that Finnell had. This was recognized in *Bang v. Brett*, 62 Minn. 4, 63 N. W. 1067. cited by appellant, the court saying: "Or, if the members of the corporation consisted wholly of the Merritts and others having notice of the existence of plaintiff's lien, it might be that their notice would be notice to the corporation." But it is unnecessary to cite authorities to sustain this proposition. John Finnell, Sr., with the aid of dummy directors and stockholders, incorporated himself, and conveyed the land to himself so incorporated. If by reason of the fact that it was then understood by him, Goodman, and the Goodman Bank, that the stock was subsequently to be transferred to Goodman and the Goodman Bank in satisfaction of his indebtedness. Goodman and the Goodman Bank could be held to have then had any interest in the corporation, the latter, as has been said, had the same knowledge in regard to plaintiff's claim as had Finnell. Although under these circumstances it was not essential to notice to the corporation that the dummy directors of appellant should have knowledge, they nevertheless did have it. We know of no theory upon which it may be held that the Finnell Land Company, constituted as it was, did not take with notice of plaintiff's right.

The trial court found against appellant's claim that plaintiff had been guilty of laches in failing to assert his lien and bring an action to enforce the same prior to October 14, 1904, the date of the commencement of this action. We cannot hold that this finding is not sufficiently sustained by the evidence. The right of a vendor to enforce his lien continues, unless waived, so long as an action can be commenced for the pur-

chase money (2 Jones on Liens, sec. 1064), and where a note for the purchase money is given, payable at a future day, an action to enforce the lien may be commenced at any time before the lapse of the period within which an action can be brought on the note: *California Savings Bank v. Parris*, 116 Cal. 254, 48 Pac. 73. This action was commenced within that period. "Where an express statute of limitations ⁶⁰⁰ applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding": *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. "There must appear, in addition to mere lapse of time, some circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed": *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467. In this case it was affirmatively made to appear that there could have been no prejudice resulting to any person by reason of the failure of plaintiff to commence his proceeding to enforce the lien until the period prescribed by the statute of limitations was about to expire. It may be assumed purely for the purposes of this decision that as against a corporation whose stock is transferable in the open market and likely to pass into the hands of innocent purchasers, a person having a mere vendor's lien against property held by the corporation must assert his claim properly, and that any unreasonable delay in asserting it will foreclose his right if stock of the corporation has been transferred to purchasers in good faith and without notice. But no such condition confronts us here. All those who have acquired the stock of Finnell, Sr., had full knowledge of the facts under which plaintiff's right to a lien exists.

It is claimed that the trial court erred in several rulings on the admissibility of evidence.

The alleged error principally relied on was the exclusion by the court of certain evidence attempted to be elicited from plaintiff relative to a conversation between him and his brother, Bush Finnell, in July or August, 1904, which was two or three months before the commencement of this action. The proposed evidence was contained in the deposition of plaintiff, which had been taken for the purposes of the trial, and, so far as necessary to be stated here, is as follows:

"Q. Now, what was it precisely that your brother Bush told you at that time? A. Well, Bush and I were talking, and I told Bush it looked to me like everything was getting muddled up, and if we did not get it settled up pretty soon there would be nothing left, and I told Bush about this note. In fact, I guess he knew ⁶⁰¹ it; I think all the Finnell family knew it, notwithstanding I never said anything to them about it.

I asked Bush if there was any way for me to make myself whole or part whole. He said he knew no other way except I might bring a vendor's lien against the land, and that was about all there was said.

"Q. Up to that time did you know there was such a thing as a vendor's lien? A. No, sir, knew nothing about it.

"Q. That was new to you? A. That was a new trick to me; I did not know of it."

The sum and substance of this was that plaintiff did not know that there was such a thing as a vendor's lien at the time of the conveyance to his father or until shortly before the commencement of this proceeding. We have already seen that the mere fact that a vendor does not know that the law gives him such security cannot affect his right. But it is urged that the proposed evidence was "very material additional evidence upon the question of the intent of Williamson Finnell in taking the \$92,000 note from his father, to the effect that he relied entirely upon the financial responsibility of his father as security for it, and that the reconveyance was in fact a family settlement and compromise," and that it went to show that no vendor's lien was ever created. To our minds, this evidence was in no way material on the question of family settlement and compromise. We have already stated our views to the effect that it was not material what were the secret thoughts or expectations of plaintiff as to how he could or would collect this purchase money, or whether he believed that he could collect it only from his father personally, and so, in his own mind, relied entirely on his father's financial responsibility. The law, not any contract of the parties, gave him the lien if the transfer of the land to his father was an ordinary sale, and we do not think that the proposed evidence as to his ignorance of the law relative to a vendor's lien was such as to throw any light upon the question whether it was a sale, or upon the question whether he did or said anything which might tend to show an understanding between the parties for a waiver of any right given him by the law. We cannot see that this evidence could have affected in any degree the conclusion of the trial court upon any material issue.

⁶⁰² It is urged that it was error for the court to exclude the testimony showing how plaintiff became indebted to his father for the \$32,000 which he claimed to owe him at the time of his conveyance on October 15, 1890. As to this claim it is sufficient to say that we are unable to find that the trial court excluded any evidence that would have had any material bearing upon this question.

Mr. F. E. Johnston, an attorney, was allowed, over the objection of appellant "that it is a privileged communication" under subdivision 2 of section 1881 of the Code of Civil Pro-

cedure, to testify that at a conversation that occurred between himself and Finnell, Sr., and Mr. Goodman at the Palace Hotel, in San Francisco, shortly prior to the formation of the Finnell Land Company, in which the matter of forming a corporation was "simply mentioned by one or the other," he was asked whether it could be done, and he said it could be done. He further said that he was not anybody's attorney in the matter. It is clear that the objection made to this evidence was properly overruled.

The evidence showing knowledge on the part of the officers of the James H. Goodman & Co. Bank of the facts giving plaintiff a right to enforce against the land his claim for the residue of the purchase money was admissible, if for no other reason, for the purpose of showing that no prejudice could have resulted from the delay of plaintiff in commencing his proceeding to enforce his lien, and thus meeting the defense of laches.

In view of our conclusion upon the matters already discussed, there is no other point suggested in the briefs that requires attention.

Those portions of the judgment that are appealed from, and the order denying a new trial, are affirmed.

Shaw, J., Sloss, J., Lorigan, J., Melvin, J., and Henshaw, J., concurred.

A Vendor's Lien is not the Result of Any Agreement or Intention of the vendor and vendee, but is simply an equity raised by the courts for the benefit of the former: Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272. See, also, Nolan v. Nolan, 155 Cal. 476, 132 Am. St. Rep. 99; Hood v. Hammond, 128 Ala. 569, 86 Am. St. Rep. 159; Smith v. Allen, 18 Wash. 1, 63 Am. St. Rep. 864. The vendor has a lien for unpaid purchase money against the vendee and subsequent purchasers with notice. Prima facie the lien exists, and it devolves upon the purchaser to show that it has been waived or lost: Ellis v. Temple, 4 Cold. 315, 94 Am. Dec. 200; Briscoe v. Bronaugh, 1 Tex. 326, 46 Am. Dec. 108; Hays v. Horine, 12 Iowa, 61, 79 Am. Dec. 518. As to the enforcement of the lien against a bona fide purchaser, see Neff v. Elder, 84 Ark. 277, 120 Am. St. Rep. 67; Maroney v. Boyle, 141 N. Y. 462, 38 Am. St. Rep. 821.

A Vendor's Lien may be Waived, either expressly or by implication: Mims v. Lockett, 23 Ga. 237, 68 Am. Dec. 521. As to what constitutes a waiver or extinguishment of the lien, see Hood v. Hammond, 128 Ala. 569, 86 Am. St. Rep. 159; Selna v. Selna, 125 Cal. 357, 73 Am. St. Rep. 47; Maroney v. Boyle, 141 N. Y. 462, 38 Am. St. Rep. 821; Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Burgess v. Fairbanks, 83 Cal. 215, 17 Am. St. Rep. 230; Dowdy v. Blake, 50 Ark. 205, 7 Am. St. Rep. 88. Failure to assert a vendor's lien for three years furnishes a strong presumption that it is considered waived: Conover v. Warren, 1 Gilm. 498, 41 Am. Dec. 196. As to the loss of the lien by operation of the statute of limitations, see Reynolds v. Lawrence, 147 Ala. 216, 119 Am. St. Rep. 78; Hood v. Hammond, 128 Ala. 569, 86 Am. St. Rep. 159; Chase v. Cartright, 53 Ark. 358, 22 Am. St. Rep. 207.

SEYMOUR v. OELRICHS.

[156 Cal. 752, 106 Pac. 88.]

FRAUDS, STATUTE OF.—A contract for personal services which cannot be performed within one year is within the statute of frauds. (p. 156.)

FRAUDS, STATUTE OF.—A memorandum to satisfy the statute of frauds must contain the essential terms of a contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. (p. 157.)

FRAUDS, STATUTE OF.—Memorandum, When Insufficient.—Where the plaintiff claims to have been employed by the defendants for the term of ten years, letters and telegrams merely showing that he had been employed as their superintendent of buildings, expressing a hope that everything was pleasant at the office and agreeing to keep him in office at the former salary, do not constitute memoranda to take the contract out of the statute of frauds, because they wholly fail to disclose the terms of the contract or the rate of compensation. (p. 158.)

FRAUDS, STATUTE OF.—Authority of Agent.—In California, the authority to execute a contract required by its statutes to be in writing must also be evidenced by a writing signed by the party to be charged. (p. 158.)

APPEAL AND ERROR.—Specifications of Insufficiency of the Evidence to Support the Finding.—Fraud, Statute of.—Where there is a finding that the defendants entered into a contract with the plaintiff, and the testimony taken at the trial refers to a contract claimed to have been entered into by the defendants by their agents, and such agents could have been authorized so to do only by a writing signed by the defendants, a specification that there is no evidence that the defendants entered into the contract with the plaintiff is sufficient to present the question of the want of authority because no authority was conferred in writing. (p. 159.)

APPEAL AND ERROR.—A specification of the insufficiency of the evidence is sufficient, if it is as specific as the finding assailed. (p. 159.)

ESTOPPEL, Notice and Knowledge Essential to.—The question of whether the defendants are estopped from denying the existence of a contract does not arise if the pleadings and evidence fail to disclose that when the defendants did the acts by which they are claimed to be estopped they knew of the existence and terms of the contract in question. (p. 160.)

FRAUDS, STATUTE OF.—The Mere Part Performance of a Contract for Personal Services, which by its terms cannot be performed within a year, does not render it enforceable when not in writing. (pp. 162, 163.)

FRAUDS, STATUTE OF, Estoppel Against Asserting.—Equity may hold a person estopped to assert the statute of frauds where such assertion must amount to practicing a fraud. This rule is not limited to any particular class of contracts. (p. 163.)

FRAUDS, STATUTE OF.—Contract for Personal Services, Estoppel to Assert Statute Against.—If one holding a permanent position, and who will become entitled to a life pension if he continues therein, resigns such position on an agreement for employment with another for the term of ten years, at a specified salary, and enters upon such employment, and thereafter cannot be restored by his employers to the position resigned by him, this is such a change of posi-

tion on his part in reliance on the contract of employment as estops his employers from denying the validity of the contract on the ground that it was within the statute of frauds, and not in writing. (p. 164.)

FRAUDS, STATUTE OF—Estoppel, Fraud, Character of Necessary to Support.—To constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct, the actual intent to mislead is not essential. There need not be a corrupt motive or evil design, but the circumstances must be such as to render it unconscionable to deny facts which the party by his silence or representation has caused the other party to believe in and act upon, and the denial of which must operate as a fraud upon him. (p. 165.)

FRAUDS, STATUTE OF—Failure to Reduce Contract to Writing as Agreed.—Though the failure to reduce to writing a contract as agreed does not ordinarily constitute such fraud as to estop a person from asserting the statute, yet if he is thereby induced to change his position in a substantial respect, and so that such position cannot be restored, estoppel arises to preclude such assertion. (pp. 167, 168.)

DAMAGES, Measure of for the Breach by an Employer of a Contract for Personal Services for a Definite Term.—Where an employé having a contract to be paid for personal services for a specified term is discharged without cause, the damages recoverable by him are not restricted to the time of the trial, but are *prima facie* the contract price for the entire period, less such earnings from other employment as he may have engaged in after his discharge, and also what he may have earned by reasonable exertion and diligence during the balance of the term. (p. 169.)

Tobin & Tobin, for the appellants.

Peter F. Dunne and C. W. Durbrow, for the respondent.

⁷⁸⁵ ANGELLOTTI, J. An opinion was filed on this appeal on July 6, 1909, and judgment given thereon as follows: "The judgment and order appealed from are reversed." The following is a copy of said opinion, the same having been written by Justice Sloss:

"In this action the plaintiff seeks to recover the sum of \$28,500 as damages for the breach of a contract of employment. He alleges that on or about the first day of May, 1902, the defendants Theresa A. Oelrichs and Virginia Vanderbilt, with their brother Charles L. Fair, since deceased, were the heirs at law of James G. Fair, deceased, and the owners of his estate, consisting in large part of real property in the city and county of San Francisco. It is alleged that on or about said date the said heirs of James G. Fair entered into a contract with the plaintiff whereby it was agreed that said heirs should employ the plaintiff for a period of ten years from June 1, 1902, at a salary of \$300 a month, to act as overseer of their lands and the buildings thereon. On August 14, 1902, Charles L. Fair died and all of his interest in the property above mentioned devolved upon his sisters, Theresa A. Oelrichs and Virginia Vanderbilt. Plaintiff, as is averred, entered upon the performance of his duties under the afore-said contract and continued in such employment until about

the twenty-ninth day of June, 1904, when, without his consent, the defendants Theresa A. Oelrichs and Virginia Vanderbilt refused to perform said contract any longer. Plaintiff has ever since been ready and willing to perform said contract upon his part.

"The answer denies the making of the contract as alleged and avers that plaintiff was employed by the Fair heirs from month to month only. The court found that all of the allegations of the complaint were true except the allegation of damage, with respect to which it found that plaintiff had been damaged in the sum of \$11,100. It was further found that the contract of employment alleged by plaintiff was, in the first instance, entered into by word of mouth, but was afterward reduced to writing subscribed by the parties to be charged thereby. The writings regarded by the court as constituting a written memorandum or contract will be more particularly referred to hereafter. It is further found that on the 1st of May, when the original oral agreement was made, the plaintiff ^{was} holding the position of captain of detectives in the police department of the city and county of San Francisco at a salary of \$250 a month; that the heirs of James G. Fair did at that time request him to give up his position as captain of detectives, and assured him that if he would do so they would give him a position for ten years upon a salary of \$36,000, payable in equal monthly payments of \$300, and would within a short time put such employment and the terms thereof in writing and sign the same. It was upon such representations and assurance, the court finds, that plaintiff resigned his said position as captain of detectives and took service with said heirs as alleged. There is a further finding to the effect that it is not in the power of said heirs to restore to said plaintiff his status and position as captain of detectives. The defendants Theresa A. Oelrichs and Virginia Vanderbilt have continuously failed and refused to give to plaintiff any written contract as promised. Upon these findings the court entered judgment in favor of plaintiff and against Theresa A. Oelrichs and Virginia Vanderbilt for the sum of \$11,100, with interest and costs, and said defendants appeal from the judgment and from an order denying their motion for a new trial.

"It is perfectly clear that the contract alleged was one that by its terms was not to be performed within one year and was therefore, under the provisions of the statute of frauds, required to be in writing: Code Civ. Proc., sec. 1973, subd. 1. It is equally clear that the writings mentioned in the findings were not sufficient to comply with the requirements of the statute. The first of these is a general notice reading as follows:

“ ‘Office of Fair Heirs, 230 Montgomery St.,

“ ‘San Francisco, June 18, 1902.

“ ‘To Whom It May Concern:

“ ‘Mr. John F. Seymour is in our employ as superintendent of buildings, and is entitled as our representative to admission to all our properties. We ask the kind consideration of any of our tenants and others whom he may come in contact with.

“ ‘Very respectfully,

“ ‘FAIR HEIRS.

“ ‘By CHARLES S. NEAL.’

787 “ ‘The second is a letter written to Seymour by Charles L. Fair under date of July 22, 1902, and containing the following expression: ‘I suppose by this time you have full knowledge of the property of the estate and hope that everything is pleasant at the office.’ The third is a telegram sent by the defendant Virginia Vanderbilt to Charles S. Neal, under date of March 4, 1904. In it are the words: ‘My sister and S (self) agree to keep Seymour in office at former salary.’

“ ‘Even if it were assumed that the evidence is insufficient to show that either Charles S. Neal or Charles L. Fair was authorized to bind the appellants, and that the defendant Mrs. Vanderbilt was authorized to bind her sister, Mrs. Oelrichs, we find nothing in any of the writings which shows any such contract as the one set up by plaintiff. Giving them their utmost effect, the papers disclose no more than that Seymour was employed by the Fair heirs as superintendent of buildings at a salary. There is no reference to an employment for any given period. As plaintiff had received payment for the time during which he had rendered service, the very essence of his case was a contract of employment for ten years. To satisfy the statute of frauds a memorandum ‘must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intentions of the parties’: 5 Browne on Statute of Frauds, sec. 371. In Breckenridge v. Crocker, 78 Cal. 529, 21 Pac. 179, the court said: ‘The memorandum must contain all the material elements of the contract.’ Again, in Craig v. Zelian, 137 Cal. 105, 69 Pac. 853, it is said: ‘The statute of frauds was originally enacted “for the prevention of frauds and perjuries,” and an agreement . . . is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.’

“ ‘In the absence of evidence to support the finding of a written contract, we are compelled to inquire whether the judgment may be sustained upon the finding that an oral agreement was entered into as alleged. In this particular, too, the sufficiency of the evidence to sustain the finding is

questioned by the appellants. The plaintiff offered testimony tending to show that while he was occupying the position of captain of ⁷⁸⁸ detectives of the police department of the city and county of San Francisco he had been urged and requested by Charles L. Fair and by Hermann Oelrichs, the husband of one of the defendants, to resign his position and enter the service of the Fair heirs. The suggestion came, originally, from Charles L. Fair. After several discussions of the subject, Fair and Oelrichs, the latter asserting that he represented Mrs. Oelrichs and Mrs. Vanderbilt, agreed to give him a ten-year contract at \$300 a month. To this Seymour assented, and about two weeks later he went into the office of the Fair heirs, taking the place of superintendent of buildings. His salary of \$300 a month was paid until his discharge in June, 1904, with the exception of a short period during which a smaller sum was paid him.

"It is claimed by the appellants that the record contains no evidence showing any authority on the part of either Charles L. Fair or Hermann Oelrichs to bind Mrs. Oelrichs and Mrs. Vanderbilt by any such contract as found by the court. We think this contention is sound and must be sustained. The contract was one which, as we have seen, was required to be in writing, and under section 2309 of the Civil Code 'an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing': *Nason v. Lingle*, 143 Cal. 363, 77 Pac. 71. The record does not show that any such written authority was given by either of the appellants to Charles L. Fair or to Hermann Oelrichs. Indeed, as concerns Fair, it is not claimed that he assumed to act on behalf of his sisters. The position taken by respondent in connection with the effect of Oelrichs' acts is that the specifications of insufficiency of evidence contained in the bill of exceptions were not such as to raise the question of Oelrichs' authority to bind the appellants. As has been stated, the allegation of the complaint is simply that the plaintiff entered into the contract alleged with the Fair heirs, and the finding follows the allegation of the complaint. One of the specifications (designated 'second') reads as follows: 'The evidence is insufficient to justify the finding that the alleged contract set forth in paragraph 3 of plaintiff's complaint was on the 1st of May, 1902, or thereabouts, entered into orally or by word of mouth by and between the plaintiff on one side and C. L. Fair and these defendants, or any or either of them. ⁷⁸⁹ on the other, in this, that the evidence is insufficient to show that the plaintiff Seymour ever orally entered into any contract of service for a term of years as alleged in his complaint with C. L. Fair and his sisters, Theresa A. Oelrichs and Virginia Vanderbilt, or any or either of them; that the evidence is insufficient to show that Hermann Oelrichs, as the at-

torney in fact of said Theresa A. Oelrichs and Virginia Vanderbilt, ever orally or in writing entered into any such contract with plaintiff as is alleged in paragraph 3 of his complaint; that none of the oral communications had between plaintiff and C. L. Fair or Hermann Oelrichs or Theresa A. Oelrichs contain any evidence of any such contract as set forth in paragraph 3 of plaintiff's complaint.' A further specification ('twelfth') states that 'the evidence is insufficient to show that either of these defendants ever entered into any agreement by word of mouth, on or about the eighteenth day of June, 1902, with plaintiff.' We see no reason for holding that these specifications were not sufficiently definite to enable the appellants to raise the point that there was no evidence to show the authority of Hermann Oelrichs to make the contract which he assumed to make on behalf of Mrs. Oelrichs and Mrs. Vanderbilt. The ultimate fact, and the fact as alleged and found, is that the plaintiff entered into the contract in question with Mrs. Oelrichs and Mrs. Vanderbilt. Such contract could have been made in one of two ways only: by the defendants themselves or by their agent duly authorized. The specification that there was no evidence that the contract alleged was entered into between the defendants and the plaintiff is all that is required. To meet such specification the plaintiff must be able to point in the record to evidence showing either that the appellants made the contract themselves or that they authorized its making by an agent who made it. The contention of respondent is based upon a narrow construction of that part of the specification first quoted, which states that the evidence is insufficient to show that Mr. Oelrichs as the attorney in fact of Mrs. Oelrichs and Virginia Vanderbilt ever entered into any such contract with plaintiff as is alleged in paragraph 3 of plaintiff's complaint. This, it is claimed, points merely to the question of whether or not Oelrichs actually made the agreement and assumes his authority to do so. As this court has shown by its later decisions, it is no longer ⁷⁹⁰ disposed to scrutinize specifications of insufficiency with the minuteness which was applied in earlier cases, such as *De Molera v. Martin*, 120 Cal. 544, 52 Pac. 825. The more liberal view now entertained is illustrated by the rulings in *American Type Founders Co. v. Packer*, 130 Cal. 459, 62 Pac. 744; *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142; *Drathman v. Cohen*, 139 Cal. 310, 73 Pac. 181; *Holmes v. Hoppe*, 140 Cal. 212, 73 Pac. 1002; *Bell v. Staacke*, 141 Cal. 194, 74 Pac. 774; *Harris v. Duarte*, 141 Cal. 498, 70 Pac. 298, 75 Pac. 58. In the case last cited the chief justice declares the rule to be that the specifications are sufficient when they are as specific as the findings themselves. In this case there is no finding that the contract was made through Oelrichs as agent or that Oelrichs had authority to act as agent.

and there was therefore no necessity for a specification directed to the fact of such agency.

"It is contended by the respondent that, regardless of the foregoing consideration, he is entitled to recover upon the theory of an estoppel. The alleged estoppel is based upon the findings of the court to the effect that Seymour, upon the faith of representations that he would have a ten-year contract, resigned, and lost irrevocably his position in the police department. This cannot, in the present state of the record, be invoked as a ground for affirming the order. If Oelrichs had no authority to bind his wife and her sister by a ten years' contract, they could not be estopped by his declaration that they would give Seymour such contract, unless they took some action with notice of the fact that this declaration had been made: *Lambert v. Gerner*, 142 Cal. 399. 76 Pac. 53. Without going into a recital of the evidence offered for the purpose of connecting these appellants with the transaction, we may say that there is nothing to show that either of them had knowledge, when Seymour commenced his service, that his employment was other than from month to month. Each of them, when informed of his claim that he had been employed under a contract for ten years, promptly repudiated the alleged contract. If it could be said that the evidence justifies an inference that Oelrichs had authority to bind one or both of the appellants by some sort of contract, it does not, in the absence of proof of written authority (Civ. ⁷⁹¹ Code, sec. 2309), justify the inference that he had authority to bind them by a contract required to be in writing. Even though they had knowledge that he had made a contract of employment with Seymour on their behalf, their duty to inquire into the terms of such contract did not impute to them notice that he had exceeded his authority and undertaken to bind them by an agreement required to be in writing. The finding of the court that the appellants had requested the plaintiff to resign his position in the police department, etc., is, therefore, not supported by the evidence. This finding is attacked by specifications which are sufficient under the views above declared.

"It is necessary, therefore, that the order denying a new trial be reversed. Upon a new trial the plaintiff may succeed in proving by competent evidence the authority of Oelrichs to bind the appellant by a contract of employment for ten years. We do not here pass upon the question whether, if such proof had been made, the appellants would upon the facts here disclosed be estopped to assert the invalidity of the oral contract made by Oelrichs with plaintiff. The question of estoppel is one which often depends upon the peculiar facts shown, and, as the evidence on another trial may vary from that here introduced, we deem it better to omit discus-

sion of this question. Nor do we, for similar reasons, pass upon the question of the measure of damages."

It will be observed that the court did not in this opinion pass upon the question whether, assuming that Mr. Oelrichs had the power to bind the appellants by a written contract for ten years, the appellants would, upon the facts disclosed by the record, be estopped to assert the invalidity of the oral contract made by said Oelrichs and Charles L. Fair with plaintiff, and also failed to pass upon the question of the measure of damages. Upon petition for rehearing it was concluded by the court that the question of estoppel should be determined for the purposes of a new trial, and solely for that reason an order vacating the decision was made.

We adhere to the views expressed in the former opinion as to the questions determined therein, and as to such questions adopt the same as the opinion of the court. For the reasons stated therein, the judgment and order denying a new ⁷⁹² trial must be reversed, but for the purposes of a new trial that must follow, we will determine the question of estoppel.

In our discussion we shall assume, of course, that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendants as is alleged to have been made by him with plaintiff. If he was so authorized, it is apparent that defendants are bound by his acts, conduct and statements to the same extent that they would have been had they been personally present and personally had done just what he did. So assuming, the facts that plaintiff's evidence tended to show are substantially as follows: Plaintiff was captain of detectives in the police department of the city and county of San Francisco, at a salary of \$250 per month. Under the law, he held practically a life position as captain of police, being removable therefrom only for good cause after trial. All this was known to the defendants and to Charles L. Fair, to whose property they have succeeded. Under these circumstances they offered him a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the place and go into anything else unless he was certain of steady employment, and they then told him that they would give him a ten-year contract at \$300 per month. This was assented to by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks, being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff:

"Now, in regard to this contract, you leave that stand until I get back, and I will give you the contract," Plaintiff asked him why it could not be done "now," and Fair told him not to be afraid, it would be all right, everything would be all right. It was understood that he was to go to work at once. On leaving Mr. Fair, plaintiff met Mr. Oelrichs and told him about his conversation with Fair, and Oelrichs said: "As far as I am concerned I will ⁷⁹³ give you my part of it now if you want it. I represent Mrs. Oelrichs and Mrs. Vanderbilt and there will be no trouble about it at all, but you might just as well leave it go until Fair returns," and plaintiff said: "All right." This was about June 1, 1902. Plaintiff relied absolutely upon the understanding that he was to have a written contract for ten years at \$300 a month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. The morning Fair went away he asked plaintiff when he was going to resign, and plaintiff said "To-day," and Fair said, "All right, you go ahead; it will be all right; everything will be all right on my return." He did resign at once and his new employment commenced June 1, 1902. Fair was killed near Paris, France, August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received \$300 a month therefor to July 1, 1904, when defendants, having determined to sell all their San Francisco property, discharged all of their employes, including plaintiff, and have ever since refused to recognize him as an employe or pay him any portion of the salary agreed upon. Plaintiff had no intimation that either Mrs. Oelrichs or Mrs. Vanderbilt did not know all about the terms upon which he entered their employ until November, 1903, when an attempt, which was not persisted in, was made to reduce his salary; Mrs. Oelrichs on November 30, 1903, told him that Mr. Oelrichs had no right to make such an arrangement. There was nothing to indicate that Mrs. Vanderbilt personally had any knowledge that plaintiff was an employe at all until after Fair's death, or that she personally knew anything about the alleged contract. It is not claimed by plaintiff that either Mr. Oelrichs or Mr. Fair did not act in perfect good faith in this matter, it being conceded that each of them fully intended to execute the written contract.

The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, "invalid" under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities: 5 Browne on Statute of Frauds, sec. 448. ⁷⁹⁴ He necessarily is compelled to rely solely on the claim

that the defendants by their conduct and promises, on which he was entitled to and did rely, having induced him to give up his life position in the police department in order to enter their employ for a term of years at \$300 a month, on the assurance from them that they would give him a written contract for such time and amount, and it being impossible for him to be placed in statu quo, are estopped from now setting up the statute of frauds as a defense to his action on the contract. Under this claim, the fact of part performance by plaintiff plays no part whatever. It was the change of position caused by his resignation from the police department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service, but was something that must be done by plaintiff before he could begin to perform, as was known to the defendants. Plaintiff's case, in this regard, would be just as strong if after his resignation he had been prevented by defendants from beginning to perform.

The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle "thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme": 2 Pomeroy's Equity Jurisprudence, sec. 921. It was said in *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418: "The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution; and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious ⁷⁹⁵ injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise: See 5 Browne on Statute of Frauds, sec. 457a. In the section last cited, Mr. Browne says: "A plaintiff . . . must be able to show clearly . . . not only the terms of the contract, but also such acts and conduct of

the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made."

We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies "in every transaction where the statute is invoked." It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618, and quoted therefrom in *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695, as follows: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."

The question, then, is whether the facts of this case bring it within the principle we have discussed. It is clear that there was such a change of position on the part of plaintiff in his irrevocable surrender of his office in the police department, ⁷⁹⁶ induced in fact by his reliance on the promise of defendants and Fair that a written contract for ten years at \$300 a month would be given, that he would incur great injury and loss in case the defendants are permitted to rely upon the statute of frauds as a defense. That there would necessarily be such a change of position on his part in the event that he relied upon their promise and accepted their offer was known to them, and the promise was given with this knowledge and with the intent that it should be relied on by him and the change in his position thereby induced. The injury done plaintiff by a repudiation of the promise by defendants under these circumstances would certainly appear to be "unjust and unconscientious." Is it permissible to them, in view of the well-settled principle stated, to so repudiate it by interposing the fact that the contract has not been reduced to writing, as promised, as a defense to this action?

Learned counsel for defendants say that no fraud on the part of defendants is shown, and that there can be no estoppel in the absence of fraud on the part of the person estopped. The presence of fraud is, of course, essential. It is established by a multitude of cases that to constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct an actual intent to mislead is not essential. Mr. Pomeroy in his work on Specific Performance says that the fraud essential in such cases is not necessarily an antecedent fraud, consciously intended by a party in making the contract, but a fraud inhering in the consequence of thus setting up the statute: Sec. 104. In *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394, it was aptly said: "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representation, have created a belief of the existence of a state of facts which it would be unconscionable to deny; but it is not essential that he should have been guilty of positive fraud in his previous conduct. . . . All that is meant in the expression that an estoppel must possess an element of fraud is, that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. . . . There need be no precedent corrupt motive or evil ⁷⁹⁷ design": See, also, 2 Pomeroy's Equity Jurisprudence, sec. 805. It is unnecessary to cite other authorities upon this well-settled doctrine in regard to equitable estoppel. We do not understand it to be disputed by counsel for defendant. Their claim, as we understand it, is that there is nothing more in this case than a mere promise on the part of defendants to give the written contract, made honestly and in good faith, and that a refusal to comply with such a promise so made cannot serve as a basis for the application of the doctrine of equitable estoppel, the contention being that the mere failure to keep an oral promise to reduce an oral contract to writing cannot suffice to constitute the fraud essential to the application of such doctrine, and that there must be some other fraud shown, such as actual fraud to prevent the contract being reduced to writing. This claim presents the most doubtful question in this case. The authorities all recognize the proposition that the acts, conduct or statements relied on as constituting ground for the estoppel must generally be acts, conduct or statements amounting to a representation of fact, as distinguished from mere expression of opinion or intention, or mere promise of something to be done in the future. It has therefore been said many times that the mere refusal to make a writing, as agreed, is not such fraud as will take a

case out of the operation of the statute of frauds under the doctrine of equitable estoppel. This, undoubtedly, is ordinarily true, even where a party, relying simply on the honor, word or promise of the other, has changed his position to his injury because thereof. But is it applicable to such a state of facts as we have before us? Practically, defendants said to plaintiff: "We want you to enter our employ at once. We know that to do so you must give up your life position in the police department and that you are not willing to do this unless you are assured of employment for ten years at \$300 a month. A written contract is, under our statute, essential to guarantee you such employment. We will execute this contract just as soon as Mr. Fair returns from Europe. Go ahead and resign your position now and commence work with us at once, and it will be all right. The written contract will be given as promised." Here certainly, in the language of a note to section 877 of 2 Pomeroy's Equity Jurisprudence, was a representation of a future intention ⁷⁹⁸ absolute in form, deliberately made for the purpose of influencing the conduct of the other party, and it is stated in such note that, notwithstanding the rule set forth in the text that a statement of intention merely cannot be a misrepresentation amounting to fraud, such a representation of intention as last set forth, if acted upon by the other party, is generally the source of a right, and may amount to a contract enforceable as such by a court of equity. Mr. Bigelow, in discussing the essentials of estoppel by conduct, and particularly the necessity of a representation or concealment of a fact, says that where the statement or conduct is not resolvable into a statement of fact, and does not amount to a contract, the party making it is not bound unless guilty of clear moral fraud or unless he stood in a relation of confidence toward him to whom it was made: 5 Bigelow on Estoppel, p. 572. The same learned author further says that situations may arise in which a contract should be held an estoppel, as in certain cases where only an inadequate right of action would, if the estoppel were not allowed, exist in favor of the injured party, citing the case of Faxton v. Faxton, 28 Mich. 159, in which a mortgagee was held estopped from enforcing his mortgage, where he had induced the son of a mortgagor, contemplating removal, to remain on the mortgaged land and care for it and support the family of the mortgagor, to whom the mortgagee was related, on a promise, honestly made, that the mortgage would never be enforced if he did so. In Harris v. Brooks, 21 Pick. 195, 32 Am. Dec. 254, it was held that a parol declaration by the holder of a note to a surety that he would look to the principal only was a good defense for the surety, on the ground that it lulled the party into security and prevented

him from obtaining his indemnity, and that it would be a fraud on the part of the holder to subsequently call upon the surety contrary to such assurance. In *White v. Walker*, 31 Ill. 422, a somewhat similar case, it was said that while a promise to forgive a debt or forbear its collection, unsupported by any consideration, was ineffectual as a defense viewed merely as an agreement, yet if the surety has been induced by such assurance to neglect any of the means which might have been used for his indemnity, the "promise may have that effect as an estoppel, which it wants as a contract, and amount to a defense in any subsequent action brought by the creditor." These ⁷⁹⁹ authorities are cited simply to show that the mere fact that there was no misrepresentation of fact, but only a promise of future action, is not always a bar to equitable relief. The cases to be found in support of the doctrine that the mere omission or refusal to make a writing, as promised, is not such fraud as will take a case out of the operation of the statute of frauds, are generally cases where the promise was not made under such circumstances as would warrant the conclusion that it constituted, in the eye of equity, a contract, the repudiation of which would be a manifest fraud on the other party. For instance, in stating the rule, the supreme court of Indiana said in *Caylor v. Roe*, 99 Ind. 1, that never has it been held that the simple failure or refusal to reduce a verbal contract to writing, unaccompanied by elements of estoppel or other circumstances invoking the equitable powers of the court, is such a fraud as will authorize the courts in excepting the contract from the operation of the statute of frauds. The case of *Equitable Gas etc. Co. v. Baltimore etc. Co.*, 63 Md. 285, cited by defendants, was a case of an oral contract for the sale of personal property which, according to its terms, was not to be performed within one year. It was intended by the parties that it should be put into writing. The action was by the vendee to obtain an injunction preventing the disposition of the property to others and for specific performance. There were allegations showing the irreparable injury that would be suffered by the plaintiff in view of its action had in reliance on the contract. The court recognized it to be a settled rule "that the equity of part performance to entitle a plaintiff to specific execution of a contract within the statute does not relate to contracts for personal service not to be performed within a year." But they further said that here the parties intended a written contract, and that if such contract was fraudulently withheld, if executed, or if not signed, if the execution be fraudulently and without justifiable cause delayed, a court of equity may require its production or enforce proper execution. It is obvious that "the application of the rules as to equitable enforcement must to a considerable

extent be governed by the circumstances of each case": 5 Browne on Statute of Frauds, p. 586.

While the question is by no means free from doubt, we believe that it should be held that there were sufficient facts ⁸⁰⁰ in this case to support a conclusion that the promise here to give such a written agreement as was required by the statute was made under such circumstances that the irrevocable surrender by plaintiff of his position in the police department in full reliance thereon made it, in the eye of equity, a binding contract, the subsequent repudiation of which by defendants would constitute such a manifest fraud as would justify the application of the doctrine of equitable estoppel.

For the purposes of a new trial it may further be properly said that we are entirely satisfied with the opinion filed in this case by the district court of appeal of the third district, written by Justice Hart, of that court, so far as the question of measure of damages is concerned. We adopt that portion of their opinion as the opinion of this court. It is as follows:

"3. Upon the question of damages, it is contended by the defendants that the basis or measure thereof for a breach of contract such as the one under consideration, where the action is tried before the expiration of the term of service stipulated in the contract, is such actual damage as the evidence shows the plaintiff has sustained up to the time of the trial. Such actual damage in such a case would, of course, be the equivalent in amount to the salary for that portion of the stipulated term of employment ending with the beginning of the trial of the action, less what the plaintiff has been paid by the defendants and what he has earned and received, if anything, from other employments after his discharge from the service of the defendants and up to the trial of the action: *Schroeder v. California Yukon Trade Co.*, 95 Fed. 296.

"It appears that the plaintiff, some eight months after his employment under the contract with defendants was discontinued, secured a position with Wells, Fargo & Co. at a monthly salary of \$200. The court based its award of damages on the aggregate salary to which plaintiff would have been entitled for the unexpired portion of the contract period of ten years with defendants, deducting therefrom, however, the amount earned by plaintiff in his employment with Wells, Fargo & Co. up to the time of the trial, together with the amount which he would earn during the remainder of the ten years at the salary of \$200 per month, the amount paid him by Wells, Fargo & Co., assuming that he would retain his employment ⁸⁰¹ and salary with Wells, Fargo & Co. during all of the unexpired portion of the stipulated ten years.

"Counsel have been unable to find any California decision in which the question of the measure of damages is directly presented, discussed and adjudicated in a case, like the one

here, where the action for the violation of the terms of a contract of hiring has been instituted before the expiration of the period of time or the term for which the service of a party is stipulated to run. The point has been squarely presented and decided, however, in other jurisdictions, but the conclusions reached are not uniform. In some states the rule contended for by the appellants is laid down and sustained upon reasons which appear to have some support, while in others it is held that the proper basis upon which damages should be awarded for the breach of the terms of a contract such as the one here is the entire term for which the party has been employed, making deductions of earnings from other employments in which the plaintiff might have been engaged after his discharge from service by the master and also allowing for what he may earn, by the exercise of reasonable exertion and diligence, during the balance of the unexpired term. We are thoroughly persuaded that the weight of authority and by far the best reasoned cases support the position of the respondent. . . .

"The gist of the complaint is in the breach of the contract and the injury resulting to plaintiff by reason of such breach. The action is not, in other words, one in which the plaintiff seeks to recover wages, but is for damages for the violation of the terms of the agreement by which he was employed for certain compensation to perform services for the defendants for a stipulated term of years. The measure of damages is, therefore, *prima facie*, the contract price. In *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437, an action involving the breach of a contract of hiring, it is said: 'There can be but a single action, and not successive actions. The action must be for damages for a breach of the contract, and not in *assumpsit* for constructive services, or for wages. All damages sustained by the servant, in consequence of the wrongful act of the master, whether present or prospective, must be included in the recovery. A single judgment for the injury bars all other claims. The ⁸⁰² suit may be brought at any time after the breach, either before the expiration of the term of the contract or afterward, within the statutory limits. But whether brought before or after the expiration of the term of the contract, the measure of the damages is the same.'

"The measure of damages,' says the Missouri court of appeals, in *Lally v. Cantwell*, 40 Mo. App. 44, speaking of a contract like the one here, 'is the contract price, although the master may recoup the damages by showing that the servant either earned, or by reasonable exertion might have earned, money in other employment during the contract period. . . . Nor is the servant in such cases confined to damages which have accrued up to the institution of the suit, or even up to

the day of the trial, as the defendant's counsel erroneously supposes, where the damages are of a continuing character.'

"The rule as thus declared is laid down and sustained in the following cases: *Pierce v. Tennessee etc. R. Co.*, 173 U. S. 1, 19 Sup. Ct. Rep. 335, 43 L. ed. 591; *De Camp v. Hewitt*, 11 Rob. (La.) 290, 43 Am. Dec. 204; *Sutherland v. Wyer*, 67 Me. 64; *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010; *Miller v. Woolman-Todd Boot and Shoe Co.*, 26 Mo. App. 57; *Boland v. Glendale Quarry Co.*, 127 Mo. 520, 30 S. W. 151; *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 57 N. E. 984; *Wilke v. Harrison*, 166 Pa. 202, 30 Atl. 1125; *East Tennessee etc. R. Co. v. Staub*, 7 Lea (Tenn.), 397; *School District v. McDonald*, 68 Neb. 610, 94 N. W. 829, 97 N. W. 584; *Daniell v. Boston & M. R. Co.*, 184 Mass. 337, 68 N. E. 337; *Forked Deer P. Co. v. Shipley*, 25 Ky. Law Rep. 2299, 80 S. W. 476; *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273, 27 Atl. 501, 22 L. R. A. 74.

"In the last-mentioned case it is said: 'A contract of employment for a year for a certain sum per week, payable weekly, is entire and indivisible, and only one action for the breach thereof can be maintained by the discharged employé.'

"But there is no necessity for reviewing the many cases which hold with respondent that the measure of damages in such a case as the present one is, *prima facie*, the contract price. The rule is invariably applied in cases of personal injury, where the jury is permitted, in the assessment of damages, to consider evidence bearing not alone upon the immediate, but upon the future, effect of the injury upon the complaining party. Nor is the rule disturbed by the argument, ⁸⁰³ advanced by the appellants, that it is impossible to determine with accuracy what damage plaintiff would actually suffer during the remainder of the unexpired term. It is to be conceded that the question of the extent of the future damage which a complaining party in a case like the one at bar would suffer is fraught with some difficulty. Yet it hardly rests with the defendants to complain of such difficulty, since it arises only through the wrongful act of the defendants themselves. There is no claim here that the plaintiff was incompetent for any reason to properly discharge the duties assigned to him by the defendants. The specific reason for his dismissal from their service does not appear, but it may be safely assumed that if the cause was inefficiency in the performance of the duties of the position, that fact would have been set up. Therefore, if the defendants conceive that to be a hard rule which compels them to respond in damages based largely upon what they characterize as pure speculative injury, they have themselves and no one else to blame. It is well said in *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010: 'But it is not the law that damages which may be larger

or smaller because of such uncertainties are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which bear upon the matters involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit. The liability to have the damages which he inflicts by breaking his contract so assessed is one which the defendant must be taken to have understood when he wrongfully discharged the plaintiff, and if he did not wish to be subjected to it he should have kept his agreement.' And upon this same point our supreme court in *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708, uses the following language: 'It has often been held that damages may be recovered for the destruction of merely immature growing crops, although there was no absolute certainty that they would ever mature, for he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages': See *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62."

804 The judgment and order denying a new trial are reversed.

Shaw, J., Melvin, J., Lorigan, J., and Henshaw, J., concurred.

Rehearing denied.

A Contract for Personal Services not to be Performed Within One Year from its execution is within the statute of frauds. Any excess of a year, however short, brings the contract within the statute and renders it unenforceable if not in writing: *Chase v. Hinckley*, 126 Wis. 75, 110 Am. St. Rep. 896; *White v. Fitts*, 102 Me. 240, 120 Am. St. Rep. 483.

The Memorandum Required to Satisfy the Statute of Frauds must give the names of the contracting parties or some description by which they can be identified: *Mertz v. Hubbard*, 75 Kan. 1, 121 Am. St. Rep. 352. The memorandum must contain, expressly or by implication, all material terms of the agreement: *Hall v. Misenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474.

Unless an Agent is Lawfully Authorized in Writing, any contract made by him as agent for his principal with respect to the sale of lands is unenforceable under the statute of frauds: *Thompson v. New South Coal Co.*, 135 Ala. 630, 93 Am. St. Rep. 49. See, also, *Henry v. Black*, 210 Pa. 245, 105 Am. St. Rep. 802. But it is not necessary that an agent in giving a license to cut standing timber should have written authority: *Antrim Iron Works v. Anderson*, 140 Mich. 702, 112 Am. St. Rep. 434. And where there is an oral contract for the sale of lands, and the purchaser pays a portion of the purchase price and is put in possession by the vendee's agent, it is not material that the agent's authority is not in writing: *Jones v. Gainer*, 157 Ala. 218, 131 Am. St. Rep. 52.

Damages for the Wrongful Discharge of an Employé are considered in the notes to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515; *Decamp v. Hewitt*, 43 Am. Dec. 205. Ordinarily the measure of damages in

such a case is the amount agreed to be paid, less such sums as he has earned or by the exercise of reasonable diligence might have earned in the line of his business during the remainder of the period covered by the contract of employment: *Baltimore Baseball Club v. Pickett*, 78 Md. 375, 44 Am. St. Rep. 304; *Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384; *Webb v. Depew*, 152 Mich. 698, 125 Am. St. Rep. 481.

ESTOPPEL FROM PLEADING THE STATUTE OF FRAUDS IN ACTIONS ON CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR.

- I. Preliminary Observations on Estoppel, 172.
- II. The Exigency of Pleading the Statute, 173.
- III. When and Why a Party is Estopped from Pleading the Statute.
 - a. Discussion of the Principal Case, 174.
 - b. The Dilemma of Part Performance, 174.
 - c. Change of Position or Situation, 176.
 - d. Prejudice to Person Setting Up Estoppel, 177.

I. Preliminary Observations on Estoppel.

Estoppel as a subject for discussion covers so extensive a field and holds such a variety of legal outcrops in its domain, that its limitation to even one of them demands attention as careful on the part of the reader as on the part of the writer. As that particular branch of the subject which deals with the matter intended to be here discussed finds its place under equitable estoppel, it will be of aid to consider, first, just what equitable estoppel is. Mr. Pomeroy defines equitable estoppel as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who has in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract or of remedy: Vol. 2, sec. 804. That definition read with Sir James Stephen's, as quoted by Mr. Pomeroy, note 1, section 804, conveys perhaps the most accurate formula for the guidance of the student. Stephen's definition is: "When any person, under a legal duty to another person to conduct himself with reasonable caution in the transaction of any business, neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is, in the natural course of things, the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act." Equally the statute of frauds is subject vast enough for a volume of dissertation, and therefore in this inquiry it is proposed to select that portion of it which requires that contracts not to be performed within one year must be in writing and signed by the party to be charged therewith. Then, having limited each of the subjects to be considered, it is proposed to read them together, and to discover how far has extended the doctrine of equitable estoppel as applied to the right to set up the defense of the invalidity of a contract under the provisions of the statute of frauds referred to.

Before proceeding, however, it is well, even at the risk of repeating matter that is so well known as almost to warrant our treating it as axiomatic, to show from what estoppel has generated and in what atmosphere it has grown. The word shows its ancient French origin, and we lean to the proposition that equitable estoppel is in reality the spirit extract of fraud, bearing to it almost the relation of alcohol to fermentation, and if there is an absence of direct or actual fraud, the attitude of denial of that which is just and of good conscience of itself constitutes the element of fraud upon which the doctrine of estoppel fastens and feeds. It has lived with the common law from its beginning, although its rules have been tempered with its application, and while Lord Coke's definition, like his times, is rough, that an estoppel is where a man is concluded by his own act or acceptance to say the truth, it is so fine in its ruggedness that, if perhaps there is fault in it for too wide a generalization, in the main it covers the ground of the later definitions, which merely put into a logical and legal phraseology that if a man by his statements or behavior leads another to do something which he would not have done but for the expression of that language or the exhibition of such behavior, such first man shall not be allowed to deny his utterance or act to the loss, injury or damage of the other one. He shall neither tell the lie nor act it. If he tries to do either, it is fraud. That fraud has begotten equitable estoppel which effectually alike at law and in equity prevents the perpetration of the injustice.

II. The Exigency of Pleading the Statute.

As this note involves the consideration of two subjects—the plea of the statute and estoppel from pleading it—we shall take first in order that which deals with the necessity for pleading the statute as a defense to any given action. Where the class of contract referred to in the statute of frauds is sued on, such as a contract not to be performed within one year, it is a prerequisite that such contract shall have been, under the statute, reduced to writing. Notwithstanding the fact that the contract has not been so reduced to writing, it is permissible in nearly all jurisdictions to maintain the action if the contract has been part performed. Thus arises the necessity of pleading that the contract relied on is not in accordance with the requirements of the statute. It is not correct to say that the contract is void under the statute. It may be voidable, but the preferable term to employ is unenforceable: 2 Page on Contracts, secs. 739, 740, and cases noted. The reply to such a plea is generally part performance; but there sometimes arises a set of circumstances which disclose that the plaintiff has done something by inducement of the defendant's language or acts which, while it does not amount to the technical part performance required to oust the statute, yet in equity entitles the plaintiff to relief, which he claims by way of saying that the defendant has disintitiled himself from using the provisions of the statute to shelter him from the consequences of his acts. It is to the consideration of that stage of the proceedings we desire to focus the attention of the reader.

III. When and Why a Party is Estopped from Pleading the Statute.

Having arrived at the very kernel of the subject, we proceed to examine it, stripped of the husk of part performance and protected

solely by an allegation of facts which are to be demonstrated as sufficiently equitable to preclude the defendant from the benefits of pleading a statute which says that the agreement sued on by the plaintiff is invalid at law, because it is not in writing. But that statute—the statute of frauds—was not passed to rear frauds but to destroy them. In the words of Mr. Pomeroy, “the statute of frauds having been enacted for the purpose of preventing fraud shall not be made the instrument of shielding, protecting or aiding the party who relies upon it, in the perpetration of a fraud, or in the consummation of a fraudulent scheme”: Vol. 2, sec. 921.

a. **Discussion of the Principal Case.**—If the subject needed introductory words, none could be more appropriate than the oft-quoted excerpt from Mr. Justice Swayne's opinion in *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618: “The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectation upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.” That dictum is the keystone of every arch under which the statute of frauds flows harmlessly. Round that dictum, Mr. Justice Angelotti delivered the strong opinion in *Seymore v. Oelrichs*, 156 Cal. 782, ante, p. 154, 106 Pac. 88, and with which by reason of its importance and the excellence of its carefully compiled matter we propose to deal. The facts warrant no further reference than to say that the action resolved itself into an ordinary breach of contract in which the defendants agreed to employ the plaintiff for a term of ten years at a salary of three hundred dollars per month. The plaintiff was at the date of the contract in a lucrative position, which position he resigned in order to accept that offered by the defendants, and the fact of plaintiff's holding such position was known to the defendants and formed ground of their desire to employ the plaintiff.

Perhaps the most persuasive part of Mr. Justice Angelotti's opinion is that which deals with this portion of the case. The plaintiff says, and the defendants deny, that it was part of the contract itself, which would then have been, “In consideration of your resigning your present position and entering my employment, I will employ you for the term of ten years at \$300 per month.”

Assuming this to have been the agreement, there arises what we may call

b. **The Dilemma of Part Performance.**—The plaintiff would clearly have partly performed his contract by resigning the position he held when the contract was entered into. But laying the conflict aside and leaving the contract without the condition of resignation, there remains that, induced by the language of defendants, and irrespective of obligation, the plaintiff did in fact resign that position in order to complete his contract with defendants. In such a setting the plaintiff's position scintillates in the light of authority. In *Butt v. Butt*, 91 Ind. 305, there was an agreement to extend the time of redemption for six years after a sale by execution. It was not in writing; nothing had been paid on account; it was not to be performed within one year, and the defendant sought to take advantage of it, although he had given the extension of the time to redeem to the plaintiff, who could have redeemed within the statutory time, but relying on his agreement with the defendant,

expended the money otherwise. The court after repeating those applicable dicta which are common to all well-considered opinions, said that such contracts were not void, but voidable, and, when fully consummated, valid, and are binding, when so far executed that the parties cannot be placed in statu quo. "Just men, after making such a contract, would have felt bound in conscience to observe it. The appellant, therefore, in relying upon the contract, and allowing the time fixed by law for the redemption of his land to expire, was not guilty of laches. His confidence in the word of the appellee, authorized, perhaps, by previous acquaintance, was certainly not blamable. Now, to permit the appellee to take advantage of this confidence would be subverting the purposes of the statute on which he relies." The words of that opinion read as though they might have been translated entire from Mr. Justice Angelotti's opinion of the plaintiff's position in the principal case. In *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394, we find: "There must be such conduct on the part of the person against whom the estoppel is alleged as to make it a fraud for him to gainsay what he had expressly admitted by his words, or tacitly confessed by his silence, but there need not be in the precedent acts actual fraud or evil design. All that is meant in the expression that an estoppel must possess an element of fraud is, that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon." In *Pope v. Armsby Co.*, 111 Cal. 159, 43 Pac. 589, the well-worn definition from *Bigelow on Estoppel* is equally well repeated: "An estoppel in pais is a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." These cases seem to have been created so that the principal case should coincide with them. "Which have induced a change of position" tallies exactly with the action of the plaintiff in that case. He resigned or surrendered a sure means of livelihood to enter the defendants' service, and for no other reason, for it was never contended, or even suggested, that he would have been employed by them and at the same time be allowed to continue his official position. Another equally virile authority is *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418: "The refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds." Once more referring to the opinion in *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618, we find on the same subject of estoppel in pais: "It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose when the statute cannot be invoked." To precisely the same effect are *Harkness v. Toulmin*, 25 Mich. 80, and *Faxon v. Faxon*, 28 Mich. 159, where mortgagees were estopped from foreclosure by verbal representations to the mortgagor; and *Truesdail v. Ward*, 24 Mich. 117, a case of forfeiting rights under a land contract where parties were led to believe they were abandoned. We cannot leave this discussion of the prin-

cial case without adding that it appears to us to fill squarely the five essential elements of an estoppel in pais. First, the false representation of material facts is supplied by the promise to employ for ten years; second, it was made with knowledge that the plaintiff must necessarily resign his then present office; third, the plaintiff was led to believe the promise would be performed; fourth, it was made under color of bona fides; and fifth and lastly, the plaintiff acted on it by resigning the position referred to, thus completely bringing himself within the protection of the salutary rule so carefully expounded in the opinion referred to.

c. *Change of Position or Situation.*—From what appears above, it will be manifest that one of the important factors that go to make up the title to an equitable estoppel is that the injured party so changed his position, not unreasonably relying on the statement of the other, that the injury resulted from the changed attitude of such other, and a fortiori the case is stronger where such change, as in the principal case, was practically the surrender of an irrecoverable position. The authorities are almost without number, and we select those which bear directly upon the points in issue in the principal case, foremost among which is the change of position of the injured party in consequence of the acts or language of the other party interested. Among the latest cases affirming the well-known doctrine that it is an essential element of an equitable estoppel that the person asserting it shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped, are *Powers v. Wells*, 244 Ill. 558, 91 N. E. 717, which cites on the same position *Knoebel v. Kircher*, 33 Ill. 308; *Smith v. Newton*, 38 Ill. 230; *Hefner v. Vandolah*, 57 Ill. 520, 11 Am. Rep. 39; *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305. In *Smith v. Cleaver* (S. D.), 126 N. W. 589, which follows and adopts *Sutton v. Consolidated Apex M. Co.*, 15 S. D. 410, 89 N. W. 1020, the same rule is laid down, but emphasizing that it is not sufficient to show that the language, acts or conduct of one might have misled a party to his prejudice, but it must affirmatively appear that such party was in fact misled or induced by such acts, conduct or language to do something that he would not otherwise have done except for such acts, language or conduct. *Bragdon v. McShea* (Okl.), 107 Pac. 916, and *Hancock v. King*, 133 Ga. 734, 66 S. E. 949, adopt the same reasoning. The earlier cases do not go quite the length of *Smith v. Cleaver* (S. D.), 126 N. W. 589, although throughout the principle is affirmed that the estoppel can be called into operation to defeat what would be an unconscionable use of the statute: *Carter v. Darby*, 15 Ala. 696, 50 Am. Dec. 156; *Ware v. Cowles*, 24 Ala. 446, 60 Am. Dec. 482; *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550; *Merriman v. Schmitt*, 211 Ill. 263, 71 N. E. 986; *King v. Mead*, 60 Kan. 539, 57 Pac. 113; *Tower v. Haslam*, 84 Me. 84, 24 Atl. 587; *Plumer v. Lord*, 91 Allen, 455, 85 Am. Dec. 773; *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931; *Oak Creek Val. Bank v. Helmer*, 59 Neb. 176, 80 N. W. 891; *Blair v. Wait*, 69 N. Y. 113; *Faison v. Grandy*, 128 N. C. 438, 83 Am. St. Rep. 693, 38 S. E. 897; *Missouri K. & T. Ry. Co. of Texas v. Dennis* (Tex. Civ. App.), 84 S. W. 860; *Wheelock v. Town of Hardwick*, 48 Vt. 19; *McDougald v. New Richmond Roller Mills Co.*, 125 Wis. 121, 103 N. W. 244.

d. **Prejudice to Person Setting Up Estoppel.**—No less important a constituent of the right to set up an estoppel in pais is the fact, in addition to all others, that the party alleging injury must show that the attempted repudiation would work him injury. This, of course, is not difficult in the cases above referred to: *Supra*, c. And outside and beyond those cases is to be found an endless list of decisions that where a person tacitly encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent—for example, by pleading the statute of frauds—if his conduct or acts of encouragement induced the other party to change his position so that he will be pecuniarily prejudiced by the assertion of such adversary claim.

The latest decisions on this point are *Jett v. O. B. Crittenden & Co.*, 89 Ark. 349, 116 S. W. 665; *Criley v. Cassel* (Iowa), 123 N. W. 348; *Ford Lumber & Mfg. Co. v. Cress* (Ky.), 116 S. W. 710; *Lazarus v. Union Bank of Brooklyn*, 116 N. Y. Supp. 710; *Jones v. Subera* (S. D.), 126 N. W. 253; *Franklin v. Texas Savings & Real Estate Inv. Assn.* (Tex. Civ. App.), 119 S. W. 1166; *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30; *Butler v. Supreme Court I. O. F.*, 53 Wash. 118, 101 Pac. 481; *Lazear v. Ohio Valley Steel Foundry Co.*, 65 W. Va. 105, 63 S. E. 722. While among earlier ones will be found: *Carter v. Darby*, 15 Ala. 696, 50 Am. Dec. 156; *Wilson v. Castro*, 31 Cal. 420; *Dudley v. Pigg*, 149 Ind. 363, 48 N. E. 642; *De Mill v. Moffat*, 49 Mich. 125, 13 N. W. 387; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; *Winegar v. Fowler*, 82 N. Y. 315; *Diller v. Brubaker*, 52 Pa. 498, 91 Am. Dec. 177; *McLemore v. Memphis & C. R. Co.*, 111 Tenn. 639, 69 S. W. 338; *McGregor v. Sima*, 12 Tex. Civ. App. 105, 33 S. W. 1014; *Griffin v. Clinton Line Ext. R. Co.*, Fed. Cas. No. 5816; *Hurt v. Riffe*, 11 Fed. 790; *Appeal of Columbus, S. & H. R. Co.*, 109 Fed. 177, 48 C. C. A. 275.

ESTATE OF HANCOCK.

[156 Cal. 804, 106 Pac. 58.]

THE JUDGMENT of a Court of Record is Presumed to have Been Authorized by Law. (p. 179.)

THE JUDGMENT of a Court of Record of another state differs in its conclusive effect from the judgment of a court of record of this state, in that it is always open to the person against whom the judgment is sought to be used to show by evidence other than the judgment or record, and even in opposition to its recitals, that the court was without jurisdiction of the cause of action or of the party, and if such lack of jurisdiction is shown, the judgment is a nullity. (p. 179.)

DIVORCE—Want of Affidavit Authorizing the Service of Summons by Publication.—If the statutes of a state authorize the service of a summons by publication when it appears by affidavit that the defendant resides out of the state, and that a cause of action exists against him, the affidavit of the plaintiff's attorney that he is informed and verily believes that the plaintiff has a good cause of action, and that the defendant is a nonresident of the state, and

her last known place of residence was at Boston, Georgia, is insufficient to give the court jurisdiction, a decree founded thereon is void. (p. 182.)

DIVORCE in Another State—Want of Jurisdiction, When Sufficiently Shown.—Where a copy of the record of a suit of divorce is offered and received in evidence, and is certified or admitted to be a true, perfect and complete copy of all records, papers and files in the cause, and the affidavit contained therein upon which the order for the publication of summons was based appears to be wholly insufficient, the jurisdiction of the court is thereby disproved. (p. 183.)

RES JUDICATA—Effect of an Order Appointing Alleged Surviving Wife Administratrix.—An order of court appointing an alleged surviving wife administratrix does not establish that she was such surviving wife, where there is nothing to show that she based her claim to letters on that ground, or that any issue was ever tendered or presented to the court on that question. (p. 184.)

RES JUDICATA—Homestead, Order Setting Aside Where There is No Contest.—An order setting apart a homestead to the alleged surviving wife and children of a decedent, where there is no appearance or contest nor any controversy on the question of widowhood, may be considered as having a conclusive effect as to the property set apart, but not as a judicial determination of widowhood in all future proceedings in the estate. (p. 184.)

Powers & Holland, for the appellants.

Tom C. Thornton, for the respondents.

805 **ANGELLOTTI, J.** This is an appeal from a judgment and an order denying a new trial in a proceeding instituted under the provisions of section 1664 of the Code of Civil Procedure, in the matter of the estate of Milton Taylor Hancock, deceased, to determine the "heirship to said deceased." By the decree it was determined that the heirs at law of deceased **806** are his surviving wife and three minor children of said deceased and said surviving wife, all born prior to the year 1902, and Mollie Hancock McNatt and John Philip Hancock, children of said deceased and Nancy Hancock, a former wife of deceased. This appeal is taken by the two last-named heirs, their claim being that the deceased and the surviving wife were never husband and wife.

The deceased and Nancy Hiers Hancock were married in the state of Georgia in December, 1877. The issue of this marriage consisted of four children, the appellants, and two children who died in infancy. The husband and wife resided together in the state of Georgia for several years next succeeding the marriage. Mrs. Hancock resided in that state until the time of her death, June 18, 1902. The deceased left that state some time in the eighties. On June 22, 1886, deceased instituted an action for divorce from his wife in the county court of Bent county, state of Colorado, and this action resulted in a decree made by said court on August 19, 1886, purporting to dissolve the marriage. On August 31, 1886, deceased and the respondent surviving wife obtained a

license to intermarry, and under this license their marriage was thereupon solemnized by a clergyman in Prescott, state of Arkansas. They lived together as husband and wife at various places of residence from that time until deceased died. His death occurred on July 20, 1905, at which time he was residing in the county of Los Angeles, in this state, with his surviving wife and their three children.

Appellants' claim is that the Colorado divorce decree was void and ineffectual for any purpose, with the result that Nancy Hiers Hancock continued to be the wife of deceased to the time of her death in the year 1902. It is not claimed by counsel for appellants that this condition in any way affected the legitimacy of the children of deceased and the second wife (see Civ. Code, sec. 84), but simply that it excludes the alleged surviving wife from participating in the estate of deceased. The trial court found that the deceased and his wife "were divorced" by said decree of the Colorado county court. The findings do not show the date of death of the first wife or that she died before deceased. In the present condition of the record, we deem the finding that the deceased and Nancy Hancock were divorced by the Colorado ⁸⁰⁷ decree essential to the judgment, and if it be not sustained by the evidence, as is claimed by appellants, the judgment must be reversed.

The county court of Bent county, Colorado, was, under the express terms of the constitution of Colorado, a court of record, and any judgment given by it is entitled to the benefit of the presumption that it was authorized by law (see 2 Freeman on Judgments, sec. 565), provided, however, it may be assumed, the jurisdiction of the court in matters of divorce is shown: 1 Nelson on Marriage and Divorce, sec. 19. A judgment of a court of record of another state differs in its conclusive effect from a judgment of a court of record of this state in one material respect, viz., that it is always open to the person against whom the judgment is attempted to be used to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. If such lack of jurisdiction in one or the other of these respects is not made to appear, the judgment is as final and conclusive on collateral attack as would be a judgment of one of our own superior courts, but if such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity: See 2 Freeman on Judgments, sec. 563; Thompson v. Whittman, 18 Wall. 457, 21 L. ed. 897; In re James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; Code Civ. Proc., sec. 1916. It was said in the James case cited above: "We agree with

appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed, did not exist; and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts."

The question before us, then, is whether or not it was affirmatively made to appear that the Colorado court was without jurisdiction of the cause or the parties.

By the laws of the state of Colorado, the county courts were given jurisdiction concurrent with that of the district courts, in certain classes of actions for divorce, and we shall assume ⁸⁰⁸ for the purposes of this decision that the record of the divorce action instituted by deceased against his first wife showed that the action was one which, under the terms of the statute, was within the jurisdiction of a county court. We shall further assume for the purposes of this decision that the trial court was sufficiently warranted in concluding, in accord with the allegation in the divorce complaint and the finding of the Colorado court, that deceased was a resident of the state of Colorado at the time of the commencement of his action, and had been such a resident for one year prior to that time as required by the laws of that state, though it must be conceded that the evidence introduced in the superior court on the trial of this contest (see *In re James*, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122) indicates very strongly that deceased was never a resident of that state.

Assuming all this, we are nevertheless unable to see how, in view of the evidence introduced on this trial, it can be held that the Colorado court ever obtained jurisdiction as to the defendant in the divorce action.

An exemplified record of the divorce proceedings was introduced in evidence by the appellants, with the express consent of respondents, duly certified to be "a true, perfect and complete copy of all records, papers and files in said cause." It appears therefrom that the complaint was unverified, and that the judgment rests entirely upon an attempted constructive service by publication of summons. The statute of Colorado authorized service of summons by publication "when the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state or conceals himself to avoid the service of summons, and *the fact shall appear by affidavit filed in the office of the clerk of the court in which the action is pending, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action.*" (The italics are ours.) It will be observed that this statute is practically the

same as ours, except that the filed affidavit is required by the Colorado law to show the essential facts, while our statute allows the verified complaint on file to show the existence of a cause of ~~some~~ action. The evidence shows that the only affidavit for publication was one filed at the time of filing the complaint and which was as follows:

"State of Colorado, }
County of Bent. }

"In County Court.

"MILTON T. HANCOCK }
v. }
NANCY HANCOCK. }

"John W. Jay, being duly sworn on oath says that as he is informed and verily believes the plaintiff on the above-entitled cause has good cause of action and that the defendant is a non-resident of the State of Colorado, and that her last-known place of residence was Boston, Georgia, and that he makes this affidavit for the reason that the plaintiff is absent from the county at the present time.

"JOHN W. JAY,
"Atty. for Plaintiff.

"Subscribed and sworn to before me this 22nd day of June, A. D. 1886.

"JOSEPH BRADFORD, Judge."

An order that service be made by publication of summons was made on the same day, and the affidavit of publication shows publication of a summons not purporting to be signed by the clerk of the court or under seal of the court, as was required by the Colorado law, but only signed by plaintiff's attorney, and not complying with the requirements of the Colorado law in its statement of the time within which the defendant must appear, in the Los Animas "Leader," a weekly newspaper, on June 25, July 2, 9, and 16, 1886. On August 17, 1886, the defendant's default for not answering was entered, and on August 19, 1886, judgment of divorce, based on said default, was entered.

There can be no doubt under our decisions that the affidavit for publication hereinbefore set forth, which upon the record before us must be taken as being the only affidavit presented in support of the order of publication, was insufficient to give the county court of Bent county, Colorado, jurisdiction to order service on the nonresident defendant by publication, and it does not appear that the Colorado supreme court has been less mindful than this court of the necessity of requiring compliance with every material requirement of the statute of Colorado relative to such service. In *O'Rear v. Lazarus*,

8 Colo. 603. 9 Pac. 621. that court, speaking of an attempted constructive service by publication, said: "This method of ⁸¹⁰ obtaining service is in derogation of the common law; consequently the proposition is universally recognized that every material requirement of the statute in relation thereto must be strictly complied with." Speaking of our own law as to publication of summons, this court said in *Ricketson v. Richardson*, 26 Cal. 149: "Those sections are in derogation of the common law, and must be strictly pursued in order to give the court jurisdiction over the person of defendant. A failure to comply with the rule thus prescribed in any particular is fatal where it is not cured by an appearance." It is established by our decisions that it must be made to appear by the affidavit for publication or by the verified complaint on file that a cause of action exists in favor of the plaintiff, and that if this is not so made to appear the court is without jurisdiction to make any order for publication, and any order made under such circumstances is ineffectual for any purpose, and any attempted service made thereunder is insufficient to give the court jurisdiction over the person of the defendant. As we have seen, the Colorado statute required this to be shown exclusively by the affidavit filed with the clerk of the court. It is further established that a statement such as that the plaintiff "has good cause of action" is not sufficient. Such a statement is nothing more than the mere opinion of the party as to the effect of the facts upon which he relies as constituting a cause of action. As said in *Forbes v. Hyde*, 31 Cal. 342: "It is merely the statement of the opinion of the witness in relation to a point upon which the judge is required to form his own opinion upon facts which must appear by affidavit. . . . Facts are the proper and only proper subjects to be set out in affidavits under the provisions of the statute to serve as the basis of judicial action. The affiant's general expression of opinion or belief, without the facts upon which it is founded, is in no sense legal evidence, and does not tend in any degree to prove the jurisdictional facts without which the judge had no authority to make the order." Upon the propositions we have stated, the following cases are in point: *Ricketson v. Richardson*, 26 Cal. 149; *Braly v. Seaman*, 30 Cal. 610; *Forbes v. Hyde*, 31 Cal. 342; *County of Yolo v. Knight*, 70 Cal. 430, 11 Pac. 662; *Columbia etc. Co. v. Warner etc. Co.*, 138 Cal. 445, 71 Pac. 498. In some of ⁸¹¹ these cases the attack on the judgment was direct, being made on appeal from the judgment, but in all the defect was recognized as jurisdictional. In two, *Braly v. Seaman* and *Forbes v. Hyde*, the attack was collateral. In *Ricketson v. Richardson*, *Forbes v. Hyde*, and *County of Yolo v. Knight* it is expressly held that an affidavit which merely repeats the language or substance of the statute as to the existence of a

cause of action is not sufficient, and in *Columbia etc. Co. v. Warner etc. Co.* the rule as to the essentials in the matter of a showing of a cause of action is clearly set forth.

As we have seen, all that the affiant in this case said in this regard was, that as he was informed and verily believes, the plaintiff "has good cause of action," and upon this statement of opinion and without the sworn testimony of anyone, in complaint or elsewhere, as to a single fact essential to a cause of action, the order for publication was made. We do not believe that a decision can anywhere be found sustaining a judgment against a nonresident defendant based upon such a constructive service by publication, where the defect in the showing for publication was legally made to appear. Were we dealing with the judgment of a court of record of this state, such a defect could be legally made to appear, of course, only on the face of the record, the judgment-roll, as is fully shown by such cases as *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *People v. Davis*, 143 Cal. 673, 77 Pac. 651; *Estate of McNeil*, 155 Cal. 333, 100 Pac. 1086, and as shown in such cases recital in such a judgment of due service is sometimes effectual as against an affidavit contained in the judgment-roll showing an ineffectual attempt at service, the presumption consistently obtaining in favor of the recital in the judgment that other showing of proper service had been made to the court. It is also true that were this a judgment of a court of this state, it could not be held by us to be void on its face because of the insufficiency of the affidavit for publication, for the reason that at the time it was rendered the affidavit for publication constituted no part of the judgment-roll (see *Estate of McNeil*, 155 Cal. 333, 100 Pac. 1086), and in the absence of evidence to the contrary this was presumably the law of Colorado at that time. We are not dealing, however, with a judgment of one of our own courts, but ^{sic} with a judgment of a court of another state, and this, as we have seen, makes a material difference. It was open to any party assailing the judgment collaterally to show by evidence aliunde the record of the judgment, and even in direct contradiction of recitals therein contained, facts establishing the want of jurisdiction of the court rendering it. Whether the affidavit for publication was a part of the Colorado judgment-roll or not, the evidence received without objection and by express consent of respondents established that the only affidavit for publication filed in the cause was the one that we have discussed. The record so received was certified to be "a true, perfect and complete copy of all records, papers and files in said cause heretofore tried," etc. We are forced to conclude that the service of summons by publication based on this affidavit was ineffectual for any purpose, and that the Colorado court never acquired jurisdiction as to the defendant. It follows that the findings of the trial

court in this proceeding to the effect that the parties were divorced by the Colorado decree was not sustained by the evidence.

Other points are made by appellants against the validity of this decree. The summons published did not comply with the Colorado law in some very material respects, but it is not necessary to determine whether the defects were such as to render the judgment void on collateral attack. The judgment was prematurely given, but it was given after the court would have acquired jurisdiction had the service been valid, and the defect in this respect was consequently one that does not go to the jurisdiction. In view of our conclusion as to the insufficiency of the affidavit it is unnecessary to determine definitely as to any of the other points made against the judgment.

The record on this appeal does not show that the question who is the surviving wife of deceased was adjudicated by the superior court in granting letters of administration in this estate, and the question as to the effect of such an adjudication in subsequent proceedings in the matter of the estate is, therefore, not presented. It is shown that the alleged surviving wife was appointed administratrix, but it nowhere appears that she based her claim to letters on the ground that she was the surviving wife, or that any such issue was ever ⁸¹³ tendered or presented to the court for determination. It is admitted by the pleadings that she subsequently presented her petition for the setting apart of a homestead for the use of herself, as surviving wife, and her children, and that the probate court granted such application and set apart certain real property as a homestead for the use of the family of the deceased, but it does not appear that there was any adverse appearance or contest on this application, or that the question of widowhood was ever controverted. The conclusive effect of this order, which was not appealed from, may be conceded as to the property so set apart, but we do not see how it can be held to operate, if the question of widowhood was never controverted, as a judicial determination as to widowhood binding in all future proceedings in the estate: See *Estate of Harrington*, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546; *Estate of Nolan*, 145 Cal. 559, 79 Pac. 428; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747.

It has been assumed by respective counsel that appellants, the surviving children of the first wife, are entitled to assail collaterally the Colorado decree of divorce after the death of both of the parties thereto, notwithstanding that the validity of the second marriage was never questioned by either of the parties thereto or by the first wife, and that the first wife died prior to the death of deceased, and we have here accepted that assumption as well founded, as, indeed, it may be. As that question has not been discussed and as there may be some

doubt of the right of appellants under the circumstances stated to now assert the invalidity of the second marriage, we deem it proper to declare that this opinion shall not be taken as establishing the law of the case thereon. As we have seen, this question is not squarely presented by the findings, as it does not appear therefrom that the first wife died prior to the death of deceased.

The judgment and order appealed from are reversed.

Shaw, J., and Sloss, J., concurred.

When Service of Process is Made by Publication, the statute must be at least substantially complied with, and generally the authorities declare that the statute must be followed strictly: *Empire Real Estate etc. Co. v. Beechley*, 137 Iowa, 7, 126 Am. St. Rep. 248; *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 124 Am. St. Rep. 615.

The Affidavit for Publication of Summons is of itself the prerequisite upon which jurisdiction is based, and it must contain and state positively all the facts required by the statute; otherwise it is fatally defective: *Gilmore v. Lampman*, 86 Minn. 493, 91 Am. St. Rep. 376. See, also, *Finn v. Howard*, 77 Kan. 421, 127 Am. St. Rep. 420; *Chapman v. Moore*, 151 Cal. 509, 121 Am. St. Rep. 130; *Kennedy v. Lamb*, 182 N. Y. 228, 108 Am. St. Rep. 800. It has been affirmed, however, that an affidavit for service by publication is sufficient if sworn to upon information and belief: *Leigh v. Green*, 62 Neb. 344, 89 Am. St. Rep. 751.

Under a Statute Requiring a Petition in Divorce to be supported by the affidavit of plaintiff, such affidavit cannot be made by a next friend, and if thus made, the decree of divorce is void: *Hinkle v. Lovelace*, 204 Mo. 208, 120 Am. St. Rep. 698.

The Effect of Decrees of Divorce Rendered in Another Country or State is discussed in the notes to *Felt v. Felt*, 83 Am. St. Rep. 616; *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 553; *Montgomery v. Consolidated etc. Co.*, 108 Am. St. Rep. 328. A decree of divorce rendered in one state may be impeached collaterally in the courts of another state, by proof that the court granting the divorce had no jurisdiction, notwithstanding recitals in the decree to the contrary: *Ingram v. Ingram*, 143 Ala. 129, 111 Am. St. Rep. 81.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

WOODRUFF v. ZABAN.

[133 Ga. 24, 65 S. E. 123.]

CONVERSION—Waiver of Tort—Action in Assumpsit.—

Where a petition alleges that the plaintiffs own specified personalty, and the only conversion by the defendants alleged is that they "wrongfully and tortiously took possession of said personal property, and carried said personal property away, thereby converting same to their own use, with the intent to deprive the plaintiffs of said personal property," and such petition further alleges that the plaintiffs waive the tort and sue for the value of the personal property, held, (a) such petition is subject to demurrer on the ground that the plaintiffs cannot maintain an action in assumpsit for the value of the property, but their remedy is confined to an action ex delicto; (b) where such action is brought for the value of the property, and the plaintiff in his petition expressly waives the tort, the action cannot be maintained as an action ex delicto, and the petition should be dismissed upon an appropriate demurrer thereto. (p. 188.)

(Syllabus by the court.)

Payne & Jones, for the plaintiffs in error.

J. D. Kilpatrick, F. M. Hughes and Morris Macks, for the defendants in error.

²⁴ HOLDEN, J. The defendants in error brought suit against the plaintiffs in error for the value of certain personalty described in their petition, which alleged that plaintiffs were the owners of the property, and that defendants wrongfully and tortiously took possession of the property and converted it to their own use, and ²⁵ "carried said personal property away, thereby converting same to their own use, with the intent to deprive the plaintiffs of said personal property." Plaintiffs allege that the value of the property was three thousand three hundred and sixty-five dollars and eighty-five cents at the time of the conversion, and made the

following allegations: "Wherefore, waiving the tort and suing for the value of said personalty, plaintiffs bring this suit and pray joint and several judgment for the value of said personal property, together with interest on said value from the third day of February, 1906, the date of said conversion." To the petition the defendants filed a demurrer on several grounds, one of which was that while the plaintiffs might have a right of action *ex delicto* against the defendants, they are restricted to that form of action, and have no cause of action *ex contractu* for the value of the property alleged to have been converted as against the defendants. To an order of the court overruling the demurrer the defendants excepted.

Where one unlawfully takes the goods of another and sells the same and receives the purchase money therefor, the latter may bring an action *ex delicto*, or he may waive the tort, affirm the sale, and bring against the wrongdoer an action for money had and received, and recover the same: *Southern Ry. Co. v. Born Steel Range Co.*, 122 Ga. 658, 50 S. E. 488; *Bates v. Bigby*, 123 Ga. 727, 51 S. E. 717; *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399. All of the authorities seem to be in accord with the rule above announced. But, as stated in 4 Cyc. 332-334, "The authorities differ, however, as to the right of the owner to sue in *assumpsit* where the wrongdoer has not sold or otherwise disposed of the property, but retains it for his own use. One line of decisions denies the right to bring an action of *assumpsit* in such case—the other line upholds such right": See, also, 15 Cyc. 255; 15 Am. & Eng. Ency. of Law, 1116. In the case of *Spencer v. Hewett*, 20 Ga. 426, the headnote is as follows: "The defendant took the plaintiff's wagon, without the plaintiff's consent, and exchanged it for another wagon, which he brought to plaintiff in place of his. This the plaintiff would not receive, but sued the defendant in the form of 'an action on account,' authorized by the act of 1847, 'to simplify and curtail pleadings at law.' Held, that an action in that form would not lie." In that case suit was brought to recover "the sum of one hundred dollars, as the value of a certain 'two-horse ²⁶ wagon.'" On page 428, the court said: "In this case *trover* will lie. *Trover* is the appropriate form." In the case of *Barlow v. Stalworth*, 27 Ga. 517, it was ruled: "An action of *assumpsit* for money had and received will not lie, unless the property of the plaintiff has been converted into money, or that which is its equivalent; and the consumption of the property by the defendant is not sufficient to authorize this remedy." In the case of *Southern Ry. Co. v. Born Steel Range Co.*, 122 Ga. 658, 50 S. E. 488, it was held: "But where the pleadings do not show that the property has been converted into money, and the suit is to recover the

of the property, the action is *ex delicto* and not *ex contractu*. In this connection, see, also, *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399. There is no allegation in the complaint that the defendants sold the property, or that they were responsible for the same. The only charge made as to the conduct of the defendants is that they carried the property away, thereby converting the same to their use, and thus depriving the plaintiffs of the property. The decisions of our court above referred to, the one holding that an action in assumpsit for the recovery of property, but are restricted to an action *ex de-*

licto, requested to overrule three of the cases above cited, *Switzer v. Hewett*, 20 Ga. 426, *Barlow v. Stal-*
wood, 113 Ga. 181, and *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399. In a review of them, there not being a concurrence of a majority of the justices for that purpose, they were affirmed. The decisions of our court holding that a person who has a right of action in property of value of the property on an express or implied warranty between the parties, though there was a conversion of the property by the wrongdoer, do not conflict with the above decisions, which are herein fol-

lowing. The plaintiff expressly waived the tort; and since their action arises *ex delicto*, the action as brought is maintainable, and the court erred in not sustaining the same. Whatever may be the reasons for waiving the tort, their action cannot be treated as an action *ex delicto* in the face of their express waiver of the tort, even though this kind of waiver is only one they have the right to maintain. Their express and unconditional²⁷ waiver of the tort prevents the action being treated as an action *ex delicto*. The court could not treat it as an action *ex delicto* without its consent any more than it could

U. S. DEPT. OF JUSTICE.

THE RIGHT TO WAIVE TORT AND SUE IN ASSUMPSIT.

THE "WAIVING THE TORT" MEANS 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

THE RIGHT TO ASSUMPSIT SPECIALLY OF REMEDY, 189.

- f. Goods Returned, 195.
- g. Goods Sold and Delivered, 195.
- h. Goods Stolen, 195.
- i. Infringement of Patent, 195.
- j. Physicians and Surgeons for Malpractice, 195.
- k. Shippers, 195.
- l. Standing Timber, 195.
- m. Tenants in Common, 196.
- n. Trespass, 196.
- o. Use and Occupation, 196.

IV. Exception to the General Rule, 196.

I. What "Waiving the Tort" Means.

Where a party is permitted to treat that which is purely a tort as having created a contract between himself and the wrongdoer, and, abandoning his right of action for the tort, pursues his remedy for the breach of the presupposed contract, he is said to have waived the tort and sued in assumpsit. "If there are in the case all the elements of an implied contract, it is of no consequence that there is, over and beyond those, some other fact or circumstance, not in any way militating against the plaintiff's claim, but rather the reverse, which constitutes a tortious element and might support an action as for a tort": Cooley on Torts, p. 93. The same learned writer follows this with the addition that where the defendant cannot possibly be prejudiced by that course, the plaintiff may ignore the tortious element and rely solely upon the facts which support the implication of a promise; he may waive that which rendered the act, in a legal sense, wrongful, and rely upon the remainder. The plaintiff has to make his election of the remedy he intends pursuing, and the evidence of his choice must be apparent and not capable of misconstruction. If his proceedings show contract he has waived the tort and vice versa: Whilden v. Merchants' & Planters' Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Morford v. White, 53 Ind. 547; Chambers v. Lewis, 2 Hilt. 591. A waiver against one of several tortfeasors operates in favor of the others: Terry v. Munger, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272, 8 L. R. A. 216. A waiver must apply to the entire remedy and not to part only: Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103.

II. Tort or Assumpsit—Election of Remedy.

The benevolence of the law does not always stop at providing a remedy for every wrong. It frequently happens that there is more than one road to the legal fount of justice, in addition to the pathway to the equitable source of remedial adjustment; and the suitor is just as apt to be confused in his choice as his lawyer is to confuse the more with the less appropriate remedy. But a choice has to be made, and care shown in making it, for an election once made, with knowledge of the facts, between coexistent remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to the maintenance of a defense founded on such inconsistent rights: Calhoun County v. Art Metal Const. Co., 152 Ala. 607, 44 South. 876; Rowe v. Sam Weichselbaum Co., 3 Ga. App. 504, 60 S. E. 275; notes to Thomas v. Joslin, 1 Am. St. Rep. 624; Fowler v. Bowery Sav. Bank, 10 Am. St. Rep. 479. A man may not take contradictory positions, and where he has a right to choose one

of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other; his deliberate and settled choice of one, with such knowledge as would warrant a resort to each, will preclude him thereafter from going back and electing again: *Thompson v. Howard*, 31 Mich. 309. But where the modes of redress are both concurrent and consistent, he may, having elected one form of action, abandon it, and, having duly and formally discontinued it, proceed with the other: *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. Rep. 4, 39 L. ed. 52. But in the colloquial language of the nursery he cannot "eat his cake and have it"—he cannot claim both remedies at once. One who has borrowed money on personalty, which has been unlawfully disposed of by the pledgee, may abandon his rights in tort and demand the application of the proceeds of his property to payment of his debt and the balance for himself; but he cannot do so under a complaint which repudiates the unlawful disposal of the property and claim its return: *Bell v. Bank of California*, 153 Cal. 234; 94 Pac. 889.

The combinations and variations of remedies are so numerous that the cases of complex remedy must be severally analyzed—each for itself—and the attention of the reader is directed in this note to such causes of action as could be developed by the pleader at his discretion into either the action *ex delicto* or *ex contractu*. It is needless to say that in these times of keen lawyers and acuminous judges the selection of the appropriate remedy must rest on some square basis rather than any chance foundations. The circumstances may point to tort and the fascinating rakishness of that form of action while the proof may fall short of the standard required to obtain and sustain a verdict; and on the other hand, the pleader may be obsessed by a predilection for *assumpsit*, when the evidence will disclose a resultant nonsuit. The choice has to be made either in the initial drawing of the pleadings or ultimately in open court; and we do not overrate its importance in ranking it higher even than the care and knowledge required in naming parties and laying venue. While it may not be absolutely necessary to have at the finger-tips the "History of Assumpsit" by J. B. Ames or the minutest details of Mr. Justice Cooley's great work on Torts, it is indispensable for the pleader, and indeed for the general practitioner, to be able to discriminate between the advantages which may accrue to his client by the adoption of the more appropriate remedy. In the language of one of the latest cases on the subject, where a person has conferred on him by the law several remedies to enforce an "obligation" or "duty" legally owing to him, he, and not the person owing the obligation or duty, has the right to select the particular remedy he shall have recourse to. If he has the right to an action *ex delicto*, he may avail himself of it, if he chooses to do so, or he may waive it and sue by virtue of a statutory right of action if one has been given to him: *Morgan's Louisiana etc. S. & Co. v. Stewart*, 119 La. 392, 44 South. 138. The effect of this election of remedies is the adoption of one of two or more existing remedies to the preclusion of a resort to the others; and, to make a case for the application of the doctrine, a party must have, as we have shown, actually two inconsistent remedies: *Calhoun County v. Art Meta Const. Co.*, 152 Ala. 607, 44 South. 876. As an example of the exercise of the pleader's technical knowledge, a complaint, to be construed a

in conversion should, by appropriate language, charge that the acts were wrongful or unlawful, as distinguished from a mere violation of contractual rights, the rule in such cases being, that if the allegations are ambiguous on this point, or it is doubtful whether the action is brought in tort or on contract, every intendment is in favor of construing the complaint as setting forth a cause of action on contract, on the theory that the tort has been waived: *Neftel v. Lightstone*, 77 N. Y. 96; *Catlin v. Adirondack County*, 81 N. Y. 639, 11 Abb. N. C. 377; *Goodwin v. Griffiths*, 88 N. Y. 629; *People v. Wood*, 121 N. Y. 522, 24 N. E. 592.

It is true, he may know that if his pleading is ambiguous, and furnishes ground for demurrer, he may amend, indeed must amend, so as to show clearly whether he is suing for a tort or for a breach of contract; and, therefore, it is as easy, and much better, to be right in the first instance: *Central Ry. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750; *King v. Southern Ry. Co.*, 128 Ga. 285, 57 S. E. 507.

While by some of the codes legal fictions are abolished, and the plaintiff is required, in order to state a cause of action, to do nothing more than give a plain and concise statement of the facts on which his cause is based (*Redel v. Missouri Valley Stone Co.*, 126 Mo. App. 163, 103 S. W. 568), advantage may yet be gained in depriving a defendant of some particular defense, changing the onus of proof, the choice between local and transitory venue, the keeping alive of a remedy which would otherwise have died with the defendant, or the choice of the remedy which yielded the better measure of damages, and, lastly, the different effect of the statute of limitations on tort and assumpsit. This last position actually arose in *McCombs v. Guild*, 9 Lea, 81, and *Whitaker v. Poston*, 120 Tenn. 207, 110 S. W. 1019.

These are only some of the considerations which perplex the lawyer, and the cases which decide that on the waiver of tort an action of assumpsit may be brought will be found so full of close reasoning and satisfying argument that they will more than repay the short time occupied in the perusal of the necessarily condensed form in which they are here presented.

III. In What Classes of Actions the Right may be Exercised.

a. *Trover*.—Until quite recently the law stood that in actions for the conversion of personal property, where there has been a sale of the property converted, the tort may be waived and the aggrieved party sue in assumpsit for money had and received to the plaintiff's use, but that where the pleadings did not show that the property had been converted into money and the suit was to recover the value of the property, the action was *ex delicto* and not *ex contractu*. From a long list of cases supporting this view we have selected for reference purposes only the following, inasmuch as they form the nucleus of the citations in support of the main question: *Potts v. First Nat. Bank*, 102 Ala. 286, 14 South. 663; *Bradfield v. Patterson*, 106 Ala. 397, 17 South. 536; *Hudson v. Gilliland*, 25 Ark. 100; *Fratt v. Clark*, 12 Cal. 89; *Lataillade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924; *Jester v. Knotts* (Del.), 57 Atl. 1094; *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399; *Dickinson v. Whitney*, 9 Ill. 406; *Ward v. Montgomery*, 67 Ill. App. 346; *Cooper v. Helsabeck*, 5 Blackf. 14; *Isaacs v. Hermann*, 49 Miss. 449; *Floyde v. Wiley*, 1 Mo. 643; *Wood-*

bury v. Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Moore v. Richardson, 68 N. J. L. 305, 53 Atl. 1032; Hinds v. Tweddle, 7 How. Pr. 278; Terry v. Munger, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272, 8 L. R. A. 16; Brush v. Batten, 15 N. Y. St. Rep. 548; McCullough v. McCullough, 14 Pa. 295; Bethlehem Bor. v. Perseverance Fire Co., 81 Pa. 445.

And in order that the reader may have his references complete, the following cases are cited in which there is evidence of a desire on the part of the courts to widen the doctrine to allow assumpsit where the goods have been changed in character by the tort-feasor, and thus prepare the way for the complete change to which they will presently lead us: Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238; Stockett v. Watkins' Admr., 2 Gill & J. 326, 20 Am. Dec. 438; Tuttle v. Campbell, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384; Stearns v. Dillingham, 22 Vt. 624, 54 Am. Dec. 88.

Following this gradual extension of the principle and the opinions of such text-book writers as Cooley and Greenleaf, the development of the change showed itself in a conspicuous manner in Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313, and Miller v. Wesson, 58 Miss. 831. In the former of these two cases, which was an action for the conversion of trees, the precise holding is thus stated: "The action of assumpsit can be maintained though there was no actual conversion of the trees into money. It is held by many courts of high authority that a tort can only be waived and an action *ex contractu* maintained where the tort-feasor has converted into money the proceeds of his wrongful act, and has thus subjected himself to an action for money had and received. . . . A more liberal and, we think, a more sensible rule is laid down by the later text-writers, and sustained by many courts, to the effect that the tort may be waived and assumpsit maintained whenever the property taken has been converted either into money or into any other beneficial use by the wrongdoer, and especially where it has been so applied to his use as to lose its identity. . . . It is impossible to perceive any valid objection to this doctrine. So long as the trespasser retains, in its original shape, the property taken, he may logically deny that he holds it under contract, and demand that he be proceeded against in tort, and that the tort be established against him; but when he has parted with it, either for money or other property, or when he has mingled it with his own, consumed it in its use, or changed its form, he should not be permitted to deny the assumption to pay its value, which the law imputes from his method of dealing with it."

In cases of the conversion of money, it is immaterial whether the defendant rightfully or wrongfully received it, for whenever one person obtains possession of money, which, of equity and right, belongs to another, the latter may maintain an action to recover it: Peterson v. Foss, 12 Or. 81, 6 Pac. 397; and in such case the defendant cannot insist that the plaintiff shall waive his contract and sue in tort. The election is with the plaintiff: Hornefus v. Wilkinson, 51 Or. 45, 93 Pac. 474.

The liberal and common-sense rule referred to soon found a ready welcome among the advanced lawyers, and an admirable compendium of the law on the subject is to be found in Owens Bros. v. Chicago etc. Ry. Co., 139 Iowa, 538, 117 N. W. 762. The following excerpts

from it are of interest: "The controlling question presented by the appeal is whether the right of action therefor is exclusively upon the written contract, or whether plaintiffs may waive or ignore the contract, and sue in tort upon the defendant's liability as a common carrier. That they may waive their right to sue upon the contract and bring an action in tort for damages, if any they have sustained, is a rule of law well established by an almost unbroken line of authorities. . . . Says Judge Cooley in his work on Torts, third edition, page 56: 'Indeed, in many cases an action as for tort or an action as for breach of contract may be brought by the same party upon the same state of facts,' and of this rule he cites the case of the common carrier as a 'conspicuous illustration.'"

The case of *Jenkins v. Seaboard Air Line Ry.*, 3 Ga. App. 381, 59 S. E. 1120, is another of the cases establishing the newer rule that where a contractual relation such as that of shipper and carrier exists between the parties, so that the carrier rightfully obtains possession of the property, and a conversion is not alleged, a suit brought to recover damages arising from delay in delivering, or failure to deliver, is not necessarily an action *ex delicto*. In such a case the plaintiff has an option to waive the tort and maintain *assumpsit*: *Bates v. Bigby*, 123 Ga. 727, 51 S. E. 717. The case of *Jenkins v. Seaboard Air Line Ry.*, 3 Ga. App. 381, 59 S. E. 1120, is to be distinguished from *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399, and *Southern Ry. Co. v. Born Steel Range Co.*, 122 Ga. 658, 50 S. E. 488, both of which deal with cases in which a conversion was alleged. Other late cases bear directly toward giving the plaintiff free election, irrespective of the goods converted being sold. The most important, perhaps, is *New York Market Gardeners' Assn. v. Adams Drygoods Co.*, 115 App. Div. 42, 100 N. Y. Supp. 596, 190 N. Y. 514, 83 N. E. 1128. In that case the defendant converted the plaintiff's goods and held them. "The defendant in refusing to surrender to the plaintiff the stock of goods which concededly belonged to him, converted the same to its own use, and negatived the suggestion of the defendant that there was a mutual agreement as to the cancellation of the contract, for it is not claimed that the plaintiff agreed to give his stock of goods as a condition of the contract being annulled. Under this state of facts the plaintiff was clearly entitled to waive the tort and to collect the value of the goods withheld, and he was likewise entitled to recover any damages which he could show resulted directly and proximately from the breach of the contract, provided such damages were of a nature which might be deemed to have been within the contemplation of the parties in entering into the contract."

This case does not appear to have been cited in *Woodruff v. Zaban*, 133 Ga. 24, ante, p. 186, 65 S. E. 123, nor indeed any, except cases decided in the state of Georgia. Other cases illustrative of the widening of the rule are: *Bettis v. McNider*, 137 Ala. 588, 97 Am. St. Rep. 59, 34 South. 813; *Fountain v. Sacramento*, 1 Cal. App. 461, 82 Pac. 637; *Newton Mfg. Co. v. White*, 53 Ga. 395; *Rowe v. Sam Weichselbaum Co.*, 3 Ga. App. 504, 60 S. E. 275; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280; *Kimball v. Jackman*, 42 N. H. 242; *White v. Eley*, 145 N. C. 36, 58 S. E. 437; *Barker v. Cory*, 15 Ohio, 9; *Tindall v. McCarthy*, 44 S. C. 487, 22 S. E. 734; *Tidewater Quarry Co. v. Scott*,

105 Va. 160, 115 Am. St. Rep. 864, 52 S. E. 835, 8 Ann. Cas. 736; McDonald v. Peacemaker, 5 W. Va. 439; Walker v. Norfolk & W. Ry. Co. (W. Va.), 67 S. E. 722; Smith v. Schulenberg, 34 Wis. 41; Florida Cent. & P. R. Co. v. Scarlett, 91 Fed. 349, 33 C. C. A. 554; Phelps v. Church of Our Lady Help of Christians, 99 Fed. 683, 40 C. C. A. 72.

In Woodruff v. Zaban, 133 Ga. 24, ante, p. 186, 65 S. E. 123, an express request to overrule Cragg v. Arendale, 113 Ga. 181, 38 S. E. 399, was denied, and the court, while readily acknowledging the difference in the decisions, sturdily adhered to the earlier ruling that except the goods converted have been changed into money, the action must be *ex delicto*; and if, as in that case, the plaintiff expressly waives the tort and elects to sue in *assumpsit*, he must be defeated. In so adhering to the old ruling the court founded its judgment on a long line of cases decided in the courts of Georgia that way.

With all respect to the court and that conservatism which so often stalks in the guise of *stare decisis*, we think the conclusion to be drawn from the text-books and the dicta in the later cases in other states is that in actions of trover the rule that the action must be *ex delicto* unless the tort-feasor has converted the subject matter into money should be regarded as obsolescent—that is, what is left of it, for it has been gradually whittled away by strong decisions which indicate that the trend of to-day, founded on wise statutory provision as to forms of action, is in favor of a freedom of election, which shall not be hampered by the fact of the physical reduction by the tort-feasor of the article converted into money.

b. **Bailments.**—The rule of the waiver has been, as may readily be conceived, extended in the case of bailments, by reason of the transaction of a bailment so easily lending itself to the contractual construction: Redel v. Missouri Valley Stone Co., 126 Mo. App. 163, 103 S. W. 568; A. G. Rhodes & Son Furniture Co. v. Freeman, 2 Ga. App. 473, 58 S. E. 696.

c. **Brokers.**—Where a broker intrusted with his client's securities has sold them without authority, the party injured has his election to sue in *assumpsit*: Barber v. Ellingwood, 122 N. Y. Supp. 369.

d. **Fraud, Deceit and False Representations in General.**—And the rule has been almost without exception applied to cases coming under the general head of fraud or false representations. Indeed, little difficulty is found in discovering in such cases of tort that shred of contract to which it is possible to hang the action of *assumpsit*, and the majority of fraudulent acts will be found to originate in some form of implied obligation which the law will readily seize upon to permit the substituted form of action: Steiner v. Clisby, 103 Ala. 181, 15 South. 612; Love v. McElroy, 106 Ill. App. 294; Morgan's Louisiana & T. R. & S. S. Co. v. Stewart, 119 La. 392, 44 South. 138; Penobscot R. Co. v. Mayo, 67 Me. 470, 24 Am. Rep. 45; Westcott v. Sharp, 50 N. J. L. 392, 13 Atl. 243; Dresser v. Mercantile Trust Co., 124 App. Div. 891, 108 N. Y. Supp. 577; Haganir v. Cotter, 102 Wis. 323, 72 Am. St. Rep. 884, 78 N. W. 423; Fenemore v. United States, 3 U. S. 357, 1 L. ed. 634; Missouri Savings & Loan Co. v. Rice, 84 Fed. 131, 28 C. C. A. 305.

e. **Fraud, Deceit and False Representations by Agents.**—In cases of agency there is still less difficulty inasmuch as, the very relation of

principal and agent being founded on contract, the tort of the agent may be laid at the door of the breach of his obligation to his principal: *First Nat. Bank v. Henry*, 159 Ala. 367, 49 South. 97; *Dittemore v. Cable Milling Co.*, 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593; *Farson v. Hutchins*, 62 Ill. App. 439; *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227, 79 Am. Dec. 781; *Stroud v. Life Ins. Co. of Virginia*, 148 N. C. 54, 61 S. E. 626; *Courter v. Pierson*, 72 N. J. L. 393, 61 Atl. 81; *Doherty v. Shields*, 86 Hun, 303, 33 N. Y. Supp. 497; *Jones v. Smith*, 120 N. Y. Supp. 865; *Hornefius v. Wilkinson*, 51 Or. 45, 93 Pac. 474; *Kimble v. Carothers*, 81 Pa. 494; *Vance v. Mottley*, 92 Tenn. 310, 21 S. W. 593; *In re Heber's Will*, 139 Wis. 472, 121 N. W. 328; *State Bank of Chicago v. Cox*, 143 Fed. 91, 74 C. C. A. 285.

f. Goods Returned.—In a case of conversion of goods which had been returned by the defendant, the plaintiff waived the tort and recovered damages for the time they had been detained: *Janes v. Buzzard*, Hempst. 240, Fed. Cas. No. 7206A.

g. Goods Sold and Delivered.—Where the plaintiff has no tort to waive, such as where it appears that the goods which he alleges were converted were voluntarily given by him to the defendant in exchange for something received by him from the defendant, no case for election is made out: *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81.

h. Goods Stolen.—For a long period the question of the right to sue at all until after the conviction of the thief was questioned, but it has now been settled and is one of the strong illustrations of the rule: *Foster v. Tucker*, 3 Greenl. 458, 14 Am. Dec. 243; *Howe v. Clancey*, 53 Me. 130; *Gould v. Baker*, 12 Tex. Civ. App. 669, 35 S. W. 708.

i. Infringement of Patent.—Where the same act which is an infringement of a patent is also a breach of some contract, the plaintiff may waive the statutory right to recover for the infringement and bring his action for damages proximately resulting from the breach of the contract, and of such action the federal courts have no exclusive jurisdiction: *B. F. Avery & Sons v. McClure (Miss.)*, 47 South. 901; *Manning v. Galland-Henning P. M. Drum Mfg. Co.*, 141 Wis. 190, 124 N. W. 291; *Steam Stone Cutter Co. v. Sheldons*, 21 Blatchf. 260, 15 Fed. 608; *Excelsior W. P. Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. Rep. 681, 46 L. ed. 910.

j. Physicians and Surgeons for Malpractice.—The tort of malpractice arising out of the obligation to perform medical duties has properly been waived to permit his being sued in *assumpsit*: *Lane v. Boicort*, 128 Ind. 420, 25 Am. St. Rep. 442, 27 N. E. 1111.

k. Shippers.—The obligations of shippers bring them so nearly within the term of agents that the courts have extended to actions against them the same facility of election to waive the tort and sue on the supposed contract: *Jenkins v. Seaboard Air Line Ry.*, 3 Ga. App. 381, 59 S. E. 1120; *Owens Bros. v. Chicago etc. Ry. Co.*, 139 Iowa, 538, 117 N. W. 762; *Waters v. Mobile & O. R. Co.*, 74 Miss. 534, 21 South. 240.

l. Standing Timber.—The only difficulty in the way of permitting the election in cases of standing timber was the danger of introducing

questions of title, and where no such questions are involved, assumpsit may be adopted as the form of action: *Asher v. Cornett* (Ky.), 113 S. W. 131; *Whitaker v. Poston*, 120 Tenn. 207, 110 S. W. 1019; *Parks v. Morris Lyfield & Co.*, 63 W. Va. 51, 59 S. E. 753. But if, in case of torts committed upon realty, the title thereto is involved, no waiver will be allowed, because the law will not convert assumpsit into ejectment: *King v. Mason*, 42 Ill. 223, 89 Am. Dec. 426; *Gates v. Rifle Boom Co.*, 70 Mich. 309, 38 N. W. 245.

m. Tenants in Common.—In actions where tenants in common are involved by reason of their common property having been converted, they have the privilege of foregoing the tort: *Tankersley v. Childers*, 23 Ala. 781.

n. Trespass.—Where wharfage dues had been collected by trespassers on the plaintiff's wharf, his election to sue in assumpsit was upheld: *O'Conley v. Natchez*, 1 Smedes & M. 31, 40 Am. Dec. 87.

o. Use and Occupation.—One of the commonest forms in which the plaintiff elects to sue in assumpsit is use and occupation, the title of the cause of action almost suggesting the contractual relation: *National Oil Refining Co. v. Bush*, 88 Pa. 335; but there can be no waiver where the trespasser is in possession: *McLane v. Kelly*, 72 Minn. 395, 75 N. W. 601.

IV. Exception to the General Rule.

There is one general exception to the rule of waiving tort for assumpsit. Where no benefit accrues to the tort-feasor by reason of the tort committed, assumpsit will not lie. He cannot be charged as on an implied contract unless some benefit has actually accrued to him. The reason for this appears fairly obvious. In order to sustain the election the law has to raise an imaginary contract resulting not only in loss to the plaintiff but in gain to the defendant. But where the act of the defendant is mere wanton injury, where he neither received nor expected to receive any benefit from his wrongdoing, and where the relief necessarily asked for is damages, there are no circumstances from which the court could generate a contract express or implied: *Tightmeyer v. Mongold*, 20 Kan. 90; *Fauson v. Linsley*, 20 Kan. 235; *Greer v. Newland*, 70 Kan. 310, 109 Am. St. Rep. 424, 77 Pac. 98, 78 Pac. 835, 70 L. R. A. 554.

GRIMSLEY v. SINGLETARY.

[133 Ga. 56, 65 S. E. 92.]

CONTRACT—Signing by Illiterate Person Without Reading.—

Where an illiterate person, unable to read, signs a written instrument in ignorance of its character or contents, believing it to be an instrument of a different nature, and is induced to do so by the misrepresentations of the other party, whose good faith he has no ground to reasonably suspect, as to the nature or contents of such writing, he is not bound thereby, although he does not request the opposite party or anyone else to read the paper to him before he signs it. (p. 198.)

INSTRUCTIONS.—It is not Error to Fail to Charge upon a Particular Contention of a party when such contention is not pre-

sented by the pleadings; nor is it error to fail to charge upon a contention made in the pleadings which is not supported by any evidence. (p. 198.)

INSTRUCTIONS.—A Correct and Pertinent Charge is not Rendered Erroneous by failure to give other instructions, appropriate to the case, in connection therewith. (p. 198.)

(Syllabi by the court.)

Pope & Bennet, Park & Collins and W. A. Jordan, for the plaintiffs in error.

Pottle & Glessner, for the defendants in error.

⁵⁷ FISH, C. J. The main issue upon the trial of this case was, whether the defendant Caroline Cowart was induced by the fraud of the plaintiff Singletary to execute to him the conveyance of the land in question, upon which conveyance the plaintiff relied for a recovery. It appeared from the evidence that Caroline was an illiterate negro and was unable to read; that the plaintiff wrote the instrument, in his store at Blakely, Georgia, and delivered it to her with direction that she go to the office of the clerk of the superior court and sign it in the presence of the clerk and another witness, which she did. According to the testimony in behalf of the plaintiff, he, after preparing the instrument, read it over to Caroline before she executed it, and it was for a valuable consideration, to wit, that he should pay what Caroline owed as purchase money for the land to the person from whom she bought it and whose bond for title she held, and lease the land to her, for a given time, at a stipulated rental, and that upon payment to him by her of all the rents that had accrued, an old account that she owed him for supplies, all the advances that he made to her, and six hundred and seventy-five dollars, he would reconvey the land to her; and the transaction was fair and entirely free from fraud. The evidence in behalf of defendants, if credible, authorized a finding that Caroline was induced to sign the instrument by the representations of the plaintiff that it was not a deed, but a note, and she executed it under the impression that it was a note or "a showing" to the plaintiff for the indebtedness due him by her husband, Shep Cowart. There was no evidence that Caroline requested anyone to read the instrument to her. It appeared that her husband was present when the plaintiff delivered the instrument to Caroline to be taken to the clerk's office for execution, and that he was also present when it was executed. It appeared ⁵⁸ that he was also illiterate and unable to read; and he testified that from the representations made by the plaintiff to Caroline and himself he understood the instrument to be a note.

1. The court instructed the jury as follows: "That although she [Caroline Cowart] may have been an illiterate

person, if Singletary delivered it [the instrument] to her, and she had the opportunity of finding out the contents of that paper, if she had reasonable opportunity for doing so, and she failed to avail herself of the opportunity, and if she signed it without taking pains to find out what was in it, then she would be bound by the deed." This charge was excepted to as being an erroneous statement of the law. In our opinion, this instruction was erroneous. It is elementary that fraud, as a general rule, vitiates all contracts. There are numerous decisions of this court to the effect that one signing an instrument without reading it is bound by its terms, unless it appears that he could not read and was for this reason imposed upon, or that the signing was under some emergency which excused the failure to read, or that the failure to read was brought about by some fraud or misleading device of the other party: *Stoddard Mfg. Co. v. Adams*, 122 Ga. 802, 50 S. E. 915, and cases cited. Where, however, one who cannot read is induced to sign an instrument by the misrepresentations of the other party as to its character or contents, he is not bound thereby. He may, ordinarily, rely upon the representation of the other party as to what the instrument is or as to what it contains; and his mere failure to request the other party, or someone else, to read it to him will not generally be such negligence as will make the instrument binding upon him. As this erroneous instruction was given on the main issue in the case, it necessarily requires a reversal of the judgment overruling the motion for a new trial.

2. There was no issue made by the pleadings as to whether the conveyance from Caroline Cowart to Singletary was made as part of a usurious contract, nor was there any evidence to authorize a finding that she executed such conveyance under duress of which Singletary had knowledge. Therefore, the assignments of error upon certain instructions to the jury, upon the ground that they excluded from their consideration the contentions of the defendants as to these matters, were not meritorious.

3. In several instances, instructions to the jury which were correct ⁵⁹ and pertinent were excepted to upon the ground that other instructions appropriate to the case were not given in the same connection. It has been frequently held that such exceptions are not well taken. No other assignments of error are of sufficient importance to be dealt with.

Judgment reversed.

All the justices concur.

One is not Bound by a Contract Which He is Induced to Sign by false representations, he being ignorant of the true character of the instrument, having no intention of signing such paper, and not being

guilty of negligence: *Keller v. Ruppold*, 115 Wis. 636, 95 Am. St. Rep. 974; *Willard v. Nelson*, 35 Neb. 651, 37 Am. St. Rep. 455. It has been held that if a person, without negligence, and by fraud and deceit, is induced to sign a note, not intending to sign it as such, the note is not valid in the hands of a bona fide purchaser: *Biddeford Nat. Bank v. Hill*, 102 Me. 346, 120 Am. St. Rep. 499. But ordinarily, failure to read a contract before signing it does not affect its validity, if the person is sui juris and is able to read and write and there is no fraud or misrepresentation: *Chicago etc. Ry. Co. v. Hamler*, 215 Ill. 525, 106 Am. St. Rep. 187; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 105 Am. St. Rep. 1016; *Crim v. Crim*, 162 Mo. 544, 85 Am. St. Rep. 521.

An Illiterate Party is not Negligent in Signing a Contract without informing himself as to its contents or legal effect, where he relies upon the other party to properly express the terms of their oral agreement in a writing, and upon the latter's representation that he has done so: *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 473.

BOND v. SULLIVAN.

[133 Ga. 160, 65 S. E. 376.]

HUSBAND AND WIFE—Deed by Her to His Creditors to Pay His Debts.—Where a wife executes a deed conveying her property for the purpose of extinguishing her husband's debt, in pursuance of a plan or scheme participated in by the grantee in the deed, such a deed is void, and the wife may maintain ejectment against her grantee or anyone else claiming under her grantee with notice of the consideration moving the wife to make the deed to her property, without the institution of equitable proceedings to cancel the deed. (p. 201.)

HUSBAND AND WIFE—Deed by Her to Pay His Debts and Encumbrances on the Property.—If a part of the consideration of the deed in question in this case was the lifting of certain encumbrances upon the property, it was a valid charge thereon; and if the remainder of the consideration was to be appropriated to the extinguishment of the debt of the grantor's husband, the deed itself, being one entire transaction, cannot be upheld, because of the impossibility of separating that which is legal from that which is illegal; and the most that could be done in such a case in favor of the grantee in the deed is to hold and decree that he be subrogated to the rights of the encumbrancers whose debts he paid off and discharged. (pp. 201, 202.)

HUSBAND AND WIFE—Deed by Her to Agent of His Creditors.—If the purchaser be not the actual creditor, but the agent of one who participates with him in the scheme for the effectuation of which the deed was executed, the sale is equally void and the deed of no effect; and the possession of the property having been surrendered to the grantee, the wife may subsequently maintain ejectment against the grantee or those holding under him with notice of the defect in the consideration. (p. 202.)

HUSBAND AND WIFE—Deed by Her to His Creditors.—The Verdict of the Jury, and the judgment of the court below to whom was submitted all questions of fact except as to the right of the plaintiff to recover the land sued for, are unauthorized by the evidence. (pp. 203, 204.)

APPEAL.—An Error in Decree or Judgment cannot be Made a Ground of Exception to the overruling of a motion for a new trial (p. 205.)

APPEAL.—An Assignment of Error Containing the Exception. "That the court erred in its entire charge to the jury, in failing to exempt from the consequences to be visited upon the grantor this defendant, who was thus deprived of all his defenses arising out of the estoppel, silence and fraud of the plaintiff, and the prescriptive holding of the premises in dispute," is too vague and general to raise any question for decision in this court. (p. 205.)

NEW TRIAL.—Exceptions to the Rulings of the Court in Admitting Testimony over objection are not grounds for a new trial, where it is not made to appear what objections were urged to the admission of the testimony claimed to be inadmissible. (p. 205.)

(Syllabi by the court.)

Walter G. Charlton and Adams & Adams, for the plaintiff in error.

Cann, Barrow & McIntire, for the defendant in error.

¹⁶¹ **BECK, J.** This suit was brought by Mrs. Louisa A. Sullivan, in February, 1905, against Allan Bond, to recover a certain tract of land and the improvements thereon, in the city of Savannah, Georgia. In her petition the plaintiff set up a legal title to the premises, claiming under deed from George W. Anderson, Jr., dated July 7, 1883, and recorded August 20th of the same year. The defendant answered, denying the plaintiff's title, and claiming title in himself under a deed from plaintiff to John F. Harrison, dated January 7, 1897, duly recorded, and under a deed from Harrison to defendant, dated May 16, 1900, and recorded May 9, 1901. Plaintiff introduced evidence for the purpose of showing that, under a scheme participated in by Harrison and defendant, she had been induced to deed the property to Harrison in 1897 in order to pay certain of her husband's debts, particularly his indebtedness to the Southeastern Plaster Company, a corporation of which Bond was a majority stockholder and Harrison an officer. Bond, the defendant, and Harrison, the grantee in the deed from plaintiff, testified that Harrison was the bona fide purchaser from Mrs. Sullivan, and that neither of them participated in any such ¹⁶² scheme as above stated. The only question submitted to the jury, by agreement of counsel, was as to the recovery of the land; if the jury should find in favor of plaintiff, the judge was to determine, subject to exception, the amount of mesne profits to be recovered by her, and also determine defendant's equity by reason of the assumption and payment by his predecessor in title, Harrison, of two mortgages aggregating \$6,000, which encumbered the property at the time of his purchase from plaintiff. The jury found in favor of the plaintiff for the recovery of the land. The judge found the

net mesne profits to be recovered by her to be \$3,833.62, with interest thereon at the rate of seven per cent from May 16, 1905, the date of the filing of the suit; and that the defendant be subrogated to whatever rights the original mortgagee might have had by the two mortgages referred to. The defendant excepted to the finding of the jury and to each of the findings of the judge.

1, 2. One of the questions presented by this record is, whether or not when a married woman conveys property for the purpose of paying her husband's debt she can bring an action of ejectment against her grantee or anyone claiming under her grantee with notice of the consideration moving the wife to make the deed to her property, without the institution of equitable proceedings to cancel the deed. This question has been decided in the affirmative more than once by this court. In the case of *Taylor v. Allen*, 112 Ga. 330, 37 S. E. 408, it was said that the question was settled by the plain provisions of the code sections which declare that the separate property of the wife shall not be liable for the debts of her husband (Civil Code, section 5790), and that any sale by a wife of her separate estate made to a creditor of her husband in extinguishment of his debts shall be absolutely void (Civil Code, section 2488). Continuing, the court says: "Section 2474 provides that her property shall not be liable for the payment of any debt, default or contract of her husband. Such a transaction, then, on the part of a wife is not merely voidable, but is absolutely void. It would be impossible to express in stronger language the absolute nullity of such conveyance of a wife than is employed in the section of the code which we have cited." In the same decision the justice delivering the opinion of the court, after citing several cases to support the views announced, says: "We could cite a number of ¹⁶³ other decisions of this court clearly indicating that these transactions, involving a conveyance by a wife of her property to pay her husband's debts, are absolutely void, and can never estop her from bringing an action of ejectment to recover her property so conveyed; and when such a conveyance is presented as a defense, if she show its consideration, she can treat it as an absolute nullity and as conveying no title whatever. We think, therefore, the court committed no error in sustaining the demurrer to the amended plea, and refusing to require the plaintiff to file any equitable pleadings for the cancellation of the deed."

If the deed in question in this case had been executed by the wife upon the consideration that the grantee should discharge a valid encumbrance upon the property conveyed, and the latter actually discharged such encumbrance, the conveyance might be upheld as valid. But if the discharge of the encumbrances upon the property by the vendee was only a

part of the consideration, and the real object of the conveyance was to appropriate the value of the property conveyed, in excess of the amount represented in the encumbrances discharged, to the extinguishment of the debt of the husband actually existing at the time of the conveyance or in contemplation at that time, while a part of the consideration would be valid, the other would be illegal, and the deed, being one entire transaction, "cannot be upheld, because of the impossibility of separating that which is legal from that which is illegal. It is not the case of a mortgage given to secure several debts, some of which are legal and some illegal, and in which that which is legal may be cut off from that which is illegal, but it is a case in which the whole transaction is so infected with the virus of illegality that there is no possibility of upholding the deed executed in pursuance of it as a conveyance of title, and the most that can be done is to award, as was done in this case, that in so far as the plaintiff has extinguished that portion of the debt legally due by the wife, it be made a charge against her estate": *Mickleberry v. O'Neal*, 98 Ga. 42, 25 S. E. 933.

3. Even if it be true, as is insisted by counsel for plaintiff in error, that there is no evidence to show that Harrison, the purchaser from Mrs. Sullivan, was a creditor of the husband, if he jointly with Bond devised or entered into a scheme whereby a conveyance of Mrs. Sullivan's property should be procured, and ¹⁶⁴ the real purpose of the conveyance was the extinguishment of her husband's debt to a corporation of which Bond was a majority stockholder, in such a case Harrison might be regarded as the agent of Bond, acting for the benefit of his principal, and the conveyance to him would be void just as if it had been made to Bond or to the corporation of which Bond was a member: *Kent v. Plumb*, 57 Ga. 207. What is said in the case last cited and the case of *Taylor v. Allen*, 112 Ga. 330, 37 S. E. 408, of the effect of such a scheme upon the question of the validity or nullity of a conveyance made to effectuate its purpose renders unnecessary any discussion of that question here. But inasmuch as this case is to be remanded for a new trial, it is unnecessary to discuss the evidence or to decide whether or not the evidence upon the last trial authorized the finding that the sale of the property in controversy by Mrs. Sullivan to Harrison was a mere colorable transaction—a part of a plan devised by Bond, or both Bond and Harrison, for the extinguishment of a debt of Mrs. Sullivan's husband to the Southeastern Plaster Company, a corporation of which Bond was a majority stockholder.

4. However reluctant this court may be to interfere with the findings of juries upon questions of fact, or the findings of the court upon questions of fact, when, as in this case, the

duty of passing upon certain questions of fact is, by agreement of the parties, submitted to the court, we cannot do otherwise than set aside the finding of the court, allowing the plaintiff to recover as mesne profits the principal sum of \$3,833.62, with interest thereon, and refusing to allow the defendant any amount whatever for payments made and evidenced by the receipts of Mrs. Sullivan. In allowing the sum found, the court must have failed to take into consideration the amounts paid to the plaintiff as shown by her receipts. After the payment of the mortgages, amounting to \$6,000, which were an encumbrance upon the property sought to be recovered, there remained to be paid a balance of the purchase price, amounting to \$5,000. As to the contention of the plaintiff's counsel that this \$5,000 (which, according to Mrs. Sullivan's receipts, was paid to her) actually went in payment of her husband's debts, there is nothing in the record to show that this entire amount was paid or was intended to be paid upon the debts of her husband. Giving the utmost effect to the evidence appearing in this record, the jury were not authorized to find that Mr. ¹⁶⁵ Sullivan's indebtedness to the plaster company was more than \$1,500, and then if we should add to this (and we express no opinion as to whether the evidence would authorize it or not) the sum of \$500, which the plaintiff insists was shown by documentary evidence to have been paid upon a debt of Mr. Sullivan on April 3, 1897, there would still be left the sum of \$3,000 of the amounts covered in the aggregate by Mrs. Sullivan's receipts, which was paid to her or her agent authorized to receive it, and nothing in the evidence to justify a finding that it was paid upon any debt of Mr. Sullivan to the plaster company, or to the defendant in this case or his agent. It certainly could not be insisted that the mere fact that a connection of certain entries on the stubs of a check-book, showing that on the same day on which Mrs. Sullivan gave a receipt for a certain sum of money the husband of the plaintiff was credited with an amount which, together with two checks payable to his order, equaled the amount for which the plaintiff gave her receipt, would, even if it authorized the finding that the amount of the credit entered in favor of the husband was deducted from the money for which the wife gave her receipt, raise more than a mere suspicion that other sums for which the wife's receipts were given, and which appear in the evidence, were likewise applied to debts of her husband; and we do not think that a mere suspicion could authorize the conclusion that the remaining \$3,000 of the cash payment of the purchase price of this property was applied to the payment of Mr. Sullivan's debts. The positive written evidence shows that it was paid to Mrs. Sullivan or her agent. There is nothing to show that it was used by Sullivan, who

.

was intrusted with the receipts of his wife, for any purpose which would affect the right of the defendant in this case to be credited with the amount upon his indebtedness to Mrs. Sullivan for the purchase price of the property sued for. And yet, in the judgment of the court, passing upon the issues of fact that were submitted to him, it does not appear that the defendant was allowed the \$3,000, or any other portion thereof. Inasmuch as this case is to be remanded for a new trial, we desire to be understood as not expressing any opinion as to whether or not the plaintiff is entitled to a finding in her favor upon her contention that any portion of the \$5,000, the amount to be paid in cash after the payment of the mortgages upon the property, is to be allowed.

¹⁶⁶ Nor do we think that the verdict of the jury can be upheld. That verdict necessarily includes a finding against the defendant's contention made in his pleadings, that he had a good prescriptive title as against the plaintiff to the premises in dispute. The grantee of the plaintiff, and this defendant who held under a deed from her grantee, had been for more than seven years in adverse possession of the property for which the plaintiff is suing, under color of title. The plaintiff had executed her deed to Harrison more than seven years prior to the filing of this suit; and while, as we have said, the deed of Mrs. Sullivan, if executed for the purposes and under the circumstances set up by the plaintiff as a basis of her right to treat the deed as void, was void as to title, still that would not prevent its being good as color of title (*Floyd v. Ricketson*, 129 Ga. 669, 59 S. E. 909), unless her grantee was guilty of actual moral fraud in procuring the conveyance; and of the existence of such fraud upon the part of Harrison, the grantee named in Mrs. Sullivan's deed we find no evidence in the record. The deed was signed by Mrs. Sullivan herself; this is admitted by her. She was not illiterate, and could have read the deed herself. There was abundant evidence to show that the deed was read to her, and there is no positive denial upon her part that this was done, though she did testify that she did not know that certain parts of the deed were read to her; and she also testified that she did not understand the character of the paper that she was signing. But there is no suggestion in any testimony to show that anything was done or said to prevent her having a full understanding of the deed before she affixed her signature thereto. If from a reading of the deed to her by others she did not understand it, she could have declined to sign it at all, or could have deferred the execution of it until she had had it sufficiently explained to her for her to grasp its entire import. Taking the plaintiff's entire testimony, we do not think it authorizes the conclusion that her grantee was guilty of moral fraud in any respect in the transaction tha

led up to the purchase of this property and the execution of the deed thereto. And that being true, the paper executed by her was such a color of title that one holding thereunder for the statutory period might acquire a good prescriptive title to the property described in the deed.

¹⁶⁷ 5. Among the specifications of error assigned upon the judgment overruling the motion for a new trial is one pointing out an alleged error in the decree rendered in this case. As has been frequently ruled by this court, a motion for a new trial is not the proper method of correcting errors in a decree or judgment: *Herz v. Clafin Co.*, 101 Ga. 615, 29 S. E. 33.

6. An assignment of error containing the exception, "That the court erred in its entire charge to the jury, in failing to exempt from the consequences to be visited upon the grantor this defendant, who was thus deprived of all his defenses arising out of the estoppel, silence and fraud of the plaintiff, and the prescriptive holding of the premises in dispute," is too vague and general to raise any question for decision in this court.

7. Exceptions to the rulings of the court in admitting testimony over objection are not grounds for a new trial, where it is not made to appear what objections were urged to the admission of the testimony claimed to be inadmissible. The rulings which we have made upon important controlling issues in this case render it unnecessary that the other questions made should be specifically passed upon.

Judgment reversed.

All the justices concur.

A Conveyance by a Married Woman may be made in absolute payment of her husband's debts, although the statute impliedly forbids her conveyance of property as security for his debts: *Pratt Land etc. Co. v. McClain*, 135 Ala. 452, 93 Am. St. Rep. 35.

Contracts, the Consideration for Which is Partly Illegal or has partly failed, are considered in the note to *State v. Wilson*, 117 Am. St. Rep. 493.

ELLIOTT v. EDDGSON & JACKSON.

[113 Ga. 519. 45 S. E. 435.]

LIVERY-STABLE KEEPER—Statutory Lien on Animals.—In this state livery-stable keepers have a statutory lien on stock placed in their care for keeping. (p. 216.)

LIVERY-STABLE KEEPER—Services for Which may Claim Lien.—Such a lien includes not only the actual feeding of the horse placed with the livery-stable keeper, but also such charges as are directly connected with its keeping by the stableman, and as are naturally in the line of a livery-stable keeper's business. (p. 209.)

LIVERY-STABLE KEEPER—Who is, so as to be Entitled to Lien.—It is not necessary for a person to exercise all the different functions sometimes performed by a livery-stable keeper and mentioned in the various definitions of that term, in order to be a livery-stable keeper within the meaning of the lien law. (By the editor.) (p. 215.)

LIVERY-STABLE KEEPER—Lien for Expenses in Keeping Horses at Races.—Expenses of transporting a horse by railroad to places where races are to be conducted, in or out of the state, of entering him in such races, and like expenses, are not such charges as would furnish the basis for a livery-stable keeper's lien under the statute. (p. 209.)

LIVERY-STABLE KEEPER—Lien for Keeping Horse at Various Places—Expense at Races.—If a horse were left with a livery-stableman to be boarded or kept at an agreed price, and the stable-keeper had two or more stables in this state for the accommodation of stock, and by agreement with the owner the horse was kept at one or the other of such stables, the fact that he was not kept at one of the stables rather than another would not defeat his lien; but if a horse was delivered to a livery-stable keeper, and, under contract with the owner, was sent for racing purposes to distant points where it was kept, not in a stable of the liveryman, but in that of other persons, although the liveryman may have paid such stable charges under the contract, this would not give him a statutory lien upon the horse therefor. (p. 209.)

LIVERY-STABLE KEEPER—Agreement for Lien.—Where Proceedings Were Begun to Foreclose a statutory lien in favor of a livery-stableman upon a horse, and equitable proceedings were commenced for the purpose of enjoining such foreclosure and recovering possession of the horse, and the whole case turned upon whether a livery-stable keeper's lien existed, and the amount thereof, and there was neither pleading nor evidence to show the assertion and effort to enforce any lien existing by contract, it was error to submit to the jury the question as to whether the owner of the horse agreed to give to the persons claiming to be livery-stablemen a lien upon the horse. (p. 210.)

LIVERY-STABLE KEEPER—Agreement for Lien—Instructions.—This error was not cured by writing off a portion of the verdict, nor by stating to the jury, in a later portion of the charge, that unless the evidence showed that there was an express agreement for a lien, they would not consider the court's instruction on that subject. This again left it to the jury to determine whether there was an express agreement. (pp. 210, 211.)

(Syllabi by the court except when stated to be by the editor.)

Hodgson & Jackson were foreclosing a livery-stable keeper's lien on a horse belonging to Elliott, when the latter filed an equitable petition to enjoin them from selling the animal, and to obtain possession of it. Among other facts he alleged the following: That the defendants were engaged in the business of racing horses. Plaintiff contracted with one Reeves to take charge of the horse and enter him at such races as Reeves might see fit during the season of 1904, stipulating that no one should handle the horse except Reeves, who agreed to pay all expenses that accrued in racing and caring for the animal, and to divide with the plaintiff equally the net proceeds of the premiums or purses which might be won; and it was agreed that the plaintiff was to bear no part of the expenses or costs in that connection. Unknown to the plaintiff, Reeves delivered the animal to the defendants for shipment to the plaintiff, but they refused to make delivery, claiming a lien upon the horse as livery-stable keepers. After making the contract with Reeves, the plaintiff was informed that he was in the employment of the defendants, that the contract which he made with the plaintiff would inure to their benefit, and that in making it he was acting as their agent. After filing a bond, under an order of the presiding judge, the plaintiff was allowed to take possession of the horse.

In their answer the defendants, among other facts, set up the following: That Reeves was in the employment of the defendants, who conducted business under the firm name of Overbrook Stables; and as their agent he made a contract with the plaintiff to care for and board the horse. Plaintiff knew that the contract was being made for the defendants. By its terms they were to care for the animal for thirty dollars a month, the plaintiff to pay all extra charges, such as for shoeing, shipping the horse, boots, and whatever other paraphernalia were necessary in training the horse. Reeves was to have charge of the animal, train it, and put it in condition for racing. When the racing season came, defendants were to "campaign" the animal under the supervision of Reeves, the plaintiff to pay all expenses thereof, such as freight and entrance fees, in addition to the board. The board and other expenses amount to four hundred and twenty-four dollars and thirty-two cents. There were no winnings from the races. The defendants were conducting a livery and livery-stable business; they contracted with the plaintiff as livery-stable keeper, and as such claimed a lien against the horse for the above amount.

The jury found for the defendants two hundred and eighty-two dollars and sixty-nine cents, and judgment was entered accordingly on the bond. The plaintiff moved for a new trial, which was refused, and he excepted.

R. W. Milner, H. C. Tuck and Alonzo Field, for the plaintiff.

Shackelford & Shackelford, for the defendants.

²¹² ATKINSON, J. If Reeves acted as the agent of the defendants in making the contract with the plaintiff, whether his principals were known to the plaintiff at the time or not, in seeking to enforce the contract made by him or rights arising thereunder, the defendants would be bound by all the terms of his agreement. If that agreement was as contended by the plaintiff, the defendants had no lien upon the horse, as they were bound to pay all the expenses incurred in connection with keeping it and entering it at races. The defendants by their pleadings allege that they received the horse under the contract made by Reeves with the plaintiff; and therefore they are not in a position of setting up a livery-stableman's lien on account of a horse received for its keeping from a third person, regardless of the true ownership. As to this feature of the case it must depend on what was the contract, not upon what rights the defendants might have on account of caring for the horse independently of such a contract with the owner. Livery-stable keepers have a lien on the stock placed in their care for keeping: Civ. Code, sec. 2810. At common law a livery-stable keeper had no lien unless by contract therefor: *Jackson v. Holland*, 31 Ga. 339. His lien in this state is statutory. Different definitions have been given of a livery-stable keeper. In 19 American and English Encyclopedia of Law, second edition, 430, it is said: "A livery-stable is a building where horses or vehicles are kept or let for hire. A livery-stable keeper is of course the keeper of such a stable." Other definitions are: "One whose business it is to keep horses for hire, or to let, or to keep, feed or board horses for others": *Abbott's Law Dictionary*; *Anderson's Law Dictionary*; *Black's Law Dictionary*. "One who takes horses to bait and board; and he usually keeps horses to let": *Groves v. Kilgore*, 72 Me. 489. And a livery-stable has been said to be "A place where horses are groomed, fed and hired; where vehicles are let": *Williams v. Garignes*, 30 La. Ann. 1094. The *Standard Dictionary* defines a livery-stable to be "A stable where horses are kept at livery and for hire, and vehicles are let." ²¹³ *Webster's International Dictionary* defines a livery-stable to be "A stable where horses are kept for hire, and where stabling is provided." We do not think that it would be absolutely necessary for a stable-keeper to exercise all of the different functions which may sometimes be performed by him, and which are mentioned in the different definitions above quoted, in order to be a livery-stable keeper within the meaning of the lien law, but his business must be substantially that so indicated.

Some livery-stables may do a more contracted business than others, without destroying their status as such. The question is one of substance rather than of verbal and exact definition. Whether or not the defendants were livery-stable keepers was a question of fact. If they were not, they had no right to a lien as such, although they might have kept the plaintiff's horse under a contract to do so. If they were livery-stable keepers, and the contract with the plaintiff was as contended by them, they were entitled to a lien, and this would include not only the actual feeding of the horse, but also such charges directly connected with his keeping as were naturally in the line of a livery-stable keeper's business. Carrying horses to distant racetracks and there racing them is not a part of keeping a livery-stable, within the meaning of the lien law. Expenses of transporting the horse by railway to places where races were to be conducted, in and out of the state, or of entering it in such races, and like expenses, were not such charges as would furnish the basis for a livery-stable keeper's lien. We are not dealing with questions of bailment generally, or labor liens, or common-law liens, but with the particular statutory lien of a livery-stable keeper as provided in Civil Code, section 2810, which was sought to be foreclosed in this case. If a horse were left with a livery-stableman to be boarded or kept at a specified price, and the liveryman had stables in two or more towns in the state, where he conducted business, and by agreement with the owner he was kept in different stables of the same liveryman, the latter would doubtless have a lien not only for the charge at the original stable where the horse was placed, but at the other stables of the keeper in this state. But a livery-stable keeper's lien is for the benefit of the keeper of the stable where the horse is cared for. If the defendants were livery-stable keepers, and, under contract with the plaintiff, sent the horse for racing purposes to distant points, where it was kept, not in the stable of the defendants, ²¹⁴ but in the stable of other persons, although the defendants may have paid the stable charges, this would give them no lien upon the horse for the keep. Such expenses might raise a claim on behalf of the defendants as contract charges, if their contention as to the contract was correct, but would not create a lien in their favor as livery-stable keepers.

The presiding judge charged: "On the other hand, if you believe the contract was made as contended by defendants, that is, made by Elliott with Reeves as agent for Hodgson & Jackson, and the terms were stipulated as insisted upon by the defendants, and he had expressly agreed to bear all expenses, as well as feeding the horse, and agreed to give them a lien upon it, then it would be your duty to find out what the evidence shows that to be, and return a verdict in their

favor against the plaintiff for whatever it amounts to"; and also: "If you believe in this case, however, that Elliott did not make that express contract that he should pay for the feeding of the horse and bear all these expenses and give a lien for the entire thing, that he did agree to pay for, and that he should have a lien therefor, for feeding and keeping the horse and training him while here and elsewhere, and taking care of him and attending to him here and elsewhere, and that they have not been paid, then the court instructs you that if the defendants themselves have borne all the expense of feeding him here and elsewhere, that the defendants would be entitled to a verdict against the plaintiff." There was no evidence of any agreement on the part of the plaintiff that the defendants should have a lien for any particular services, nor was any lien by contract set up in the pleadings. If they had a lien it was not by contract, but such as the statute gave them. As there was a conflict in the evidence as to what was the contract, and as the defendants were claiming a lien as created by statute because of an alleged contract for the keeping of the horse, this reference to a lien by contract, several times repeated, was not adjusted to the evidence, and was calculated to mislead the jury, and perhaps cause them to think that a contract to do certain things in regard to a horse included a contract to create a lien upon it for those services, whether they were such as the statute in this state would create a lien for or not. It is true that the judge wrote off a part of the recovery, and left standing only what he considered well authorized by the evidence; and also that he charged that unless ²¹⁵ the evidence showed that there was an express contract for a lien, the jury would not consider the court's instructions on that subject; but we cannot say what effect on the minds of the jury may have been produced by these references to whether the plaintiff had agreed or contracted for the defendants to have a lien on the horse for various services, when there was no evidence to authorize them. This error went not merely to the question of amount, but to the question of establishing a lien. These charges may also have led the jury to believe that they might find a lien to exist in favor of the defendant for items which were not properly those of a livery-stable keeper.

Taken alone, some of the charges on which error was assigned were subject to criticism in using such expressions in regard to the defendants as, "in their line of business as livery-stable keepers," and, "they would have a lien as livery-stable keepers for all these items, if you find that to be the contract." Expressions of this character standing alone might have been understood by the jury as meaning that the presiding judge recognized the defendants as livery-stable keepers, and dealt with them as such, whereas whether

they were or not was a question for the jury. Although qualified by other portions of the charge, it would have been better not to have so charged as to authorize such impressions on the mind of the jury. But this will probably not occur on another trial.

Judgment reversed.

All the justices concur.

One Who Takes, Keeps and Trains a Horse Under Contract with the owner has a common-law lien for the labor, expense and skill bestowed: *Scott v. Mercer*, 98 Iowa, 258, 60 Am. St. Rep. 188. But see *Sharp v. Johnson*, 38 Or. 246, 84 Am. St. Rep. 788; *Lowe v. Woods*, 100 Cal. 408, 38 Am. St. Rep. 301. The keeper of a livery and boarding stable has a lien upon horses for his reasonable charges entitling him to retain possession until they are paid, although the property is exempt from execution: *Flint v. Luhrs*, 66 Minn. 57, 61 Am. St. Rep. 391.

A Statute Declaring That "Persons Keeping Livestock for Hire shall have the same rights and remedies for the recovery of their charges therefor as innkeepers have," gives to anyone keeping livestock for compensation a lien like that of an innkeeper. In such cases it is the keeping, and not the possession alone, which gives rise to the lien: *Lambert v. Nicklass*, 45 W. Va. 527, 72 Am. St. Rep. 828. That a chattel mortgage on a team is superior to a lien for caring for and feeding them unless they were actually delivered to the lien claimant for that purpose prior to the time of the filing of the mortgage, see *Erickson v. Lampi*, 150 Mich. 92, 121 Am. St. Rep. 607.

ADKINS v. BRYANT.

[133 Ga. 465, 66 S. E. 21.]

ATTORNEY—Authority to Consent to Judgment.—A verdict and judgment rendered with the consent of counsel is binding upon the client, in the absence of fraud and collusion upon the part of the counsel with whose consent such verdict and judgment is rendered. (p. 212.)

JUDGMENT—Motion to Set Aside, When Properly Denied.—Under the facts in this case the court did not err in denying the motion to set aside and vacate the judgment attacked. (p. 212.)

(Syllabi by the court.)

M. G. Bayne, for the plaintiff.

L. D. Moore, for the defendant.

⁴⁶⁵ **BECK, J.** The plaintiff in error, Mrs. Anna G. Adkins, made a motion to set aside and vacate the verdict and decree rendered at the preceding term of the court in a cause there pending between herself and W. T. Bryant, the defendant in error here. The motion was based upon the following grounds: "1. Because the said verdict and decree was entered into without plaintiff's consent; 2. Because the said

verdict and decree was entered into without any authority from her, but was made without her consent ⁴⁶⁶ by counsel." A rule to show cause was issued upon this motion; and at the hearing the movant testified that in the case in which the judgment was rendered, which she now seeks to have set aside, her attorney at law representing her in the case at the time the judgment was rendered, without her knowledge and consent, agreed to the verdict and the judgment as rendered; that the verdict and judgment so rendered fixed a certain "dividing land line, by which she lost a part of a lot of land"; that she never ratified the agreement of her attorney nor the verdict and judgment in any way; and that she was not in court when said verdict and judgment were agreed to by her attorney. The record of the former suit was introduced, as well as the verdict and judgment agreed to, and the latter showed that a different line was established between the parties from the one claimed in the suit. The court, after hearing the evidence, denied the motion.

It will be observed that neither in the motion nor in the evidence is there anything upon which to base a charge of fraud upon the part of counsel who represented the plaintiff in error here in agreeing to the verdict and judgment which she sought to have set aside. The argument of counsel for the plaintiff in error in his brief, wherein it is contended that a different ruling from that made by the court below should have been made, because of fraud on the part of the attorney at law representing Mrs. Adkins in the suit in which the consent verdict and judgment was rendered, finds no support whatever in this record. There is nothing to suggest fraud upon the part of anyone in the consent to the judgment attacked in this proceeding; nor is there anything in the record to suggest that counsel, whose conduct in the action resulted in that judgment, did not act bona fide and for the best interest of his client. That being true, the court below could not have done otherwise than overrule the motion to vacate. In the case of *Williams v. Simmons*, 79 Ga. 649, 7 S. E. 133, it is said: "When a suitor comes into court, competent to select counsel, and does select counsel, no matter who the suitor may be, or how much married, the counsel is there for the purpose of representing the client; and whatever the counsel assents to, the client assents to. There is full power on the part of the counsel to represent the client, and it is just the same as if the client were there in person; and it is no answer ⁴⁶⁷ to a decree, a solemn judgment of a court, for the client to come in and say that the counsel misrepresented the client's interests, or did not represent the client's wishes. Let the client see that the counsel conforms to instructions and if there is any injury by failure

to do it, let the counsel answer for it, and not the other party."

Judgment affirmed.

All the justices concur.

The Implied Authority of an Attorney to Consent to or Confess Judgment is discussed in the note to *Tobler v. Nevitt*, 132 Am. St. Rep. 162.

WEEKS v. HOSCH LUMBER COMPANY.

[133 Ga. 472, 66 S. E. 168.]

ADMINISTRATION—Certificate to Transcript of Record in Court of Ordinary.—Where, in a certificate to a transcript of a record in the court of ordinary, the ordinary described himself as "ordinary and ex officio clerk of said court of ordinary of said county," and signed the certificate in the same manner, this was a sufficient statement that the ordinary and the clerk were the same person to admit the transcript in evidence. (p. 216.)

EXECUTORS—Authority of One of Several to Execute Deed. A special trust as to the sale and conveyance of land, conferred by a will on three executors, cannot be executed by one of them selling and making a deed. Such a deed could not be upheld by parol evidence tending to show that the other two executors took no active part in administering the estate, and that the executor making the sale and conveyance was the managing executor. (p. 217.)

EJECTMENT—Evidence.—Where a Deed is Apparently Offered as Conveying title and rejected as invalid, if the person claiming under it desires to have it admitted as color of title in connection with evidence of possession thereafter to be offered, he should so tender it or call the attention of the court to the purpose of its offer as color of title. (p. 217.)

EJECTMENT—Evidence.—Where in an Action of Ejectment the defendant offered in evidence certain deeds, which were properly rejected when and as they were offered, and afterward he offered evidence to show possession, but no color of title, and it alone was not sufficient to show prescription, and its admission could not have altered the result, ruling it out will not require a reversal. (p. 218.)

APPEAL.—The Burden of Showing Error on the Part of the Trial Court rests upon the plaintiff in error. (By the editor.) (p. 217.)

EJECTMENT.—Although Evidence may have been Admissible to Show Adverse Possession at the time of the making of an administrator's deed to a purchaser of land, yet where the same result of the case was inevitable, regardless of whether such evidence was admitted or not, its rejection will not cause a reversal. (p. 219.)

(Syllabi by the court except when stated to be by the editor.)

John A. Wilkes and Shipp & Kline, for the plaintiff in error.

Edwin L. Bryan and E. K. Wilcox, for the defendant in error.

473 LUMPKIN, J. An action of ejectment in the common-law form was brought by John Doe on the several demises of the Hosch Lumber Company, R. E. Davison as administrator de bonis non cum testamento annexo of the estate of James Davison, deceased, C. J. Haden, Ella Martin Davison, James Davison, Mary Pearl Davison, and Temperance Estelle Davison, jointly and severally, against Richard Roe, casual ejector, and J. S. Weeks, claimant of title. The defendant pleaded the general issue, and also "that he and those under whom he claims have been in the open, exclusive, notorious, continuous and bona fide possession of said land under written color of title." It appeared that both parties claimed under James Davison. One Davant, executor of Davis, made a quitclaim deed to Norman, and Norman conveyed to the defendant. Later an administrator de bonis non was appointed on the estate of Davison. He conveyed to Haden. Afterward he made a deed reciting that the estate of Davison had been fully administered pursuant to the terms of the will, and all debts had been fully paid, and conveying to the devisees in the will "all the right, title and interest in the real property of said estate that may yet remain in said estate," designating certain lots including the one now in suit. The devisees under the will of Davison conveyed to Haden. Between the dates of the two conveyances to him, Haden conveyed to the Hosch Lumber Company. On the first trial the judge directed a verdict for the defendant. The judgment was reversed, this court holding that the deed from **474** Davant, one of the three executors of Davison, was not authorized by the will, which provided for the testator's wild lands (including the lot in dispute) to "be sold at such time and place as may be to the best interest of my estate, at the discretion of my executors and the ordinary of this [Greene] county": Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 S. E. 439.

On the second trial the plaintiffs made out a prima facie case. The defendant tendered in evidence the deed from Davant, executor of Davison, to Norman, being a quitclaim deed. Objection was made to this, on the ground that it was void and that it was the personal deed of Davant. The defendant then offered certain depositions tending to show that Davant was the active executor of the estate of Davison, and with the consent of the other two executors managed the affairs of the estate while all three were in office, and so continued to act after Overton resigned, until he himself resigned; that Overton and Mrs. Davison did not have any active management of the estate, but left the business of it entirely to Davant, who, in the year 1882 (in which year the deed to Norman was dated), made all the returns and signed all the papers connected with the estate; that about 1896 or

1897 Haden entered into correspondence with the son of Mrs. Davison, making inquiry about the lots of land owned by his father; that the younger Davison thought the title valueless on account of certain transactions with one Newsome and one Sawtell, the mismanagement of the estate, and the lapse of time; that Haden thought the deed from Davant to Norman void; that Davison explained the details of certain transactions between his mother and one Newsome and Sawtell; and that finally Haden purchased and paid two hundred dollars or two hundred and fifty dollars, taking a deed from the administrator de bonis non, but causing to be inserted in it a consideration of one thousand dollars. Depositions of Norman were also offered to show that he bought the land from Davant as executor of Davison, paid the price stated in the deed, had no notice of any kind to indicate that the deed was not good, paid full value, and believed that it was effective to pass title out of the estate of Davison, deceased, and that he afterward sold the land in dispute to Weeks for one hundred and twenty-five dollars. The court rejected the deed from Davant, executor, to Norman, on the ground that it was void as an executor's deed, and also rejected the evidence offered in support of it. Defendant then offered in evidence a deed from ⁴⁷⁵ Norman to Weeks, covering the lot in dispute. This was rejected on the ground that it was not connected with any person having title, no title being shown in Norman, the grantor. Defendant offered in evidence a turpentine lease, dated January 8, 1895, from Weeks to one Horne, conveying all the turpentine timber on certain lots, including the one in dispute, to be used, worked and operated for the purpose of manufacturing rosin and spirits of turpentine from the eighth day of January, 1895, for the full term of three years from the date of boxing. It recited a valuable consideration, and was attested and recorded. This was rejected on the sole ground that no title had been shown in Weeks. Defendant then offered to prove by Horne and Weeks that immediately after the execution of the turpentine lease they began boxing and working for turpentine purposes all the pine trees on the land in dispute; that it was covered entirely and completely with a growth of pine trees capable of being worked for turpentine purposes, except a small, unimportant portion thereof; and that they were in possession of the lot, boxing, hacking and otherwise working all the trees thereon capable of being worked for turpentine purposes, and during that time were in as full possession of the land as the manufacture of turpentine and naval stores from trees can give possession. This evidence was rejected. The defendant rested. The court directed a verdict for the plaintiffs, and the defendant excepted.

1. In making out their title, the plaintiffs introduced in evidence a certified copy of the letters of administration *de bonis non cum testamento annexo* on the estate of Davison deceased, issued to R. E. Davison in 1894, and also a certified transcript of the application of Davison, administrator *de bonis non*, for leave to sell the wild lands at public or private sale, and of the order of the ordinary granting it. The certificate to each of these transcripts was in similar form. It recited that "I, Jas. H. McWhorter, ordinary and ex officio clerk of said court of ordinary of said county, do hereby certify that the above and foregoing copy," etc. It concluded with the words, "Given under my hand and seal of office, this 1st day of April, 1903," and was signed, "Jas. H. ⁴⁷⁶ McWhorter, Ordinary and ex officio clerk court of Ordinary for Greene County, Georgia." Objection was made to these transcripts, on the ground that it did not appear that the ordinary had no clerk, and that if there were a clerk of the court of ordinary, he and not the ordinary should have signed the certificate. The objection was overruled. "The ordinaries are, by virtue of their offices, clerks of their own courts, but they may, at their own expense, appoint one or more clerks, for whose conduct they are responsible, who hold their offices at the pleasure of the ordinary": Civ. Code, sec. 4247. "Such appointed clerks may do all the acts ordinaries could do, not judicial in their nature": Sec. 4248. Before entering on their duties they must give bond: Sec. 4249. "It is the duty of such clerks or the ordinaries acting as such, . . . to give transcripts likewise as they are required, and when the ordinary and the clerk are the same person, so to state in the certificate" Sec. 4250. In *Lay v. Sheppard*, 112 Ga. 111, 37 S. E. 132 it was held that a certificate signed by an ordinary for the purpose of authenticating a transcript from the record on file in his court does not conform to law unless it affirmatively discloses whether or not such ordinary was also the clerk of that court: See, also, *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011; *Smallwood v. Kimball*, 129 Ga. 49, 58 S. E. 640. The requirement of the law is that when the ordinary and the clerk are the same person, it shall be so stated in the certificate. It is not also required that there shall be a direct additional statement that the ordinary has no clerk. In the present case the ordinary described himself in the certificate as ordinary and ex officio clerk of the court of ordinary, and likewise signed the certificate as ordinary and ex officio clerk. It would have been useless to add to the description of his official position as ordinary that he was also ex officio clerk except for the purpose of indicating that the ordinary and clerk were the same person; and, fairly construed, such is the meaning which should be given to the certificate.

2. It has been settled by the decision of this court on the former consideration of this case (123 Ga. 336, 51 S. E. 439), that where several executors of a will have qualified, the joint act of all of them is necessary to execute a special trust created by the will; that the power to sell the wild land conferred by the will of Davison on his executors, at their discretion and that of the ordinary of the ⁴⁷⁷ county, was such a trust and that the deed of Davant, executor, alone was not a valid execution of such trust. On the second trial it was sought to avoid this ruling by showing that the other two executors did not give attention to the business of the estate, but left it to Davant, who was the managing executor. This was not sufficient to cure the trouble. It was the testator who created the special trust and empowered his three executors jointly to execute it. The law required all to join in so doing: Civ. Code, sec. 3317. The executors could not change the law and the will by letting some of them take no part in discharging their functions and leaving another to do so alone. Treating the deed as one by Davant in his official capacity as executor, it was properly rejected from evidence, as were also the depositions by which it was sought to avoid the effect of the former decision of this court.

In the brief of counsel for plaintiff in error it was argued that if the evidence rejected had been admitted, it would have shown a prescriptive title. Apparently, from the recitals of the bill of exceptions, the deed from Davant, executor, to Norman, and that from Norman to Weeks were offered as muniments of title, and not as color of title. In connection with the former deed there is no suggestion in the bill of exceptions on the subject of prescription or color of title, even in the assignment of error. In regard to the latter the only mention of that subject is in the assignment of error where it is said that "Said deed would, at least, have been good as color of title." But it is not stated that it was so offered, or that the court's attention was called to the fact that reliance was sought to be placed upon it as such. One cannot tender a deed as a muniment of title, offering it as conveying actual title, invoke a ruling on that subject, have it rejected as being invalid as a conveyance of title, say nothing to the court as to an offer of it as color of title in connection with other evidence to be thereafter tendered, and later obtain a reversal on the ground that it might have been admissible for the latter purpose. The burden of showing that the court erred in the ruling which he made rests upon the plaintiff in error who seeks a reversal. The presumption is in favor of the court, not of the plaintiff in error. When a paper is offered as a deed, the primary and natural understanding, in the absence of anything to the contrary, would be that it was offered as a conveyance. If ob-

jection is made to it ⁴⁷⁸ on the ground that it was made an executor without authority, or that no title was shown in the grantor, and no other purpose in offering it except to convey title is disclosed, the court would most naturally conclude that the deed was relied on as title. To allow him to rule on it as such, without having his attention called to any other purpose for which it might be admissible, and then reverse him because it was admissible for some other purpose, might often have the effect to entrap the court. A deed might perhaps be admissible on a question of handwriting, or as containing an admission, or for other purposes, but would it be right to the judge to offer it as a deed conveying title, let it be ruled on with respect to its validity as a conveyance, and reverse his ruling because the paper might have been admissible for some other purpose not shown to have been disclosed? Here, it seems that the mind of the judge was directed to the deeds as conveyances of title. As to the first deed excluded, additional evidence was offered with it for the purpose of supporting its validity as such. This having been ruled out, and no title being shown in the grantee therein, the deed from him was ruled out on that ground—counsel and the court thus apparently dealing with the deeds as conveyances of title. The defendant did say in his plea that he and those under whom he claimed had been in possession under color of title but this was not a good plea of prescription, nor did it show a length of possession sufficient for that purpose. Adverse possession was also urged for the purpose of attacking the conveyance from Davison, administrator, to Haden, as having been made pending such possession. There was no reference in the plea to the deeds now being considered; and it was not enough to render their exclusion, under the circumstances above stated, erroneous. At first blush it might appear that the ruling of this court to the effect that, where evidence was admissible for any purpose, admitting it over a particular objection would not be reversed, was not in perfect harmony with what is here said. But a careful consideration will show that the two rulings are based on the same principle, namely, that the burden of showing that the court committed error rests upon the plaintiff in error. There are intimations along the line here followed, in some of the cases in this state: See *Clark v. Hulsey*, 54 Ga. 608 (1); *Barker v. Blount*, 63 Ga. 423 (1). The decision in *Simmons v. Lane*, 25 ⁴⁷⁹ Ga. 178, was based on the act of 1802, which is not now embodied in the code. In the earlier case of *Hester v. Young*, 2 Ga. 31, that act was considered, not as working a radical change in the law, but practically as declaratory of it as it previously stood.

The principle above announced has been recognized by the courts of a number of states: *Barksdale v. Toomer*, 2 Bail.

(S. C.) 108; *Main v. Gordon*, 12 Ark. 651; *Jones v. St. Louis etc. Ry.*, 53 Ark. 27, 22 Am. St. Rep. 175, 13 S. W. 416; *Jones v. State*, 11 Lea, 468; *Wheeler v. Rice*, 8 Cush. 205; *Young v. Otto*, 57 Minn. 307, 59 N. W. 199; *Maxwell Land Grant Co. v. Dawson*, 7 N. M. 133, 34 Pac. 191.

3. With the deeds from Davant, executor, to Norman, and from Norman to Weeks, properly rejected, there was no error in later rejecting the turpentine lease from Weeks to Horne. The latter was not prescribing or seeking to prescribe. The only use of the lease, if introduced, would have been to show that Horne was holding under Weeks, and that his possession would inure to the benefit of Weeks. But the timber lease, as a paper, added nothing to the title of the latter. From the standpoint of prescription, the lease and the evidence touching possession would at most have shown that Weeks was in possession through himself or his lessee from 1895 to the time of the bringing of the suit in 1904. This was less than twenty years, and therefore did not give a prescriptive title by possession alone, and there was no color of title in Weeks in evidence. He made out no prescriptive title.

4. It was contended that if the evidence in regard to possession by Weeks and Horne had been admitted, it would have been shown that they were in possession at the time Davison, administrator, made his conveyance of the land to Haden, and therefore that such administrator's deed would have been invalid under the Civil Code, section 3457, which declares that "An administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." This may be true, and we incline to think that the court should have admitted the evidence for that purpose. But again it appears that if such evidence had been admitted, it could not have changed the result of the case, or prevented a verdict against the defendant. If the deed from the administrator de bonis non to Haden was void, then whatever ⁴⁸⁰ title the estate had at that time remained undevested. Subsequently, the administrator de bonis non assented to the legacies in the will and conveyed the land to the legatees. Under the ruling in *French v. Baker & Hall*, 95 Ga. 715, 22 S. E. 652, such an assent to legacies and conveyance to legatees in settlement of the estate was not void, even if the land was held adversely. Afterward the legatees conveyed to Haden, who had conveyed previously to the Hosch Lumber Company. So that, if the deed from the administrator to Haden were shown to be ineffectual, he would still have acquired the title of the legatees, and the same result of the suit would follow.

There was some discussion of the subject of laches and estoppel, but neither the pleadings nor the evidence made

out any case which would have authorized a verdict in favor of the defendant on that ground.

Judgment affirmed.

All the justices concur.

The Authority of One of Several Executors or Administrators is the subject of a note to Alerding v. Allison, 127 Am. St. Rep. 381.

MACKIN v. BLALOCK.

[133 Ga. 550, 66 S. E. 265.]

BILLS AND NOTES—Necessity of Words of Negotiability.—To render a note negotiable, within the purview of Civil Code, section 3694, it must be payable to the payee and to his order, or assigns or bearer. (By the editor.) (pp. 221, 222.)

BILLS AND NOTES—Negotiability of Due-bill.—The indorsee of a due-bill, containing no negotiable words, is chargeable with notice of all defects in the consideration, although he takes it for value and before due. (p. 222.)

PLEADING.—The Plea of Want of Consideration was good as against a general demurrer. (p. 221.)

PLEADING.—A Verification of a Plea to an Action Founded on an Unconditional Contract in writing is sufficient where the defendant swears that the facts stated therein are true to the best of his knowledge and belief. (p. 222.)

TRIAL.—Testing Sufficiency of Evidence to Support Verdict.—Where a case has been tried by a jury and a verdict rendered therein, and the losing party desires to test the sufficiency of the evidence to support the verdict, a motion for a new trial is indispensable. (p. 222.)

(Syllabi by the court except when stated to be by the editor.)

Lamar Rucker, for the plaintiff.

J. W. Wise and W. B. Hollingsworth, for the defendant.

⁵⁵¹ EVANS, P. J. Mackin brought suit against Blalock on the following instrument:

"\$7,000.00 Hot Springs, Ark., Feb. 27, 1905.

"For value received, I owe J. Henry Peyser Seven Thousand dollars (\$7,000). (Signed) S. T. BLALOCK."

(Indorsed:) "Pay to the order of William J. Mackin.

(Signed) "J. HENRY PEYSER."

In his answer, the defendant, after denying indebtedness, specially pleaded "that he has no recollection whatever of having given J. Henry Peyser any note or paper, and for that reason can neither admit nor deny that he signed the

paper sued on, and for the same reason he cannot state the facts and circumstances under which said paper was executed, if at all, by him; but this defendant states positively that if said paper was signed by him, it is a nudum pactum for the reason that it was executed without consideration, either good or valuable, to him or anyone else, and without injury, loss, or detriment to the said Peyser, or anyone else. And this defendant specifically avers that with the exception of an indebtedness to said Peyser of about three hundred dollars, which was subsequently paid by check, he owed the said Peyser nothing and was not indebted to the said Peyser in any sum whatever at the time when said paper purports to have been signed, or at any time thereafter, and was under no obligation or liability to said Peyser of any character whatever; and no money or other thing of value passed from said Peyser to this defendant or anyone else at his instance or request, either at the time said paper purports to have been signed or at any time thereafter." At the trial term the plaintiff ⁵⁵² demurred generally to the sufficiency of the plea, and the court overruled the demurrer. He then moved to strike the answer, because it was not positively verified; which motion the court denied. The case proceeded to trial, and eventuated in a verdict for the defendant, upon which a judgment was entered. The plaintiff sued out a bill of exceptions assigning error on the action of the court in permitting the verdict to be rendered and judgment entered thereon, and on the ruling on the demurrer and the motion to dismiss.

1, 2. Counsel for plaintiff in error characterizes the special plea as a plea of non est factum, and points out its deficiency as such. We concede that the plea is not good as a plea of non est factum; but we think that, as against a general demurrer, the plea is good as a plea of want of consideration. The writing sued on is to all intents and purposes a due-bill: *Brewer v. Brewer*, 6 Ga. 587. It is assignable by indorsement or written assignment in the same manner as bills of exchange and promissory notes: Civ. Code 1895, sec. 3682. While the code section just referred to declares that any contract in writing for the payment of money is negotiable by indorsement or written assignment in the same manner as bills of exchange and promissory notes, its effect is not to render such paper a negotiable instrument so as to come within the operation of Civil Code, section 3694, which provides that a bona fide holder of a negotiable instrument, who receives the same before due and without notice of any defect or defense, shall be protected against all defenses by the maker except non est factum, gambling or immoral and illegal consideration, and fraud in its procurement. In order to render a note negotiable within the purview of the

Civil Code, section 3694, it must be payable to the payee and to his order, or assigns or bearer. The writing sued on contains no such words of negotiability. These two code sections (sections 3682, 3694) as well as other cognate sections were exhaustively considered by Bleckley, J., in the case of *Cohen v. Prater*, 56 Ga. 203, where it was held: "The indorsee of a note containing no negotiable words is chargeable with notice of all defects in the consideration, although he takes it before due and for value. The negotiable paper which is not subject to such a defense, in the hands of a bona fide indorsee, is paper which the parties render negotiable as a part of their express contract, and not such as, wanting negotiable words, the statute alone renders negotiable for the purpose of passing the legal title and enabling the indorsee or assignee to sue ⁵⁵³ in his own name." This case has been followed several times: See *Ryals v. Johnson County Savings Bank*, 106 Ga. 525, 32 S. E. 645, and cases cited. The plaintiff therefore stands in no better relation to the maker than his assignor as to defenses which the maker might set up. An essential element in every contract is that it must be supported by a consideration; without a consideration the contract is nudum pactum and unenforceable.

3. The plea was verified according to rule 24 of the superior court: Civ. Code, sec. 5655; *Bishop v. Exchange Bank*, 114 Ga. 962, 41 S. E. 43.

4. Where a case has been tried by a jury and a verdict rendered therein, and the losing party desires to test the sufficiency of the evidence to support the verdict, a motion for a new trial is indispensable: *Holsey v. Porter*, 105 Ga. 837, 31 S. E. 784. No error of law having been committed on the trial, the verdict will not be reversed.

Judgment affirmed.

All the justices concur.

Negotiable Instruments are Such as Run to Order of Bearer, payable in money, for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely, not upon a contingency: *Hatch v. First National Bank*, 94 Me. 348, 80 Am. St. Rep. 401. A writing in these words "Due C seventeen dollars, value received, B," is held not a negotiable instrument in *Currier v. Lockwood*, 40 Conn. 349, 16 Am. Rep. 40. That the use of the words "to order" or "for value received" in a bill or note does not show an intent to make it a negotiable instrument, if it contains other words inconsistent with its negotiability, see *Culbertson v. Nelson*, 93 Iowa, 187, 57 Am. St. Rep. 266.

WHITLEY v. McCONNELL.

[133 Ga. 738, 66 S. E. 933.]

LOTTERY—What Constitutes.—Where an Owner of Land Subdivided it into lots or parcels, and offered them for sale at public outcry, announcing that after the sale a drawing would be had, at which each purchaser would be entitled to draw, and the lucky person would receive, in addition to his purchase, a certain lot which was not to be put up at the sale, this was a scheme in the nature of a lottery. (pp. 223, 224.)

LOTTERY—Enforcement of Scheme by Courts.—A court having equitable jurisdiction will decline to enforce any such scheme by decreeing specific performance of the agreement as to the drawing. (p. 224.)

LOTTERY—Enforcement of Scheme by Courts.—Nor will the court decree that a conveyance of such prize lot be made to one who purchased another lot, or adjudge that he recover possession of the additional lot, on the ground that the seller, who reserved the right to start the lots or make the first bid on them, failed to obtain another bid on the second lot offered for sale, and thereupon withdrew it and stopped the sale. (pp. 224, 225.)

(Syllabi by the court.)

J. S. James, for the plaintiff.

J. H. McLarty, for the defendant.

739 LUMPKIN, J. Whitley brought his action against McConnell, seeking to recover a certain lot of land, and to have the latter specifically perform an alleged contract of sale to him. The defendant denied any contract of sale as to the lot in controversy, and pleaded illegality of consideration as to the agreement to have a drawing for a lot. The evidence introduced by the plaintiff showed, in brief, as follows: The defendant advertised for sale a tract of land divided into six or seven parcels. There was a lot separated from the main tract. It was announced by him and his auctioneer that each purchaser of a lot would have a chance at the lot which was not to be put up, and the purchasers would draw for it and see who would get it. Defendant announced that he reserved the right to start the lots, or, as some of the witnesses expressed it, to make the first bid on them. There was a small crowd present. When the first parcel was offered, he started it at twenty-five dollars, another person bid twenty-five dollars and twenty-five cents, and the plaintiff bid twenty-five dollars and seventy-five cents. It was knocked down to him. A second parcel was put up, and the defendant started it at twenty-five dollars. No other bid was received, and he stopped the sale. Plaintiff asked defendant about the drawing, and the latter said he would "fix the drawing" up at a named store, after the lot bought by plaintiff was paid for and the deed to it made. After this was done, defendant

offered to prepare two tickets, one having figures on it, and one a blank, and to let plaintiff draw, and if he drew the one with figures on it, he could have the lot; if not, the defendant would keep it. Plaintiff claimed that, as he was the only person at the sale who bought a lot, the defendant had no right to draw, and that plaintiff was entitled to the lot. Defendant refused to have a drawing unless there was a ticket for himself, or to convey the land to the plaintiff. Thereupon this action was brought. On the close of the plaintiff's evidence, the court granted a nonsuit, and the plaintiff excepted.

The penal law of this state prohibits any lottery, gift enterprise, or other similar scheme or device: Pen. Code secs. 406, 407. In the Civil Code, section 3668, it is declared that a contract which is against the policy of the law cannot be enforced, and among the illustrations given are "wagering contracts." In *Meyer v. State*, 112 Ga. 20, 81 Am. St. Rep. 17, 37 S. E. 96, 51 L. R. A. 496, it was held that a merchant who gave to a designated class of customers an opportunity to secure by lot or chance any article of value, additional⁷⁴⁰ to that for which such customer paid, violated section 407 of the Penal Code; and in *De Florin v. State*, 121 Ga. 593, 104 Am. St. Rep. 177, 49 S. E. 699, it was held that an arrangement by which members of "a suit club" paid to a tailor one dollar per week, and weekly drawings were held as a result of which the member holding the lucky number received from the tailor a suit of clothes and then ceased to be a member of the club, was a scheme in the nature of a lottery, although a member who did not hold a lucky number and who continued to pay his dollar a week for thirty weeks was entitled to a thirty-dollar suit of clothes, regardless of the result of the drawings. Enticing offers of this kind are unfortunately not uncommon in the effort to attract trade or make sales. But they are illegal. That a lottery or gift enterprise scheme is added to legitimate business to draw customers or buyers by appealing to the hope of securing something by chance, beyond the article actually bought, does not sanctify such an appeal to the gambling disposition so common in human nature, or make the agreement lawful. The courts will not enforce any such executory contracts. This has been repeatedly announced, not because of any more regard for the promisor than the promisee; but simply because the law must be upheld, and courts will not enforce contracts of this character, which violate its positive prohibitions.

In the case at bar the plaintiff did not buy the lot involved in controversy. He bought another lot, with a chance to get this one at a drawing to be had after the sale. The scheme of the sale was to induce purchasers to bid, by means of the

hope on the part of each that, in addition to the lot which he actually bought, he might get a prize—another lot—as a result of chance at a drawing. This was a scheme in the nature of a lottery, and could not be enforced by decree for specific performance, or by a judgment for the recovery of the land by a purchaser of another lot. It is immaterial that there was but one lot actually sold, and that the owner, having started the next lot and having failed to get another bid, withdrew it. If all had been sold, the scheme would have been illegal. It was not made legal because only one lot was sold.

In his petition the plaintiff did not allege the chance element of the auction sale, but the evidence introduced by him disclosed it; and the grant of a nonsuit was proper.

Judgment affirmed.

All the justices concur.

As to What Constitutes a Lottery, see the note to *Yellow-stone Kit v. State*, 16 Am. St. Rep. 42; and the recent cases of *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 106 Am. St. Rep. 586; *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17. A scheme of a "home company," whereby applicants for contracts with it contribute to a fund which is to be used in the purchase of homes for them, the applications being numbered and dated in numerical order as received at the home office, and the right to share in the distribution of the fund depending upon obtaining an early number, is a lottery: *State v. Nebraska Home Co.*, 66 Neb. 349, 103 Am. St. Rep. 706. For other cases where investment schemes have been attacked as lotteries, see *State v. Interstate Savings Invest. Co.*, 64 Ohio St. 283, 83 Am. St. Rep. 754; *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177. A tailor carries on a lottery where he conducts a suit club, whose members each pay a dollar a week and participate in a drawing every Saturday, at which the one getting a certain number receives a suit of clothes, the members being entitled to credit on merchandise for the amounts paid in, and the lucky ones having the privilege of withdrawing: *Grant v. State*, 54 Tex. Cr. 403, 130 Am. St. Rep. 897; *De Florin v. State*, 121 Ga. 593, 104 Am. St. Rep. 177. As to whether schemes for the sale and drawing of city lots constitute lotteries, see *Branham v. Stallings*, 21 Colo. 211, 52 Am. St. Rep. 213; *Lynch v. Rosenthal*, 144 Ind. 86, 55 Am. St. Rep. 168.

Am. St. Rep., Vol. 184—15

THORNTON v. FERGUSON.

[133 Ga. 825, 67 S. E. 97.]

EXECUTION—Disqualification of Clerk to Issue.—Where the clerk of a superior court was the administrator upon the estate of a deceased person, and as such was the defendant in a suit to foreclose a mortgage pending in the superior court, an execution issued by him as clerk against himself as administrator, based on the judgment of foreclosure, was not void because of disqualification to issue the execution. (p. 227.)

EXECUTION—Sufficiency of Levy in Mortgage Foreclosure.—Where in a suit to foreclose a mortgage upon land, against two defendants, a judgment was obtained against only one of them, and the execution commanded the sale of the property mortgaged, and the sheriff, while making the levy, omitted to recite that the land was levied upon as the property of the defendant named in the execution, the levy was not for that reason void, or inadmissible upon the trial of a claim case between the plaintiff in execution and a third person. (p. 228.)

EVIDENCE—Statements of Person Since Deceased.—Where property was levied upon to satisfy a mortgage execution against the administrator of a deceased person, and was claimed by a third person, who did not hold under the defendant in execution, it was not erroneous to allow the plaintiff in execution, while testifying in his own behalf, to give evidence as to sayings of the mortgagor while in life, over the objection that the plaintiff was incompetent to testify. (p. 228.)

APPEAL—Exception to Amendment of Issue.—An exception to an allowance, over objection, of "the amendment to the issue which is in the record," there being two such amendments in the record, and nothing further to indicate to which of them the objection and the ruling of the court applied, is insufficient as an assignment of error. (p. 228.)

ESTOPPEL—Whether Operative Against Grantee.—An estoppel in pais, on account of representations made by the owner of land, which induced another person to extend credit and accept a mortgage on the land from a third person, is not operative against a subsequent grantee of the owner of the land who was a bona fide purchaser for value. (p. 230.)

ESTOPPEL—Whether Operative Against Grantee.—There was no evidence to impeach the bona fides of the grant under which the claimant asserted title; and it was erroneous to so instruct the jury as to authorize a finding that the property was subject on the theory of an estoppel operative against the claimant. (p. 230.)

APPEAL—Errors not Calling for Reversal.—Other grounds of error complained of are not of such character as to require the grant of a new trial. (pp. 230, 231.)

(Syllabi by the court.)

J. C. Edwards, for the plaintiff in error.

826 **ATKINSON, J.** This was a claim case. The property was found subject. A motion for new trial was overruled, and the claimant excepted.

1. The execution was based on a judgment foreclosing mortgage. J. A. Erwin, as administrator upon the estate of

Ed. Hayden, deceased, was defendant in execution. Erwin was also clerk of the superior court, and as such clerk issued the execution. Objection was made to the admission of the execution in evidence, on the ground that it was illegal and void, because Erwin, as clerk, could not issue an execution against himself as administrator. Error is assigned upon the ruling of the court in refusing to sustain the objection. There was no such disqualification as rendered the execution void: *Blount v. Wells*, 55 Ga. 282; *Thornton v. Wilson*, 55 Ga. 607.

2. The mortgage upon which the suit was founded purported to have been executed by Ed. Hayden, in his lifetime, and Lydia Hayden. After the death of Ed. Hayden, Erwin was appointed administrator upon his estate, and the mortgagee instituted suit to foreclose his mortgage against Erwin as administrator, and Lydia Hayden in her own right. Before final judgment, the suit was dismissed as against Lydia Hayden, and proceeded against the other defendant, who was the only party against whom a judgment was taken and against whom the execution issued. The execution recited the judgment upon which it was based, showing that it was against J. A. Erwin, as administrator upon the estate of Ed. Hayden. The entry of levy made upon the execution merely recited, "I have this day levied the within fieri facias upon the following described property" (describing the property as it was described in the mortgage), and set forth the date of the levy and the signature of the officer. On the trial of the claim case, the claimant objected to the admission of the entry of levy in evidence, on the ground that "it did not show whose property was levied upon," and excepted to the ruling of the court admitting the evidence. Where a levy is made under an ordinary fieri facias, attachment, or other similar process, commanding the seizure of the property generally of the defendant, the levy should describe the interest of the defendant in ^{§27} the property levied upon: *Civ. Code*, sec. 5421; *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 716, and cases cited. But the levy now under consideration was made in pursuance of the mandate of the court, directing the sale of specific property to satisfy a mortgage debt under a final judgment of foreclosure against the defendant. The levying officer had no discretion: *Wallace v. Holly*, 13 Ga. 389, 58 Am. Dec. 518; *Haslett v. Rodgers*, 107 Ga. 239, 33 S. E. 44. The entry of levy was made on the execution, and recited that the levy was made under authority of the execution. The execution recited the name of the defendant and the judgment of foreclosure. The judgment authorized no property to be sold except that which was specified, nor the seizure of any person's interest in the mortgaged property except that of the defendant. A purchaser, seeing the levy,

would be informed that the property was levied upon as the property of the defendant in execution as certainly as if it were so expressly stated in the entry of levy. Under these circumstances, the levy was sufficient without any further recital in the entry as made upon the execution: See, also in this connection, Civ. Code, sec. 2750.

3. During the progress of the trial, and while testifying in his own behalf, the plaintiff was permitted to state that Ed. Hayden, deceased, told him "that he owned the land levied upon before he made the advance and took the mortgage on it." This testimony was objected to on the ground that "Ed. Hayden was dead, and his administrator was a party to the case on trial." The objection attempts to apply the provisions of the Civil Code, section 5269, paragraph 1, making exceptions as to persons who, by the statute, are declared competent to testify. The answer is that the suit was a claim case, and it was not contended that the claimant derived title through Ed. Hayden. The administrator upon the estate of Ed. Hayden, who was merely defendant in execution, was not a party to the claim case: *Woodruff v. Wilkins*, 73 Ga. 115. There was no merit in the objection.

4. In the exceptions pendente lite, and also in the bill of exceptions, error was assigned upon the ruling of the judge in allowing "the amendment to the issue which is in the record," over the objection that "if the allegations therein were proved as alleged, it would not bind the claimant." There were two amendments to the "issue," and the record does not disclose to which of them the ⁵²⁸ objection referred. The plaintiff in error should have shown, by setting forth in connection with his assignment of error the substance of the amendment objected to, or in some other way clearly indicated, which of the two amendments was allowed over his objection; and as he has failed to do this, the assignment of error does not present any question for consideration by this court: See Civ. Code, sec. 5527.

5. One of the grounds of the motion for new trial complains of the charge of the court which instructed the jury with regard to the law of estoppel as applied to the claimant. Several assignments of error were made upon the charge among them, that it was without evidence to support it. The plaintiff's mortgage upon the one hundred and five acres of land was dated March 2, 1901, and signed by Ed. Hayden and Lydia Hayden. When the mortgagee sought to foreclose it, Lydia Hayden filed a plea, in which, among other things, she denied its execution by herself or by anyone else empowered to represent her. Upon the trial a verdict was rendered in her favor. On motion a new trial was granted by the court. Afterward the plaintiff entered an order of dismissal as against Lydia Hayden, and proceeded to judg-

ment against the administrator upon the estate of Ed. Hayden, foreclosing the mortgage as against all the land therein described. Upon the judgment thus procured, execution issued and was levied. As to a part of the property, the sale was interrupted by a claim interposed by Frances Thornton, a daughter of Lydia Hayden. The claimant asserted title to fifty acres of land under a deed from Lydia Hayden, executed after the dismissal of the mortgage foreclosure suit as against Lydia Hayden. The deed recited a consideration of five dollars cash in hand paid, love and affection, and an undertaking upon the part of the claimant to support Lydia Hayden the rest of her life. On the trial of the claim case the plaintiff in execution introduced evidence to the effect that Ed. Hayden and Lydia Hayden resided on the property at the time and before the mortgage was given; that the debt secured by the mortgage was for the purchase of certain corn which was sold to Lydia Hayden and Ed. Hayden; that the sale of the corn was made upon the strength of the credit of both of them, and was induced by the representations of Lydia Hayden made to the plaintiff that Lydia Hayden and Ed. Hayden owned the land together; and that such representations were made before and at the ⁸²⁹ time of the sale of the corn and the acceptance of the mortgage, and both were induced by such representations. The plaintiff did not introduce any evidence tending to show that the claimant had notice of the above-recited representations by Lydia Hayden, or that she had induced the plaintiff to extend credit and accept the mortgage by making such representations; nor did the plaintiff introduce evidence tending to show that the claimant's deed was without a valuable consideration, or that it was void on account of fraud in attempting to delay or hinder creditors in the collection of their debts, or for any other reason. But relatively to such matters the claimant's uncontradicted testimony was to the effect that not until the date of the trial of the claim case had she heard of the representations attributed to Lydia Hayden, as above; that she was the daughter of Lydia Hayden, and was present in court and heard the plaintiff in *feri facias*, through his counsel, dismiss the mortgage foreclosure suit as against Lydia Hayden; that she then supposed the case, in so far as it affected Lydia Hayden, was ended, and hereafter, in good faith, bought that part of the land involved in the claim case, without any intention to hinder or delay the plaintiff in the collection of his debt, or any other creditors in the collection of their debts; and in compliance with the provisions of the deed from Lydia Hayden to herself she had been supporting and taking care of Lydia Hayden ever since the deed was made; she did not pay the five dollars mentioned as a part of the consideration in the deed.

The claimant's deed was dated March 18, 1907, and recorded June 3, 1907. The order dismissing Lydia Hayden from the mortgage foreclosure suit was dated March 7, 1907. The two amendments relating to the representations made by Lydia Hayden to the plaintiff as having induced the extension of credit, as above referred to, were both filed on August 14, 1908, which, from the recitals in the bill of exception, appears to have been the date of the trial of the claim case. The theory of the plaintiff was that Lydia Hayden was estopped, and that the estoppel extended to the claimant, who was her grantee. It has been held in this state, in effect, that an estoppel as against a person on account of misrepresentation, or the like, will operate against his heirs after his death: *Taylor v. Street*, 82 Ga. 723, 9 S. E. 829, 5 L. R. A. 121. Also, that such an estoppel would also extend to the administrator of a deceased person: *O'Kelley v. Gholston*, 8 Ga. 1, 15 S. E. 123; ⁸³⁰ *Martin v. Walker*, 102 Ga. 72, 29 S. E. 132. In such cases the heirs or representatives occupy the same position as the person against whom the estoppel first operated. But the evidence discloses a different situation in the case now under consideration. It is true that the claimant is a successor in title to Lydia Hayden, but her interest was acquired under a deed based upon a valuable consideration, obtained in good faith, untainted with fraud. We fail to find any instance where an estoppel in pais, operating against a person relative to an interest in land, will extend to his grantee, who subsequently acquires the land upon a valuable consideration, in good faith, and without any notice of the grounds of the estoppel. The Civil Code, section 2695, enumerates certain acts which are void as against creditors, including among them conveyances of real estate made with intention to delay or defraud creditors, and such intention known to the party taking; but it contains a saving clause declaring, in effect, that bona fide transactions founded upon a valuable consideration, and without notice or ground of reasonable suspicion, shall be valid. The Civil Code, section 3934, declares: "A bona fide purchaser for value, and without notice of an equity, will not be interfered with by a court of equity." If the plaintiff had a right to subject the property to payment of his debt merely because of an estoppel against Lydia Hayden, such right was based upon an equity between them. Equity will not enforce a right of that character as against a bona fide purchaser for value. If it be said that because of the claimant's near relation to Lydia Hayden the transaction should be scanned with care (*Booher v. Worrill*, 57 Ga. 235), or even that the onus was upon the claimant to show a valuable consideration (*Cruiger v. Tucker*, 69 Ga. 557), the uncontradicted evidence showed that she had met both requirements. No judgment

was obtained against Lydia Hayden, and the act of the plaintiff in dismissing the mortgage foreclosure suit as against her and proceeding against the other defendant was calculated to lead the claimant to the conclusion that the plaintiff had abandoned all claims as against Lydia Hayden. Conceding that Lydia Hayden was a debtor, and that she might have been estopped from asserting title to the property, we do not think that the evidence was sufficient to authorize an estoppel against the claimant.

Judgment reversed.

All the justices concur.

The Sufficiency of the Levy of an Execution on Real Estate in describing the property or the interest of the debtor therein is considered in *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818; *Kunze v. Cox*, 113 Mich. 546, 67 Am. St. Rep. 480; *Wiggins v. Gillette*, 93 Ga. 20, 44 Am. St. Rep. 123; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398.

A Grantee Without Notice is not Affected by an Estoppel in Pais which binds his grantor: *Miller v. Washburn*, 117 Mass. 371; *Brian v. Bonvillain*, 52 La. Ann. 1794, 28 South. 261. It is otherwise, however, in the case of a grantee with notice: *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; *Comstock v. Robertson*, 72 Kan. 465, 83 Pac. 1104. See, further, in this connection, *McCravey v. Remson*, 19 Ala. 430, 54 Am. Dec. 194; *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524; *Portis v. Hill*, 30 Tex. 529, 98 Am. Dec. 481.

CRESWILL v. GRAND LODGE KNIGHTS OF PYTHIAS.

[133 Ga. 837, 67 S. E. 188.]

FRATERNAL ASSOCIATION—Proprietary Right in Name.—

Persons who associate themselves together to promote fraternity, benevolence and charity are authorized to use a name by which they will be known, and under certain circumstances will be protected in the use of the name chosen. The name may be such as indicates the purposes of the association, or it may be arbitrary or fanciful. (By the editor.) (p. 237.)

FRATERNAL ASSOCIATION—Protection of Name Against

Infringement.—Where an association known as the Knights of Pythias, with a supreme lodge incorporated in the District of Columbia, and a grand lodge unincorporated in this state, the main objects of which were fraternal and benevolent, but which received and owned large amounts of property and had an insurance feature, acquired a proprietary right in the name by which it was known and under which it operated, no other association of persons organized for similar purposes had the right to fraudulently copy or infringe upon that name. The mere addition to the distinctive name of the defendants' association of the words "of North America, South America, Europe, Asia, Africa, and Australia, jurisdiction of Georgia," cannot be declared, as matter of law, to constitute such a difference as to

make the name so altered free from the complaint of being an infringement, or to render the finding of the jury that there was fraudulent infringement contrary to law. (pp. 237, 239.)

FRATERNAL ASSOCIATION—Protection of Name Against Infringement.—Upon an application to the superior court for the grant of a charter for a private corporation, the law of this state makes no provision for another person to make himself a party to the proceeding for the purpose of resisting or objecting to the grant of the application. But another corporation or association which has acquired a proprietary right in a name may apply to a court having equitable jurisdiction to enjoin the applicants from fraudulently appropriating such name and obtaining a charter under it for a similar organization, and copying its insignia, badges and emblems, to the detriment of the plaintiff. (p. 240.)

TRADE NAME—Laches in Protecting from Infringement.—The general rule that laches will bar equitable relief seems to be qualified in trade name cases, especially in the United States. (By the editor.) (p. 242.)

FRATERNAL ASSOCIATION—Laches in Protecting Name.—The evidence authorized the jury to find that there had been no such laches on the part of the plaintiffs as to bar them from a right to equitable relief. (pp. 240, 243.)

FRATERNAL ASSOCIATIONS—Conflicting Names—Foreign and Domestic Corporations.—Under the facts of this case, the ruling made by some courts that generally a foreign corporation has no right to enjoin a domestic corporation, which has been chartered under a similar name, from continuing to do business thereunder, especially in the absence of fraud, are not applicable. (p. 243.)

FRATERNAL ASSOCIATION—Protection of Name from Infringement.—This was not a suit between two corporations chartered in the District of Columbia under the general incorporation act of May 5, 1870. The incorporated supreme lodge of the plaintiffs' association was a party, but that of defendants' association was not so. An assignment of error based on a contrary hypothesis was without merit. (p. 243.)

CONSTITUTIONAL LAW—Race or Color of Litigants—Due Process and Equal Protection.—Where the plaintiffs did not allege or base their proceeding on the fact that the defendants were colored persons, and the judge in charging the jury made no reference to the racial or social status of either the plaintiffs or the defendants, but submitted the issues as to the rights of the parties without reference to race or color, and the evidence authorized the finding against the defendants regardless of any consideration of their color, it cannot be held that such finding was in conflict with that provision of the constitution of the United States which declares, "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (pp. 243, 244.)

APPEAL—Whether Reversal Required.—No ground of the motion for a new trial requires a reversal. (pp. 243, 244.)

(Syllabi by the court except when stated to be by the editor.)

Bell, Pettigrew & Bell, for the plaintiffs in error.

John P. Ross and Hamilton Douglas, for the defendants in error.

⁸³⁸ EDWARDS, J. Charles D. Creswill and others made application to the superior court of Fulton county to be incorporated and made a body politic for the full period of twenty years, with the usual privilege of renewal at the expiration of said term, under the corporate name and style of the Grand Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, jurisdiction of Georgia. The petition set forth that the object of petitioners was not pecuniary gain, but was the social and benevolent benefit of its members and their dependent relatives. They asked to be allowed to organize and charter subordinate lodges in this state and to provide an endowment fund, etc. The defendants in error, the Grand Lodge Knights of Pythias of ⁸³⁹ Georgia, T. H. Nickerson, D. J. Bailey, John P. Ross, William H. Leopold, R. C. Norman, C. M. Walker, B. D. Brantley and George T. Cann, filed in said superior court a petition seeking to enjoin the plaintiffs in error from prosecuting said application to be incorporated under the name set forth in the petition for charter, or under the name, "Grand Lodge Knights of Pythias of Georgia," or any colorable imitation of such name, and from using any name embracing the word "Pythias" in conjunction with the words "Knights of," or any name which is a colorable imitation of said Grand Lodge Knights of Pythias of Georgia, and from using and wearing emblems and insignia like or a colorable imitation of the emblems and insignia of petitioners; and for general relief. The court granted a rule nisi and a temporary restraining order. On the hearing the Supreme Lodge Knights of Pythias was made a party plaintiff, and it adopted the averments and prayers of the original petition.

Without going fully into the details of the plaintiffs' petition it is sufficient to state that the following is alleged: The order of Knights of Pythias of which they were members was organized by Justus H. Rathbone in Washington, D. C., on February 19, 1864, and as a voluntary fraternal society adopted the name "Knights of Pythias," and has since been in continuous existence throughout the United States, using the same name. The first Grand Lodge known as the Grand Lodge Knights of Pythias of the District of Columbia was organized in 1864. The Grand Lodge of Pennsylvania was organized in 1867, and the Grand Lodge of New Jersey and the Grand Lodge of Maryland were each organized in 1868. These grand lodges organized the Supreme Grand Lodge Knights of Pythias for the United States on August 11, 1868. Since then the plan has been to organize and maintain subordinate lodges in the cities and towns throughout the United States and a grand lodge in each of the states and territories of the United States, subject to and forming a part of the Supreme Lodge of the order, from which subordinate lodges

and grand lodges obtain authority and to which they owe allegiance. The first subordinate lodge in Georgia was organized in 1869, and the Grand Lodge of Georgia was organized 1871. The Supreme Lodge was incorporated under the laws of the United States in the District of Columbia, August 5, 1870; its articles of incorporation were amended under said laws ⁸⁴⁰ October 5, 1875, and again on May 5, 1882, the name of the order being preserved in its entirety. The plaintiffs' order of Knights of Pythias was incorporated by an act of Congress approved June 29, 1894, by which all the rights, powers and liabilities of the Supreme Lodge Knights of Pythias, incorporated on August 5, 1870, were preserved and made to survive to the body politic and corporate which was created by the act. This act of 1894 was amended by act of Congress approved June 7, 1900, the terms of this amending act being to make valid all meetings of the legislative bodies of the order held outside of the District of Columbia. The order of plaintiffs embraces more than 650,000 members, and the subordinate lodges in Georgia own assets valued at \$160,319.08. There are in Georgia 143 sections of the insurance branch, with 2,327 members carrying an insurance protection of \$4,113,500. The first lodge of the defendants' order was organized in Mississippi in 1880. Their Supreme Lodge was organized on October 10, 1889. Their first subordinate lodge in Georgia was organized in 1886, and their Grand Lodge for Georgia was organized in 1890.

The defendants by their answer neither affirmed nor denied the historical part of plaintiffs' petition as above set forth. They denied that their order had sprung from the plaintiffs' order, and that they had received any authority from plaintiffs' order to organize lodges, and that their name is identical with the name of the plaintiffs' order or is an imitation of the same. They set up that the Supreme Lodge Knights of Pythias of North America, South America, Europe, Asia, and Africa was incorporated on October 10, 1889, by virtue of the act of Congress of the United States approved May 5, 1870, and organized under said charter lodges throughout the United States and other countries; that said corporation was reincorporated on the 14th of December, 1903, in order to more perfectly comply with the laws of the various states relative to fraternal societies doing business therein, which reincorporation was in the name last above mentioned, with the suffix "Australia"; that this corporation has been in active work ever since its organization in 1889; that the sole purpose of defendants in asking incorporation under the laws of Georgia is to form a more perfect union among the subordinate lodges, with a governing head which would have authority and be amenable to the laws of Georgia, and be able to better enforce obedience among ⁸⁴¹ its several members

and subordinate lodges; that its signs, symbols, emblems, insignia and other paraphernalia have been adopted by said corporation honestly and fairly, and it has a perfect right thereto; and that its membership in the United States numbers 80,747, and in Georgia 11,805.

The case came on for a hearing on the motion for preliminary injunction, upon substantially the above record, when injunction was refused. The plaintiffs brought the case by bill of exceptions to this court. The judgment of the court below was by this court affirmed with direction: Grand Lodge Knights of Pythias v. Creswill, 128 Ga. 775, 58 S. E. 163. By reference to this decision it will be seen that all questions of law or fact on the final trial of the case, except as therein ruled, were left open to be then determined; the only question settled being the point of want of proper parties plaintiff, which point it was held had been adjudicated in the court below, no exception to the ruling allowing amendments for this purpose having been taken.

The case coming on for trial in the court below, a verdict was rendered in favor of the plaintiffs against the defendants, and decree was entered as prayed for by the plaintiffs. The defendants moved for a new trial upon various grounds, which motion having been overruled, the case was again brought to this court for review. The original motion for a new trial and the amended motion contained forty grounds. The view we take of this case renders it unnecessary to discuss in detail the various grounds of the motion for a new trial, except those complaining that the verdict is contrary to the law and evidence and without evidence to support it. The record in the case is quite voluminous, but is made up largely of exhibits attached to the plaintiffs' petition and the defendants' answer, each setting out copies of proceedings to incorporate and reincorporate under the various acts of Congress. Each side has also put in the record certified copies of the constitution of the Supreme Lodges and the Grand Lodges and the statutes, declarations of principles, and much statistical matter pertaining to each order.

Neither plaintiffs' nor defendants' order has ever been incorporated in the state of Georgia. Seniority in the selection of the name, seniority of organization under the name with its continued use, and seniority of incorporation under the general laws enacted by Congress and seniority of organization in Georgia are all in ⁸⁴² favor of the plaintiffs' case. It is well established by the evidence that the word "Pythias" is the distinctive word in the name of both orders. This word is used indifferently in all the designations made by both orders touching its name and order. While the defendants' order in its original incorporation added the suffixes, "of North America, South America, Europe, Asia,

and Africa," and in a subsequent incorporation added "Australia," the testimony, oral and documentary, shows that its order was called and known to the public as the order "Knights of Pythias," "K. P.'s," etc. In the "Declaration of Principles" put in evidence by the defendants it is declared that "the order of the Knights of Pythias is founded in Friendship, Charity, and Benevolence," and the suffixes beginning with North America, etc., are not used. In the "Supreme Constitution" introduced by defendants in their narrative touching the early progress of the "Knights of Pythias" it is recited that the "order was organized by J. H. Rathbone and others in the city of Washington, D. C. February 19, 1864." (This is the date of the founding of the plaintiffs' order.) It is further recited, in this history of the early progress of the defendants' order, that "at the session of the Supreme Lodge of the Knights of Pythias of the World (plaintiffs' order), held at Richmond, Virginia, March 8, 1869, an application for a charter from a body of colored citizens of Philadelphia, Pennsylvania, praying that they might be permitted to have and enjoy the great benefits of the Grand Order of the Knights of Pythias, was refused on account of their color." It is also further recited in the by-laws of the defendants' order, introduced by the defendants: "The order of Knights of Pythias having been instituted and established on the 19th of February, 1864, the Pythian period is hereby declared to date therefrom."

It is conceded that the emblems publicly used by the defendants' order are identical with those worn and used by the plaintiffs' order, this fact being testified to by Creswell, one of the defendants. Some confusion has arisen in Georgia in the delivery of the mail of the plaintiffs' order, but this confusion is not shown to any great extent. On one occasion a member of plaintiffs' order, seeking the "K. P. Hall" of his own order, was directed to the "K. P. Hall" of the defendants' order. There is really very little, if any, material conduct of evidence between the parties. As above stated the jury found in favor of the plaintiffs, this finding being that the proposed ⁸⁴⁸ corporate name of the defendants is an infringement upon the name of plaintiffs' association; that such and moment injured plaintiffs in their property rights in their name; that this infringement is of fraudulent purpose and design; that the emblems or insignia used by the defendants are the same as those used by the plaintiffs; that such use of the same plaintiffs in their property rights; that the use of the same, not recognized in the use by defendants; that the name and insignia of the defendants' organization of the Knights of Pythias is a fraud, and its introduction in the State of Georgia has been the order of the Knights of Pythias and its members have been known as Knights of

Pythias or Pythian Knights; that "Pythias" is the distinctive word in the name of the order represented by plaintiffs, which cardinally distinguishes it from the name and style of fraternal orders in the state of Georgia and in the United States, and the name set forth in defendants' petition for incorporation is substantially identical with the name and style of petitioners, the Grand Lodge Knights of Pythias of Georgia; that the name set forth in defendants' petition for incorporation is a colorable imitation of the name and style of petitioners, the Grand Lodge Knights of Pythias of Georgia; that the use by the defendants and their associates of the name under which they are seeking incorporation would work a fraud upon the plaintiffs and their associates and the public, in that the name under which defendants propose to incorporate is a colorable imitation of the name of the order of plaintiffs.

1. The first question of law which presents itself is whether the plaintiffs in the court below have shown such infringement of the name of their order and the use of their insignia as entitles them, under the law, to the relief which they ask. It is well settled that a number of persons may associate themselves together for the purpose of promoting any lawful enterprise. Fraternity, benevolence and charity are among such lawful enterprises. Having thus associated themselves, they are authorized to use a name by which they will be known, and under certain circumstances they will be protected in the use of the name chosen. The name may be such as indicates the purpose of the association, or it may be arbitrary or fanciful. Words or phrases which are arbitrary or fanciful as applied to an association of persons organized for legitimate purposes will constitute a valid trade name. It has been held that words or ⁸⁴⁴ phrases are arbitrary or fanciful when they do not by their usual and ordinary meaning denote or indicate the purposes of the association, but come to indicate their purpose by application and association. The name of a historical or mythological event, or of a person long since dead, would be an arbitrary or fanciful name. An association first appropriating and using an arbitrary or fanciful name acquires a property right in that name. Where an association of persons have acquired, by appropriation and use, a proprietary right in a name that is arbitrary and fanciful, no other association of persons have the right to fraudulently copy or infringe upon that name; Paul on Trademarks, sec. 160. An infringement upon a trade name is such a colorable imitation of the name that the general public, in the exercise of reasonable care, might think that it is the name of the association first appropriating the name. Fraud on the part of the infringer is the use of the name, or infringement thereof, with the intent to make the impression

upon the general public that the infringer's association and the association first appropriating the name are the same. If the association first appropriating and using a name have a clear right to the use of the same, its subsequent use by another association knowing of this right is presumed by the law to be fraudulent. It has been held that even the innocent or accidental use of a trade name capable of exclusive appropriation will be enjoined.

The plaintiffs' order, while primarily fraternal and benevolent, has certain property and business attributes and activities, including the acquiring and ownership of large amounts of property and the conducting of a department of insurance protection. Under the evidence, the element of injury is sufficiently shown. Moreover, as to the corporate plaintiff, the name of a corporation is in some degree analogous to a trademark: Clark on Corporations, 64. The finding of the jury in this case, that the use of the name of the plaintiffs' order by the defendants was with fraudulent purpose and design, we think is supported by the evidence. It appears from the testimony that both the plaintiffs' order and the defendants' order took out articles of incorporation under a general act of Congress of May 5, 1870, which makes provision for a summary suing out of articles of incorporation by persons desiring to associate themselves together for any lawful purpose: 16 U. S. Stats. at Large, 101. It will be remembered that the plaintiffs' ⁸⁴⁵ order filed its articles on August 5, 1870, and the defendants' order October 10, 1889. This act contains the following provision relative to the names to be taken by the proposed corporation: "The provisions of this act shall not extend to nor apply to any association or individual who shall, in the certificate filed with the register of deeds, use or specify a name or style the same as that of any previously existing incorporated body in the District of Columbia." Counsel for defendants contend that the name they are seeking to appropriate by incorporation is not substantially the same or a colorable imitation of the plaintiffs' name. They say they make the name essentially different by adding the names of the continents, North America, South America, Europe, Asia, Africa, and Australia. We could not agree with this contention of the defendants if the names of the continents thus used as suffixes were employed in every instance where the order is designated; for it is well established by the proof that the distinctive words in both orders are the words "Knights of Pythias." At one time in the history of the plaintiffs' order, from the time of its incorporation under the act of 1870 to the time of its incorporation by the special act of Congress of 1894, the supreme order was known as the "Supreme Order Knights of Pythias of the World." The

defendants, in specifying their field of operation, do not specify the entire earth, but the main continents thereof. These words denoting latitude of operation are not distinctive, and they are not always added in the use of the name. It is the use and colorable or imitative character of the name that controls, and the use made of the name by the association alleged to have infringed is a question of fact for the jury: *Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284; *Lies v. Daniel*, 82 Ga. 272, 8 S. E. 432; *Whitley Grocery Co. v. McCaw Mfg. Co.*, 105 Ga. 839, 32 S. E. 113. The addition of the word "Artificial" by suffix to the name "Carlsbad Sprudel" does not prevent infringement, "Carlsbad" being the distinguishing word. The name "National Folding Box and Paper Company" is infringed by the name "National Folding Box Company, Limited." "The imitation need only be slight, if it attaches to what is most salient"; *Johnson v. Bauer*, 82 Fed. 662, 27 C. C. A. 374; *McCann v. Anthony*, 21 Mo. App. 83; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 21 Sup. Ct. Rep. 7, 45 L. ed. 60; *Paul on Trademarks*, secs. 59, 168, 170, ⁸⁴⁶ 188. The plaintiffs in error rely upon the case of *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658, in which it was held that these names are not so similar as to cause one to be taken for the other. We do not believe that this case is in line with the trend of authorities on the subject of similarity of names. It evidently turned largely on the merits of the defendants' case as against the plaintiff which was seeking the injunction. It appears that the members of both orders had been members of the plaintiff's order, and that a law had been enacted in the plaintiff's order, prohibiting the publication of its constitution, statutes, by-laws, rituals, etc., in any language other than English. Those who afterward organized the defendants' order, being foreigners by birth and many of them unable to read the English language, for this cause withdrew from the plaintiff's order. The plaintiff's order had made the members of defendants' order *Knights of Pythias*, and therefore did not stand in the same relation to them as does the plaintiffs' order in the case at bar. Here no authority was given by plaintiffs to use the name, but such authority was expressly refused. After such refusal the persons under whom the defendants claim to operate appropriated the name of the plaintiffs' order in the very teeth of the law by which they claimed to have legal existence.

The supreme court of Tennessee has recently passed on a case similar to this one. In that case, Neil, J., says: "We are of the opinion that the injunction was properly awarded and made perpetual. While the complainant was not engaged in

business for profit, in the sense of commerce and trade, yet it employed certain business activities for the purpose of maintaining itself and to procure funds to carry out the purposes of its organization, and it maintained certain business institutions, its club-houses, and its home for aged and invalid members. The name it had acquired and appropriated had become very valuable, in the nature of a trade name,' etc.: *Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of Elks*, 118 S. W. 389.

In a recent case of the *Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of Elks of the World*, and the Grand Lodge of the same, in the supreme court ⁸⁴⁷ of New York (60 Misc. Rep. 223, 111 N. Y. Supp. 1067), an injunction was granted on July 18, 1908. In the appellate division the judgment was affirmed on a memorandum decision: See *Society of the War of 1812 v. Society of the War of 1812*, 46 App. Div. 568, 62 N. Y. Supp. 355.

2. It is contended that under the provisions of our law no one will be heard to object to the creation of a corporation by the superior courts that the power exercised by the superior courts in granting charters is legislative and not judicial, and therefore that a charter will be granted as a matter of course: See Civ. Code, sec. 2350. It is true that it has been held that the act of the superior court in granting a charter under the statute is legislative in its character, rather than judicial: *Gaslight Co. of Augusta v. West*, 78 Ga. 318. It is quite clear that the provisions of our law on this subject have not been framed to enable a stranger to the proceeding to make himself a party thereto, either as objector or otherwise, in order to resist the same; but it has never been held, to our knowledge, that any person whose name would be affected by the granting of a charter to one who fraudulently undertakes to appropriate such name could not assert his right in equity in a direct proceeding for that purpose, and make the same effective by injunction. On the contrary, it has been distinctly held by this court that such right may be thus asserted: *Lane v. Brothers & Sisters of the Evening Star Society*, 120 Ga. 355, 47 S. E. 951.

3. The defendants contend that the plaintiffs have been guilty of such laches as estops them from having injunction against the use by defendants of the name in controversy. As before stated, the evidence in this case amply establishes the fact that the defendants, or those under whom they assert a claim of right to operate, took the plaintiffs' name not only without authority but after defendants had been by the plaintiffs' order expressly refused; and further, that the name was adopted in articles of incorporation under a statute which expressly forbade the use of a name already ap

propriated by another. This puts the defendants' case within that class where the name has been taken and is used in fraud of the plaintiffs' rights. The Civil Code, section 3939, provides: "Equity gives no relief to one whose long delay renders the ascertainment of the truth difficult, though no legal limitation bars the right." The status of each order, from the organization of each, is clearly shown by the testimony submitted by each side, and, as before stated, there is very little dispute between the parties so ⁸⁴⁸ far as the testimony is concerned. A perusal of the record in this case makes it clear that the delay of the plaintiffs in bringing this suit has not prejudiced the defendants in their ability to ascertain the truth. Does section 3775 of the Civil Code afford a rule for equitable estoppel? It provides, "The limitations herein provided apply equally to all courts; and in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of complainant, it would be inequitable to allow a party to enforce his legal rights." Among the "legal rights" sought to be enforced in many cases of this character is that of damages for infringement, loss of profit, etc. Damages are not sought in this case, the only legal right sought by plaintiffs being to have the use of the name in question by defendants prohibited and discontinued, as well as the use of certain emblems and insignia. It is true that the defendants have established an order in this state which has a numerous membership, and that in its insurance department and by its charities it dispenses a considerable sum of money; and the enforcement of the decree in this case that it shall not continue to do this work in the name it now proposes to employ might work considerable inconvenience and some hardships. While we see no reason why this cannot be readily done by the defendants and the work of benevolence and charity they are engaged in be but little impeded, yet even this enforcement would not be granted if the plaintiffs have been guilty of such laches as works an equitable estoppel. The question, therefore, to be determined is upon the assignment that the finding of the jury, that the plaintiffs have not acquiesced in the use of their name by defendants, is contrary to law and evidence, and without evidence to support it. The application of the defendants to be incorporated in Fulton county in 1905, which is sought to be enjoined, is the first attempt to organize under the laws of this state. This is a secret society holding its meetings behind closed doors. The evidence further discloses that there was no confusion in the delivery of mail until a short time before this suit was instituted. As each order grew in the number of its members and lodges the probability of confusion in the name increased. Besides, the element of actual fraud has been con-

sidered in cases of trademarks and labels in dealing with the subject of laches: *McIntire v. Pryor*, 173 U. S. 38, 19 Sup. Ct. Rep. 352, 43 L. ed. 606; *McLean v. Fleming*, ⁸⁴⁹ 96 U. S. 245, 24 L. ed. 828; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143, 32 L. ed. 526.

The court below properly submitted to the jury the question whether under the proof the plaintiffs had been guilty of such acquiescence or laches as would estop them, rightly holding that the burden was on the defendants to establish such acquiescence as would bar the plaintiffs' right to have relief. As to burden of proof when fraud has been shown see 18 Am. & Eng. Ency. of Law, 118, and citations. In South Carolina it appears that the plaintiff is not required in the first instance to prove his ignorance, the burden to show knowledge being on the defendant: *Means v. Feaster*, 4 S. C. 249; *Bank of Charleston v. Dowling*, 52 S. C. 345, 29 S. E. 788. Quoting from 18 American and English Encyclopedia of Law, 119: "There is no artificial, fixed or determinate rule according to which the defense [of laches] is applied. By reason of the difference in the facts, no one case becomes an exact precedent for another. So each case as it arises must be decided according to its own particular circumstances, taking into consideration all the elements which affect the question." "Though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information," etc. "The cases all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." Citing authorities from numerous state courts and from United States courts.

The general rule that laches will bar equitable relief seems to be qualified in trademark and trade name cases, especially in the United States. "In England the rule is somewhat strictly applied that the proprietor of a trademark forfeits his right to relief against infringement by laches and acquiescence in the use of his mark by another." "In the United States the rule is not so strictly applied, the general rule being that acquiescence or delay in asserting a trademark right against an infringer amounts only to a license at will, which can be terminated at any time by a suit for an injunction. If the title of the plaintiff is clear and the infringement plain, an injunction will be granted": 28 Am. & Eng. ⁸⁵⁰ Ency. of Law, 2d ed., 397, citing many authorities, state and federal. Taking into consideration that the subject of controversy in this case is in the nature of a trade

name, and that the contest is between two secret societies whose relations to each other, during the period from the appropriation of the name by one to the institution of the suit or injunction by the other, was not the usual relation that one person ordinarily sustains to another, we cannot say that the finding of the jury that the plaintiffs had not acquiesced in the use of their name by defendants is not supported by the evidence. The suit was filed promptly after the defendants came out into the open and by petition duly published asked the court to give legal sanction to their use of the plaintiffs' name.

4. Authorities are submitted in the brief of the plaintiffs in error on the proposition asserted by them, that "a foreign corporation has no right to object to a domestic corporation being incorporated under the same name." If it be conceded that this contest is between the Supreme Lodge Knights of Pythias as a party plaintiff and the defendants Creswill et al., as constituting a domestic corporation, party defendant, the proposition stated is not supported by the record. The defendants are not a Georgia corporation. If the incorporation of the plaintiffs' order and that of the defendants under act of Congress are compared, that of the plaintiffs is the older. Moreover, the plaintiffs include not only a corporation, but also individual members of a voluntary organization of this state.

5. The plaintiffs in error make what they call two federal questions in this case: 1. That this is a contest between two federal corporations, and therefore a federal question is involved. Complaint is made that the court below erred in not stating to the jury that the defendants claimed their right to use the name in question by authority of the act of Congress, being the general incorporation act of May 5, 1870; and that the finding of the jury and the decree of the court violate their rights under this charter. We do not appreciate the force of this exception. It would not have been proper for the trial judge to submit such a question to the jury. A finding on the point could have thrown no light on the controversy and could not have aided the defendants in any way. This proposition is also not supported by the record. This suit was brought against Creswill et al. as individuals acting and ⁸⁵¹ seeking a charter. The Supreme Lodge of the order of which they claim to be members has never been made a party to this case, and is not here asserting any corporate rights. 2. The second federal question raised is claimed to be predicated on the provision of the fourteenth amendment to the constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The pleadings of the

plaintiffs in this case contain no reference to the social status of the defendants or their color. The defendants, in an amendment to their original answer, set up that the members of the defendants' order are members of the negro race, and that the order of the plaintiffs is made up of members of the caucasian race. The able judge trying this case, in his instructions to the jury, made no reference to the matters set up by this amendment on the part of the defendants or to the racial or social status of either the plaintiffs or the defendants. Neither do we think that the defendants, by merely alleging their color, can introduce this subject into the case to make a federal question or to claim any superior rights thereby. The question of color raised by the defendants certainly does not entitle them to greater rights in the case under the fourteenth amendment to the federal constitution than they would have enjoyed had they been members of the same race as the plaintiffs.

Judgment affirmed.

The Law of Trade Names and Trademarks is considered in the notes to *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83; and in the recent cases of *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa, 228, 128 Am. St. Rep. 189; *Johnson v. Seabury*, 71 N. J. Eq. 750, 124 Am. St. Rep. 1007; *Giragosian v. Chutjian*, 194 Mass. 504, 120 Am. St. Rep. 570; *George G. Fox Co. v. Glynn*, 191 Mass. 344, 114 Am. St. Rep. 619; *International Silver Co. v. William Rogers Corporation*, 67 N. J. Eq. 646, 110 Am. St. Rep. 506. A bill for an injunction against a corporation to restrain it from the wrongful and injurious assumption and use of the name of an individual, or of another corporation, may be maintained by the owner of the name, without the intervention of the state, as such a suit is not one to annul the corporation: *Armington v. Palmer*, 21 B. L. 109, 79 Am. St. Rep. 786.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

STATE v. BRUCE.

[17 Idaho, 1, 102 Pac. 831.]

TRUST FUNDS—Lien of State After Their Intermingling.—

Where the state treasurer deposited state funds in a bank without authority of law, and the bank had notice of the character of the funds and of the relation the depositor sustained to the funds, and the trust funds were mixed and commingled with the general assets of the bank and used from day to day in the commingled form promiscuously in the payment of the debts of the bank and in the purchase of paper and securities, and the bank thereafter suspended payment and went into the hands of a receiver, and at the time the receiver took charge there was not enough cash on hand to pay the trust account, the lien of the state will attach to all the assets of the bank as a preferred claim for the payment of the trust funds. (pp. 250, 252.)

TRUST FUNDS—Right to Follow After Loss of Identity.—

Trust funds may be followed into the trustee's estate although no particular property or asset can be identified as having been purchased or acquired by the particular funds, where it appears that the trust fund was mixed and commingled with the general funds and property of the trustee's estate and went into the general assets either in the purchase of paper and securities or in the payment of the debts of the trustee, and in such case the lien of the cestui que trust will attach against the entire assets of the trustee's estate for the payment of such claim. (pp. 250, 252.)

(Syllabi by the court.)

Edwin Snow, for the appellant.

Wyman & Wyman, Cavanah & Blake and Morrison & Pence,
for the respondents.

⁵ AILSHIE, J. On January 20, 1908, the Capital State Bank of Idaho suspended payment, closed its doors and on the following day a receiver was appointed by the district court to take charge of its assets and business. For several months preceding the insolvency of the bank, C. A. Hastings, treasurer of the state of Idaho, had been carrying an account

at this bank in the name of "C. A. Hastings, State Treasurer Collection Account." The account was opened on June 24, 1907, and thereafter fluctuated from time to time by reason of withdrawal of deposits and additional deposits of checks and drafts. On January 20, 1908, the day on which the bank suspended business, there remained due as a balance on the account carried by the state treasurer, the sum of \$24,434.44. This was the money of the state of Idaho, and that fact was at all times known to the bank and its officers and is admitted in this case. Soon after the bank suspended payment and the receiver was appointed the state, acting through the attorney general, filed its petition in the receivership ⁶ case, praying the district court to make an order directing the receiver to pay to the state the balance due on the account of these various deposits as hereinbefore stated. The case was tried on an agreed statement of facts. That portion of the stipulation of facts necessary or essential for the consideration of this case is as follows:

"1. That Charles A. Hastings is and has been, since the first Monday in January, 1907, the duly elected, qualified and acting state treasurer of the state of Idaho.

"2. That on the twenty-fourth day of June, 1907, the said Hastings opened an account with the Capital State Bank which was carried on the books of the said bank in the name of C. A. Hastings, State Treasurer, collection account; and that from day to day he thereafter made deposits on said account and as such state treasurer checked upon and withdrew money from it.

"3. That on the twenty-seventh day of June, 1907, there was due on said account \$30,334.00; that thereafter the said bank paid large sums of money to said Hastings, as state treasurer, on account of said balance, so that on the twenty-eighth day of October, 1907, there was due on said account \$8,597.92, and that thereafter the said balance increased until on January 17, 1908, there was a balance due of \$41,228.77 and on January 20, 1908, of \$24,434.44.

"4. That the said account occurred by reason of the deposits by the said Hastings with the said bank of large numbers of checks and drafts, and that the said checks and drafts were received by the bank and were credited immediately upon their deposit as cash in the pass-book of the said Hastings and became immediately subject to the check of the said Hastings, state treasurer. That in the event any of the said collections were unpaid the account of said state treasurer would be charged with said sum.

"5. That the said moneys were public moneys belonging to the state of Idaho, and known by the bank to be such.

"6. That all the said checks and drafts so deposited by the said Hastings as state treasurer were honored by the drawee

and the funds from the same were received by the ⁷ said bank and mingled with its general funds and went to the increase of the bank's assets at the time the proceeds were received, in the same manner as did all other deposits and cash receipts received by the bank and not otherwise.

"7. That the said sums so deposited by the said state treasurer were not secured by bond or otherwise, and it was understood between the said Hastings and the said bank that no interest was to be paid on the said deposits, and no interest was so paid.

"8. That the said moneys so deposited by the state treasurer were mingled with the other moneys of the bank received by the bank from its depositors and from other sources.

"9. That from the general funds of the bank in which said moneys so deposited by the state treasurer were mingled, loans and investments were made by the bank; that the said loans and investments so made from the general funds of the bank were, in the aggregate, at least \$62,000.00 between the twenty-ninth day of October, 1907, and the twentieth day of January, 1908. That it cannot be established that any of the identical money deposited by the state treasurer, as aforesaid, went into the making of any loans or investments, except that all loans and investments at all times after June 24, 1907, were made according to the general custom of said bank from the general funds of the bank with which the said deposits of said state treasurer were mingled. Nor can it be shown whether or not at the time of the making of any of said loans or investments any of the identical moneys so deposited by said state treasurer were actually in said bank.

"10. That the said bank is insolvent in the sense that it has suspended payment and is unable to meet its current demands, but not otherwise, and that the receiver appointed to take charge came into possession at his appointment on January 21, 1908, of \$28,289.06 in cash belonging to the bank. That he has since collected and now has in his possession from the said loans and investments made by the said bank between the twenty-eighth day of October, 1907, and the twentieth day of January, 1908, the sum of \$——, and that ⁸ he has collected from the total assets of the bank and now has in his possession, as such receiver, the sum of \$168,784.80, which is in amount more than sufficient to pay the sums demanded as trust funds, and also all expenses of receivership and court costs.

"11. That it is impossible to trace any of the said money in specie, deposited by the said state treasurer, as aforesaid, into the mass of cash that came or has come into the hands of the receiver nor into loans or investments made by the bank, as hereinbefore referred to; nor into any notes or securities coming into his hands, except that the said loans and invest-

ments herein referred to were all made from the general fund of the bank into which said deposits were so received as money and mingled, and the cash which came into the hands of the receiver on his taking charge was the residue of said mingled funds."

Various other petitions were filed asking to have trust funds held by the bank declared preferred claims on the assets of the bank, among them being Ada county, Boise City Independent School District and several others, aggregating upward of \$84,000. The trial court held that the only assets of the bank that could be pursued as trust funds was the amount of cash on hand in the vault at the time the bank closed, to wit, the sum of \$28,289.06, and that the state could not pursue any other property or assets of the bank and impress the trust lien on such property. The state insisted that it was entitled to have its preferred claim attach as a lien against all the assets of the bank.

The essential part of the order or judgment appealed from and which affects the appellant reads as follows:

"It is by the court ordered: That the said receiver of the said Capital State Bank of Idaho, Limited, be and he is hereby directed to pay the said petitioners out of the assets in his hands the sum of twenty-eight thousand two hundred and eighty-nine dollars and six cents (\$28,289.06), being the amount of cash in the said bank at the time it suspended, and which sum came into the hands of the receiver of said bank together with the proceeds of any investment ⁹ made of trust funds between the tenth day of January, 1908, and the twentieth day of January, 1908, both inclusive, and that an accounting be had to determine said sum, if any; that the said petition be granted to that extent and denied to any other or further relief."

Respondent has moved to dismiss this appeal on the ground that the order or judgment appealed from is not final, and is therefore not an appealable order or judgment. The position of the respondent is not tenable. The state came into the receivership case by petition to have a certain claim and lien established and decreed in favor of the state as a prior and preferred lien claim. The court's order or judgment is final as to the subject matter involved in the state's case. It finally determines that the state is not entitled to recover except as against the cash on hand in the bank at the time it suspended business. The additional clause in the decree authorizing an accounting and the state to receive "the proceeds of any investment made of trust funds between the tenth day of January, 1908, and the twentieth day of January, 1908, both inclusive," does not limit, qualify or affect the order or judgment in so far as the finality of the same is concerned. In view of paragraph 11 of the stipulation of facts, which was

adopted as the finding of facts by the court, this clause in the decree would be meaningless and useless anyway. It is agreed by that stipulation that none of the trust fund was invested in notes or securities, and that none of it can be traced into any special fund or asset of the bank, but that, on the contrary, the entire trust fund went into the general funds of the bank and was used promiscuously and generally in investments and the payment of the debts of the bank the same as the other funds of the bank. The motion to dismiss the appeal is not well taken, and is accordingly denied.

The controlling question to be decided in this case is whether the state is entitled to a preferred lien on all the assets of the bank or only upon the cash in the bank at the time its ¹⁰ doors closed to business. Many courts, and perhaps the greater number, passing upon this question have held with the contention made by the respondent, that the lien can attach only against the cash on hand when the bank suspended payment. But this court, and many of the courts of the country of high standing, have held otherwise, and we believe the soundest reason and most convincing logic of the situation is with the position maintained by the state.

The money deposited by the state treasurer was the property of the state, and the bank knew that fact at all times it was dealing with this fund. It is conceded that it went into the general funds of the bank and was paid out from day to day, together with general deposits on the checks of depositors and in the purchase of securities and other assets. No pretense is made by the bank or its receiver that this money was embezzled, stolen or dissipated. It was used in the due course of business as transacted by the bank. It is also conceded that no part of this fund can be traced into any particular securities, paper or assets. The bulk of it was doubtless paid out on depositors' checks during the closing days the bank did business and while it was struggling to maintain its credit and continue in business. We fail to see what difference it can make in point of fact, reason or law whether the money was used in buying bonds, mortgages and other paper to add to the general assets of the bank, or in discharging the debts of the bank. In either event, it adds to or appreciates the body and value of the bank's assets. If the money is used to-day to pay the bank's debts and it suspends business to-morrow, the indebtedness of the bank to-morrow will be just as much less than it would otherwise have been as the amount paid out represents. The assets of the bank are worth more when the bank's debts amount to only \$500,000 than when they amount to \$600,000. So it was in this case; the assets of the bank in the hands of the receiver are worth more to the general creditor with the debts reduced in the sum of \$60,000 by the disbursement of these trust funds

than they would have ¹¹ been had that amount of debts not been paid before the bank went into insolvency.

Appellant relies on *State v. Thum*, 6 Idaho, 323, 55 Pac. 858, and *First National Bank of Pocatello v. Bunting*, 7 Idaho 27, 59 Pac. 929, 1106, for a reversal of the judgment of the trial court. In the *Thum* case, the state treasurer had deposited state funds in the bank of C. Bunting & Co., and the state successfully contended in this court that it had a preferred lien against all the assets of the bank in the hands of the receiver for the payment of the trust account. This court recognized and upheld the prior claim and lien of the state, and ordered that a judgment be entered directing the receiver to pay the state in full before paying any of the general creditors. The *Thum* case was followed and approved in the subsequent case of *First National Bank v. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106. While the identical question here raised was not considered and discussed in the written opinion, still it was necessary to hold that the claim and lien was preferred against all the assets of the bank, irrespective of the amount of cash on hand when the bank closed, or of the class or character of the assets acquired by the particular fund, for the reason that the amount of cash on hand when the C. Bunting & Co. bank closed was only \$5,300, while the preferred liens for trust funds that were established and approved by this court amounted to more than \$63,000.

The authorities on this question are numerous, and it would serve no useful purpose to attempt to review, consider or analyze them in this opinion. In addition to the above cases from our own court, we will call attention to one other case, namely, *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658. That was a case where the treasurer of a school district had deposited money in a bank without any authority to do so, and the bank thereafter became insolvent, and at the time it went into the hands of a receiver there was not enough cash on hand to pay the amount due the school district. The money could not be traced into any special fund or particular part of the assets. It had apparently been paid out largely on the checks of depositors ¹² in the discharge of the bank's indebtedness. The supreme court of Kansas upheld the claim of the district for a preferred lien on all of the assets of the bank in payment of the trust account. The court, in considering the validity of the claim and the equity doctrine applicable thereto, said: "The modern doctrine of equity, and the one more in consonance with justice, is that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that, when the funds are traced into the assets of the unfaithful trustee or one who has knowledge of the character of the funds, they

become a charge upon the entire assets with which they are mingled. . . . It would seem to be immaterial whether the property with which the trust funds were mingled was moneys, or whether it was bills, notes, securities, lands or other assets. The bank which assigned in this case appears to have been engaged in a general business, and its assets consisted of moneys, securities, and lands; and, as the estate was augmented by the conversion of the trust funds, no reason is seen, under the equitable principle which has been mentioned, why they should not become a charge upon the entire estate."

The court in reviewing the case of *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, and speaking of the facts of that case and the rule applied to it, said: "It was found that the proceeds of the trust property were used by the trustee either to pay off his debts or to increase his assets, and it was held to be unnecessary to trace the trust fund into any specific property in order to enforce the trust; and that, if it could be traced into the estate of the defaulting agent or trustee, that was sufficient. It was further decided that, whether the trust funds were used to increase the assets or to pay off the debts, in either case it would be for the benefit of the estate; and, having been so used, it was held that a trust attached to the entire estate which came into the hands of the assignee."

Myers v. Board of Education, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658, has been subsequently cited with approval in the following cases: *Rose v. Douglas Tp.*, 52 Kan. 451, 39 Am. St. Rep. 354, 34 Pac. 1046; *City of Clay Center v. Myers*, 52 Kan. 363, 35 Pac. 25; *Hubbard v. Almo Irr. Co.*, 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625; *City of Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030; *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909; *Burroughs v. Johntz*, 57 Kan. 778, 48 Pac. 27; *Hazeltine v. McAfee*, 5 Kan. App. 119, 48 Pac. 886; *Travelers' Ins. Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 440; *Kansas State Bank v. First State Bank*, 9 Kan. App. 839, 61 Pac. 868; *Kansas State Bank v. First State Bank of Marion*, 62 Kan. 788, 64 Pac. 634; *Reeves v. Pierce*, 64 Kan. 502, 67 Pac. 1109; *Cherry v. Territory*, 17 Okl. 221, 89 Pac. 192, 8 L. R. A., N. S., 1254; *Capital National Bank v. Coldwater National Bank*, 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115; *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; *Page Co. v. Rose*, 130 Iowa, 296, 106 N. W. 744, 5 L. R. A., N. S., 886.

It has also been disapproved and criticised in the following cases: *Bank Commrs. v. Security Trust Co.*, 70 N. H. 536, 49 Atl. 113; *Spokane Co. v. First National Bank*, 68 Fed. 979, 16 C. C. A. 81; *New Farmers' Bank's Trustee v. Cockrell*, 106 Ky. 578, 51 S. W. 2; *State v. Bank of Commerce*,

54 Neb. 725, 75 N. W. 28; *Lowe v. Jones*, 192 Mass. 94, 116 Am. St. Rep. 225, 78 N. E. 402, 6 L. R. A., N. S., 487, 7 Ann. Cas. 551; *City of Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885.

Notwithstanding the criticism of the *Myers* case from courts of the highest standing, the reasons given by the writer of that opinion appeal to us as sound, and the rule there adopted is in harmony with our view of the equities of this case, and is in accord with the rule this court has heretofore announced in the *Thum* and *Bunting* cases. We would note this exception to that rule which we believe should be observed: Had the receiver shown that the trust fund had been embezzled or stolen or dissipated by unfaithful officers of the bank or others, prior to the suspension of business, and that the bank received no benefit therefrom, either by way of swelling its assets or payment of its debts, then the trust lien should not attach to the general assets of the bank. That is not the situation, however, in this case.

¹⁴ The order is reversed and the cause remanded, with directions that judgment be entered decreeing the state a preferred lien over general creditors of the bank. Costs in favor of appellant.

Sullivan, C. J., and Stewart, J., concur.

The Right to Follow Trust Funds after they have been misapplied by the trustee is discussed in the notes to *Ferchen v. Arndt*, 46 Am. St. Rep. 608; *Union Nat. Bank of Chicago v. Goetz*, 32 Am. St. Rep. 125. The general rule is that equity will follow a fund through any number of transmutations, and preserve it for the owner, so long as it can be identified: *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 71 Am. St. Rep. 608; *Boyle v. Northwestern Nat. Bank*, 125 Wis. 498, 110 Am. St. Rep. 844. This rule applies as against municipalities. Hence the holders of school bonds, void because issued in violation of the constitutional provision limiting municipal indebtedness, are entitled to relief, on showing that the proceeds of the bonds have been invested in a lot, schoolhouse, and school furniture: *Board of Trustees of Fordsville School v. Postel*, 121 Ky. 67, 123 Am. St. Rep. 184. But it is said that a trust cannot be established against the proceeds of trust property which has been disposed of, unless the proceeds can be identified and traced into some particular fund of property: *Lowe v. Jones*, 192 Mass. 94, 116 Am. St. Rep. 225. See also, *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 98 Am. St. Rep. 118. Hence if public moneys received by a state or county treasurer and deposited by him with a banker, who afterward assigns for the benefit of creditors, are found to be on general, and not special deposit, thus being thrown into the mass of the funds of the bank and applied generally to the payment of debts, so that they can be traced no further than into the insolvent assignor's possession, and into his estate, the state or county can recover nothing but the amount of moneys on hand at the time of the assignment: *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47.

LA VEINE v. STACK-GIBBS LUMBER COMPANY.

[17 Idaho, 51, 104 Pac. 666.]

NON-NAVIGABLE STREAM—Right to Increase Flow for floating Logs.—Every person has a right to float logs down any stream in this state that is sufficient in volume to float and carry such commodity, but he has no right whatever to enter and trespass upon the lands through which such stream flows, and erect dams or other obstructions in such stream in order to increase the volume of water therein for floating or any other purposes. A stream that is not capable for carrying logs without the construction of dams for flooding purposes is not navigable for the floating of logs. (p. 255.)

INJUNCTION Against Damming Stream for Logging Purposes. An injunction is the proper remedy to prevent one person from encroaching upon the land of another, through which a non-navigable stream flows, in order to erect dams to increase the volume of water for floating logs. (By the editor.) (p. 256.)

(Syllabi by the court except when stated to be by the editor.)

E. N. La Veine, for the appellant.

Edwin McBee, for the respondents.

53 AILSHIE, J. This action was instituted by the plaintiff to secure an injunction against the defendants, enjoining them from constructing and maintaining a dam on plaintiff's premises and thereby flooding portions of his land. The court granted a temporary restraining order. Subsequently, and after the defendants had answered and affidavits had been filed in support of both the complaint and answer, the court modified the temporary restraining order so as to permit the defendants to maintain the dam and consequently flood the lands for twenty-five days, during which time the defendants were permitted to float logs through plaintiff's premises. From the order thus modifying the injunction the plaintiff appealed.

It is contended by respondent that this is not an appealable order under the provisions of section 4807 of the Revised Codes. It is argued that this order had the effect of suspending **54** the original injunction for a period of twenty-five days, and at the expiration of that time the plaintiff obtained all the relief he had prayed for. There is no merit in this contention. Whether it be considered an order dissolving the previous order granted, or an order refusing to grant an injunction for a certain length of time, or an order suspending the injunction for twenty-five days, makes no difference. In any case it either grants or denies an injunction, and would come clearly under the provisions of the statute and is an appealable order. It certainly did not give appellant the relief for which he applied.

The essential and material facts involved in the case are as follows: Fernan lake is a body of water something like a mile long and about half a mile wide. At the lower end of the lake there is a small stream or outlet draining the overflow waters of the lake into Lake Coeur d'Alene. Plaintiff owns a tract of land bordering the lower end of Lake Fernan and also owns the land through which the stream or outlet from the lake flows. During the high-water season this stream flows considerable volume of water and will float logs, but is very low during the low-water season and is not capable of floating logs. Some time about the year 1900 the plaintiff constructed a dam on his premises across this stream or outlet to the lake so as to raise the waters of the lake something like three feet. By means of this dam the stream could be flooded and logs carried down into Coeur d'Alene lake by the flood water. He appears to have maintained this dam for some time, charging the owners of timber fifty cents per thousand toll for floating their logs through the dam and into Lake Coeur d'Alene during the low-water season. Some time subsequent to 1900 and prior to the commencement of this action one Chapin, who owned lands bordering on Lake Fernan, notified plaintiff that if he continued to maintain the dam and flood his (Chapin's) lands, he would hold the plaintiff for such damages as he sustained by reason thereof. For this or some other reason the plaintiff removed a portion of the dam and allowed it to fall into a state of disrepair.

⁵⁵ Some time in the month of March, 1909, and during the low-water season the defendants entered upon plaintiff's premises over his protests and objections and repaired and reconstructed the dam and kept men on hand to guard the same and proceeded to use the dam for flooding the stream and floating their logs down to Lake Coeur d'Alene. Plaintiff served repeated notices upon them and protested against their action, but they paid no attention to the same and he thereupon commenced this proceeding.

Defendants admit plaintiff's title and ownership as alleged by him and in fact admit all the material allegations of the complaint. They then allege that they have a large quantity of lumber in Lake Fernan—something like two million feet—and that it would cost a large sum to remove the logs in any other way than to float them down this stream; that the stream can be made capable of floating the logs by means of this dam and that to do so will be no material damage to the plaintiff; that plaintiff's land is not good for anything, any way, and that plaintiff's charge of fifty cents a thousand was unreasonable and unjust even if he had a right to charge for such purposes. They also allege that this stream forming the outlet from Lake Fernan is a navigable stream during the

high-water season, and capable of floating logs down to Lake Coeur d'Alene. They further allege that it would be a great injury and damage to them if they were not permitted to float their logs down this stream.

The defense in this case is sham and frivolous, and utterly devoid of any element of merit. The fact that it would be more convenient and cheaper for defendants to float their logs down this stream over plaintiff's premises than to remove them in any other way affords no reason whatever for their trespassing upon plaintiff's premises and building dams thereon and maintaining guards to protect the same and flooding his premises. There can be no question but that they have a right to float their logs down the stream when it is navigable: *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97; *Johnson v. Johnson*, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A., N. S., 1240. But this right gives them no license to trespass upon ⁵⁸ plaintiff's lands and erect structures thereon and to go and come through and over his premises without let or hindrance. They should be required to respect the private rights of property just the same as anyone else, and the fact that they owned lumber about Lake Fernan or millions of feet of logs floating in the lake furnishes no reason, pretext or excuse whatever for their turning trespassers and wrongdoers themselves and riding over the rights of others. The fact that appellant's land may not be of any particular value for agriculture or any other purpose has nothing to do with this case. It is plaintiff's land, and he has a right to use it as he pleases and to exclude everyone else. It does not lie in the mouth of a trespasser to justify his wrongdoing by saying the premises were of no value anyway. He may show that in mitigation of damages but not in justification of his wrongful act.

No right whatever is shown by defendants to do the things complained of, nor do they show even color of title. The only previous use they appear to have ever made of this dam was when they paid the appellant toll for the use. This could never ripen into an easement or prescriptive right. The mere plea of convenience gives them no legal standing. If it did, a man's property rights would never be safe or secure: *De Camp v. Thompson*, 16 App. Div. 528, 44 N. Y. Supp. 1014; *Banks v. Frazier*, 111 Ky. 909, 64 S. W. 983. When they bought lumber on Lake Fernan they did so with notice of the existing legal avenues and means of ingress and egress, and if those modes were not sufficient, the law prescribes an ample remedy for securing more ready and available modes: *Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426; *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97. But it looks with contempt and

disfavor on any attempt at forcible seizure and appropriation of another's property without compensation being first made therefor. That an injunction is the proper relief to be granted in a case of this kind is clearly established. This court has repeatedly held that an injunction is the proper remedy in many cases of trespass: *Gilpin v. Sierra Nevada*, 57 Consolidated Min. Co., 2 Idaho, 696, 23 Pac. 547, 1014; *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67; *Wilson v. Eagleson*, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613; *Smith v. Alberta & British Col. Ex. & R. Co.*, 9 Idaho, 399, 74 Pac. 1071; *Meyer v. First Nat. Bank*, 10 Idaho, 175, 77 Pac. 334; *Price v. Grice*, 10 Idaho, 443, 79 Pac. 387; *Shields v. Johnson*, 10 Idaho, 454, 79 Pac. 394; *Weber v. Della Mountain Min. Co.*, 11 Idaho, 264, 81 Pac. 931; *Shephard v. Coeur d'Alene Lumber Co.*, 16 Idaho, 293, 101 Pac. 591.

The order appealed from is reversed, with costs in favor of appellant.

Sullivan, C. J., and Stewart, J., concur.

A Stream to be Navigable or Floatable for Sawlogs, must be capable in its natural condition at ordinary recurring freshets, of being successfully and profitably used for that purpose. And a stream not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation: *Kamm v. Normand*, 50 Or. 9, 126 Am. St. Rep. 698, and see note thereto on what waters are navigable.

That One Using a Stream for Floating Logs must confine his operations to the stream and not trespass upon the banks and adjacent land belonging to others, see *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905; *Garth Lumber etc. Co. v. Johnson*, 151 Mich. 205, 123 Am. St. Rep. 262; *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 132 Am. St. Rep. 1127.

EAVES v. SHEPPARD.

[17 Idaho, 268, 105 Pac. 407.]

LEASE ON SHARES—Title of Lessor to Crops.—A landlord acquires no title in the grain raised by the tenant until the division and delivery thereof by the tenant to him, when under the lease the tenant is to deliver a share of the crop as rental. (p. 257.)

APPEAL—Reversal of Verdict.—Where There is a Substantial Conflict in the Evidence, the verdict of a jury will not be reversed on appeal. (p. 259.)

(Syllabi by the court.)

George W. Tannahill, for the appellant.

F. E. Fogg and P. W. Mitchell, for the respondents.

269 SULLIVAN, C. J. This action was brought to recover the value of four hundred and three sacks of wheat and two hundred and eighty-nine sacks of barley, alleged to be of the value of seven hundred and eighty-nine dollars and seventy cents. It is alleged that the respondents wrongfully took possession of said grain and converted same to their own use. The respondents by their answer denied the material allegations of the complaint. The case was tried by the court with jury and verdict rendered and judgment entered for the plaintiff, awarding the plaintiff the sum of eight hundred and seventy-five dollars and thirty-five cents against the respondent Sheppard only, and judgment was entered dismissing the action as to the other **270** defendants. A motion for a new trial was made by the plaintiff, who is appellant here, and overruled by the court. The appeal is from the judgment and the order denying a new trial.

Counsel for appellant contend that the plaintiff was entitled to judgment, not only against Sheppard, but also against the other two respondents, Fuller and Olson. Appellant claims title to said grain by virtue of a lease executed by said Sheppard and wife to one James A. Mattoon. That lease was verbally assigned to the appellant. The evidence shows that such assignment was acquiesced in by Sheppard.

The assignments of error go to the sufficiency of the evidence to sustain the verdict. It is contended by counsel that the evidence clearly shows that the defendants, Fuller and Olson, as well as Sheppard, appropriated the grain referred to in the complaint to their own use, or at least hauled it from the ranch on which it was grown, and that they were equally guilty of conversion thereof as Sheppard; and that if Sheppard were guilty of converting the grain, respondents Fuller and Olson were equally guilty under the evidence, as one who aids and assists in wrongful taking of chattels is liable for their conversion; and counsel cites in support of that principle, *Starr v. Bankers' Union*, 81 Neb. 377, 129 Am. St. Rep. 84, 116 N. W. 61. The rule laid down in that case is no doubt correct, the principal question being whether the evidence supports the verdict.

In our view of the matter, it is not necessary for us to go into an extended discussion or citation of the evidence. The first question to be determined is whether, under the evidence, the grain referred to was ever delivered to the plaintiff. The jury by its verdict evidently found that it was not, and it is a well-recognized rule of law that no title is acquired by a landlord in grain raised by a tenant until the division and delivery thereof to him: *Symonds v. Hall*, 37 Me. 354, 9 Am. Dec. 53; *Dockham v. Parker*, 9 Greenl. (Me.) 137, 3 Am. Dec. 547. The witness Marker, who was the tenant of

the plaintiff, testified as follows: "I rented the land of Mr. Eaves. My arrangements with Mr. Eaves were I ²⁷¹ was to give Mr. Eaves one-third of the grain. He was to furnish the sacks. I was to haul it to the tramway for eight cents or to Nez Perce for three cents." The plaintiff testified that one-third of the crop was to be delivered to him in the field and if the tenant hauled it, he was to pay the tenant for that work. He testified as follows: "I was to furnish the sacks to Mr. Marker and instructed him to get them from the grain warehouse." The witness Marker further testified in the matter, and referring to a conversation he had with the defendant Sheppard wherein Sheppard informed him that Mr. Eaves had no authority to rent the land, and speaking of his reply at that time to Mr. Sheppard, testified: "I will tell you, Mr. Sheppard, if you don't stop me I will go on and fulfill my contract. . . . If you stop me you have to notify me according to law or you will never get the grain, and he did not notify me before harvest not to deliver it. . . . When I got notified by Sheppard not to deliver the grain to Eaves I sat down and wrote Eaves a letter and he answered me back. He says, 'Marker, go to the Clearwater Grain Co. and get my third of the sacks.' Sheppard wanted me to go to Kettenbachs and get sacks for him. So there I was between two fires and I studied the matter over a little . . . went to Alvords and asked him what I should do. . . . I bought the sacks myself at Kettenbachs. The grain was put in my sacks. I was paid for the sacks. Mr. Mitchell paid me for them. Mr. Mitchell was acting for Mr. Sheppard. . . . I never, in fact, delivered any grain to Eaves. I didn't have time. I put it in my sacks. . . . As a matter of fact, I didn't deliver it to either one of the parties." The plaintiff testified in his own behalf, and in commenting on the testimony above quoted, testified: "Mr. Marker's testimony is that he refused to put that grain in my sacks. He didn't object to it. He said, 'I have furnished the sacks,' and I authorized him to get the sacks. He didn't do it—went on and got his own sacks. No, sir, I didn't pay him for the sacks. He didn't ask for pay. I didn't get any grain." The plaintiff also testified as follows: "I saw the grain. I saw it piled out by itself. . . . How I know he ²⁷² piled it out for me, he showed it to me and told me I could take it. . . . He told me he had furnished the sacks himself so there would be no claim from Sheppard or anybody about the sacks. . . . He told me when I talked about it, there should not be a sack of grain hauled out of the field by either party until it was settled who the owner was."

The above-quoted testimony clearly shows that the grain was not delivered, or, at least, that there was a direct con-

dict in the testimony as to the delivery of the grain by Marker to Eaves, the plaintiff. Marker, a disinterested witness, testified positively that he did not deliver the grain to Eaves, but, on the contrary, put it into the sacks paid for by Sheppard, and the plaintiff himself testified that Marker informed him that "there should not be a sack of grain hauled out of the field by either party until it was settled who the owner was." Eaves testified that the grain was delivered to him and Marker that it was not, thus making a direct conflict in the testimony as to the delivery. Under the well-established rule of this court, a judgment will not be reversed on account of the insufficiency of the evidence when there is a substantial conflict therein: *Church v. Van Housen*, 15 Idaho, 249, 97 Pac. 36; *Camas Prairie State Bank v. Newman*, 15 Idaho, 719, 28 Am. St. Rep. 81, 99 Pac. 833, 21 L. R. A., N. S., 703; *Water v. Haywood*, 15 Idaho, 716, 99 Pac. 828, and the decisions of this court therein cited; also Revised Codes, sec. 4824.

The plaintiff could not recover in this case unless the grain had first been delivered to him by his tenant, and as there is a substantial conflict in the evidence upon the question of delivery of the grain to the plaintiff, the verdict of the jury will not be disturbed. It is true the jury found a verdict in favor of the plaintiff as against Sheppard, but there is no appeal on the part of Sheppard and the verdict and judgment must stand as to him. And had Sheppard appealed, the verdict and judgment would have been sustained as to him because of the rule that where there is a substantial conflict in the evidence the verdict will not be disturbed.

²⁷³ This disposes of this appeal in favor of respondents. The judgment is therefore affirmed, with costs in favor of respondents.

Stewart and Ailshie, JJ., concur.

The Title of the Lessor to Crops in the case of a lease of agricultural land on shares is considered in the note to *Kelly v. Bummerfield*, 98 Am. St. Rep. 956.

HARDING v. HARKER.

[17 Idaho, 341, 105 Pac. 788.]

MORTGAGE FORECLOSURE—Unrecorded Conveyance—Parties.—Under the provisions of section 4520, Revised Codes, "No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action. (p. 261.)

MORTGAGE FORECLOSURE—Unrecorded Conveyance—Parties.—Under this statute, it is presumed that the mortgagor will represent the interests of the grantee of an unrecorded conveyance in a suit to foreclose a mortgage on the premises conveyed; and the same presumption would arise where the grantee is made a party. That he would represent the interests of a person holding an unrecorded conveyance from such grantee. (p. 262.)

MORTGAGE FORECLOSURE—Conclusiveness Against Grantee Under Unrecorded Deed.—Under this statute, where the court acquires jurisdiction of the mortgagor in an action to foreclose a mortgage, the court also acquires jurisdiction of all persons who hold unrecorded conveyances or contracts from the mortgagor, so as to conclude such persons by the judgment entered in the foreclosure proceeding; and in like manner, where the court acquires jurisdiction of a grantee of a mortgagor, the court also acquires jurisdiction of all persons who hold unrecorded conveyances or contracts with such grantee of the mortgagor, so as to conclude such persons by the judgment of foreclosure. (p. 262.)

MORTGAGE FORECLOSURE.—The Writ of Assistance is the Appropriate Remedy to place in possession the purchaser at a foreclosure sale, and may be issued against any and all persons concluded by such judgment. (p. 262.)

(Syllabi by the court.)

B. J. Briggs, for the appellant.

E. M. Holden and Harry Holden, for the respondent.

343 STEWART, J. On March 22, 1900, Thomas A. Harris and Blanche B. Harris, his wife, executed and delivered to the American Mortgage Company of Scotland a mortgage upon the real property involved in this action. On February 12, 1906, proceedings were commenced to foreclose said mortgage, and service was made upon Joseph Squibb, Rickie Squibb, Kate Johnson, Marion Louise Johnson, Catherine Lucile Johnson and Fred L. Huston, administrators of the estate of D. O. Johnson, deceased. A decree of foreclosure was entered in said suit, the property sold under such decree to Clency St. Clair, and after the expiration of the period of redemption a sheriff's deed was made to St. Clair for said property. Thereafter, on July 2, 1907, St. Clair conveyed said property to P. W. Harding, the petitioner in this case. On February 27, 1909, P. W. Harding made application to the district court in and for Blaine county for a writ of assistance, putting said Harding into possession of said premises and ousting Job Harker, who was then in possession of said premises. This appeal is from the order of the district court granting the writ of assistance as prayed for in the petition of P. W. Harding.

Upon the hearing of the application for the writ of assistance, oral evidence was tendered upon behalf of the defendant from which it appears that the defendant went into possession of the premises in February, 1905, and that he has been in

possession ever since; that he went into possession under a contract to purchase said premises made with one C. O. Janson, who had a contract with Joseph Squibb; that the contract was never been recorded. Harker further testified that he had a conversation with Squibb after he made the contract with Janson, and Squibb said it was all right; that he was informed that the deed was ready and was shown the deed, but that he never got it or placed it upon record.

It is the contention of the appellant that Job Harker was in possession of the premises involved, under a claim of ownership, at the time and prior to the commencement of the proceedings to foreclose the mortgage; and not having been made a party to such proceedings, that the court was without jurisdiction to oust Harker from his possession of said premises by virtue of a writ of assistance.

It will thus be observed that Job Harker was not a party to the foreclosure proceeding or the decree entered in said cause. He was, therefore, in no way bound or concluded by such decree unless by reason of the provision of Revised Codes, section 4520, which makes such decree conclusive as to him, under the particular facts of this case. This section provides: 'No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.'

It appears that Harker claims an interest in the land in controversy by reason of a contract for the purchase of the same, made with one C. O. Janson under some contract or arrangement with Joseph Squibb. It was admitted by counsel for both parties, upon the oral argument, that Joseph Squibb was the grantee of Harris, the mortgagor. If Joseph Squibb was the grantee of the mortgagor and had held an unrecorded conveyance of said property, under the provisions of the statute above quoted, it would not have been necessary to make Squibb a party defendant, and he would have been concluded by the judgment as effectually as though he had been made a party defendant. It appears, however, that Squibb was a grantee of the mortgagor and was made a party defendant, and Harker was a grantee or held a contract of conveyance from Squibb, who was made a party defendant. Harker then stood in the same relation to Squibb that Squibb would have borne to Harris had Squibb's conveyance been unrecorded, in which case the judgment would have been conclusive as to Squibb; and there can be no reason why it should

not be conclusive as to Harker, the grantee of Squibb. The very reason why the statute makes conclusive a judgment as to one holding an unrecorded conveyance from the mortgagor³⁴⁵ applies also where a person holds an unrecorded conveyance from the grantee of the mortgagor.

Under this statute, it is presumed that the mortgagor would represent the interests of the grantee, and the same presumption would arise where the grantee is made a party that he would represent the interests of a person holding an unrecorded conveyance from such grantee. When the foreclosure proceeding was commenced the mortgagee had no notice that Squibb had parted with title or contracted to sell the property. There was nothing upon the record showing that Harker had or claimed any interest in the property covered by the mortgage. An examination of the record disclosed that the mortgagor had passed title to Squibb, but further than that there was nothing to indicate that anyone holding under Squibb claimed any title or interest in the property in controversy. Under this statute the court, having acquired jurisdiction of Squibb, acquired jurisdiction also of all persons who held unrecorded conveyances or contracts from Squibb, in so far as to conclude such persons by the foreclosure proceedings, and while it is true that Harker was not formally named in the foreclosure suit, yet under this statute he is concluded by the judgment, under the facts of this case. In the case of *Hibernia Savings & Loan Society v. Cochran*, 141 Cal. 653, 75 Pac. 315, in discussing this question, the court said: "The person who purchases prior to the action, subject to the mortgage, and who fails to record his deed prior to the commencement of the action, and of whose interest the mortgagee has no notice at the time he commences his action, never can become a necessary party, in the sense that it is necessary to bring him in, in order that a foreclosure decree effectual against him may be rendered. The situation as to him in this regard is determined by the condition of affairs at the time of the institution of the action. For all purposes of obtaining jurisdiction the mortgagor fully represents him."

If, then, Harker was concluded by the judgment of foreclosure, the writ of assistance is the appropriate remedy to³⁴⁶ place in possession the purchaser at the foreclosure sale under such judgment: *Hibernia Savings etc. Society v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; 4 Cyc. 290, 291; 2 Ency. of Pl. & Pr. 795; *Burton v. Lies*, 21 Cal. 87; *Kirsch v. Kirsch*, 113 Cal. 56, 45 Pac. 164.

Judgment affirmed. Costs awarded to respondent.

Sullivan, C. J., and Ailshie, J., concur.

In Foreclosure Proceedings the Grantor of the Mortgagor is ordinarily a necessary party: Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108; Berlack v. Halle, 22 Fla. 236, 1 Am. St. Rep. 185. But in Hager v. Astorg, 145 Cal. 548, 104 Am. St. Rep. 68, it is held that if the mortgagor conveys the mortgaged premises to one who does not place his conveyance on record, he need not be made a party defendant to a suit to foreclose, though the mortgagee has actual knowledge of the conveyance, if the statute of the state declares that no person holding a conveyance from or under the mortgagor which does not appear of record need be made a party to the action, and the judgment therein rendered and the proceedings therein had are as conclusive against a party holding such unrecorded conveyance as if he had been made a party to the action.

STATE v. BUTTERFIELD LIVESTOCK COMPANY.

[17 Idaho, 441, 106 Pac. 455.]

INTERSTATE COMMERCE—State Inspection Laws and Taxes.

The federal constitution reserves to the states the power to pass inspection laws and to lay imposts and duties upon imports or exports necessary for executing and carrying into effect such inspection laws. (p. 265.)

INTERSTATE COMMERCE—State Inspection Laws and Taxes.

A state, however, cannot, under the guise of exercising its police power, enact inspection laws which burden foreign or interstate commerce or impose upon property or products brought into a state from another state burdens or taxes more onerous than are imposed upon like property or products of the state enacting such legislation. (p. 265.)

INTERSTATE COMMERCE—License Fee on Sheep Entering

State.—A statute with the title, "An act to provide for the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories, and providing a penalty for the violation hereof," which in the body of the act requires all persons, who bring or cause to be brought sheep from any other state or territory within the state of Idaho, to pay a grazing fee of five cents per head, is not an inspection law but is a discriminatory tax against property of another state, and an undue interference with interstate commerce and is unconstitutional and void. (pp. 268, 269.)

INTERSTATE COMMERCE—License Fee on Sheep Entering

State.—Such statute cannot be construed into an inspection law by reason of the fact that the fund realized from the payment of the grazing fee is paid into the livestock sanitary fund, out of which the expenses and costs are paid for the enforcement of the laws of the state regulating the sanitary and healthful condition of livestock, where no like fee is required to be paid upon livestock produced within the state and no inspection required under the provisions of said act, or any duty imposed upon those whose duty it is to enforce the livestock laws of the state. (pp. 268, 269.)

(Syllabi by the court.)

Frank Harris, for the appellant.

Richards & Haga and J. L. Richards, for the respondent.

445 STEWART, J. This action was brought by the state respondent, against the defendant, appellant, to recover the sum of two hundred and sixty-five dollars, alleged to be due under the provisions of an act approved March 11, 1909 (Laws of 1909, page 72), as follows:

"An act to provide for the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories, and providing a penalty for the violation thereof..

"Sec. 1. Any person, company or corporation attempting to bring, or causing to be brought, from any other state or territory any sheep into the state of Idaho in any manner except by shipping the same through the state by railroad train, shall, before crossing the state line, notify the state livestock inspector of the district to be entered or the state veterinary surgeon, of such proposed action, which notice shall set forth the number of sheep, the brand thereon, the locality from which such sheep came and through which they have been driven, and accompanying such notice with a grazing fee equal to the sum of five cents (5c) per head for the total number of sheep embraced within said notice. All fees so collected shall be placed in the state treasury to the credit of the state livestock sanitary fund.

"Sec. 2. Any person, company or corporation violating the provisions of this act shall, upon conviction thereof, be fined in a sum not less than one hundred (\$100) nor more than fifteen hundred dollars. (\$1500.00) together with the costs of prosecution."

A demurrer was filed to the complaint in the lower court upon the following grounds: First, that the complaint failed to set forth facts sufficient to constitute a cause of action; second, that the court has not jurisdiction of the subject matter of the action; third, that the act of March 11, 1909, upon which the action is founded, is unconstitutional and void, for the reason that it conflicts with sections 8 and 10 of article 1, **446** and section 2 of article 4 of the federal constitution and section 5, article 7 of the constitution of the state of Idaho. The demurrer was overruled by the trial court and the defendant declined to plead further; whereupon judgment was entered as prayed for in the complaint. From this judgment the defendant appeals.

The contention of the appellant is that it cannot be taxed under the provisions of the act involved in this case, because first, such taxation is an interference with interstate commerce, and therefore violates article 1, section 8, of the federal constitution, which provides that the Congress shall

have power "to regulate commerce . . . among the several states"; second, such taxation is an impost on imports and therefore violates article 1, section 10, of the constitution, which provides, among other things: "No state shall, without the consent of the Congress, lay any imposts or duties on imports . . . except what may be absolutely necessary for executing its inspection laws"; third, such taxation infringes upon the rights of citizens of other states, and therefore violates article 4, section 2, of the constitution, which provides that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; and fourth, that such act violates section 5, article 7 of the constitution of Idaho, which provides, "All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

It has been held by the supreme court of the United States since the decision in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, down to the present time that the federal constitution reserves to the states the power to pass inspection laws and to lay imposts and duties on imports or exports necessary for executing and carrying into effect such inspection laws: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 51 Pac. 456, 39 L. R. A. 365; *In re Kinyon*, 9 Idaho, 642, 75 Pac. 268, 2 Ann. Cas. 699; *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. Rep. 44, 27 L. ed. 370; *Brimmer v. Rebman*, 138 U. S. 78, 11 ⁴⁴⁷ Sup. Ct. Rep. 213, 34 L. ed. 862; *Voight v. Wright*, 141 U. S. 62, 11 Sup. Ct. Rep. 855, 35 L. ed. 638; *Penn. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. Rep. 132, 48 L. ed. 268; *Vance v. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. Rep. 645, 42 L. ed. 1111; *Patapsco Guano Co. v. Board of Agr.*, 171 U. S. 345, 18 Sup. Ct. Rep. 862, 43 L. ed. 191, 52 Fed. 690; *Georgia Packing Co. v. Mayor etc.*, 60 Fed. 774, 22 L. R. A. 775; *Vines v. State*, 67 Ala. 73; *Powell v. State*, 69 Ala. 10; *Adison v. Saulnier*, 19 Cal. 82.

We think that it is also settled by the same line of authorities and others that a state cannot, under the guise of exercising its police power, enact inspection laws which burden foreign or interstate commerce or impose upon property or products, brought into a state from another state, burdens or taxes more onerous than are imposed upon like property or products of the state enacting such legislation: *State v. Duckworth*, 5 Idaho, 642, 95 Am. St. Rep. 199, 51 Pac. 456, 39 L. R. A. 365; 7 Cyc. 423; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454, 29 L. ed. 691; *Schollenberger v. Pennsyl-*

vania, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49; *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. Rep. 132, 45 L. ed. 224.

The question then arises in this case, whether the act under consideration imposes a burden upon interstate commerce by levying a tax which discriminates against property brought into the state from another state, or whether the act under consideration can be held to be an inspection law, enacted for the purpose of suppression and prevention of disease among sheep and livestock of the state and to protect the health of such livestock.

The objects and purposes of the act under consideration, as disclosed by the title, are "to provide for the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories and providing a penalty for the violation thereof." In other words, it is an act, as disclosed by the title, to require persons who bring sheep into this state to pay a grazing fee. The title does not provide that a grazing fee shall be paid generally by persons grazing sheep within ⁴⁴⁸ the state, but shall only be paid upon sheep entering the state from other states and territories; and an examination of the body of the act discloses that its terms are in accordance with the title; that is, all persons who bring or cause to be brought sheep from any other state or territory are required to notify the state livestock inspector and set forth in such application the number of sheep, the brand, locality from which such sheep came and through which they have been driven, and accompany such notice with a grazing fee equal to the sum of five cents per head for the total number of sheep brought within said state. Thus the terms of the act are made to apply only to persons who bring sheep into the state from other states and territories.

It will thus be seen that under the provisions of this act, it discriminates in favor of sheep produced within the state, and only requires the payment of a grazing fee upon those brought into the state. Counsel for respondent, however, contends that the effect of this statute is to provide for and promote the health, safety and well-being of the livestock of the state; and that this is true by reason of the fact that the grazing fee thus provided for is required to be paid into the state livestock sanitary fund, which is the fund out of which the expenses and costs are paid in the enforcement of the laws of the state regulating the sanitary and healthful condition of the livestock of the state. It will be observed from an examination of this statute that nothing whatever is said with reference to the inspection of the sheep brought into the state and upon which the grazing fee is required to be paid. No duty whatever is imposed upon the state veterinary surgeon with reference to an examination or inspection of such sheep.

No requirement is exacted that the sheep shall be healthy before they are admitted into the state, or the grazing fee accepted. No reference or provisions are to be found in the act which in any way indicate that the grazing fee required to be paid is for the purpose of inspecting the sheep after they arrive in the state, or that the charge is reasonable or for the purpose of compensating the officers for any duty required to be performed by them under any of the laws of the state.

⁴⁴⁰ We also find that, under the provisions of section 1185 of the Revised Codes, "Any person, persons, company, corporation or association, or any agent or employé of any person, persons, company, corporation or association, who shall drive or herd, or cause to be driven or herded, or shall bring or cause to be brought, into the state of Idaho from any other state, any sheep, shall immediately, upon crossing the state line of Idaho, notify the livestock inspector of the county or district where said sheep crossed the state line, and before he shall proceed further than two miles from said state line into the state of Idaho he shall make an application in writing to such livestock inspector for the inspection of said sheep. . . . Any inspector on receiving such notice shall at once proceed to inspect the sheep as set forth in the application."

This statute is clearly and purely an inspection statute which provides for the inspection of sheep brought into the state from any other state or territory, and prescribes the duties of the person bringing such sheep in and the duties of the inspector with reference to the same. If the act involved in this case operates as an inspection law, then we have two provisions of the statute which provide for the inspection of sheep brought into the state. But it will be observed that both of these statutes relate to sheep brought into the state from another state, the former requiring a grazing fee to be paid and the latter requiring that such sheep shall be inspected; and a comparison of these two statutes, it seems to us, clearly indicates that in enacting the statute providing for a grazing fee the legislature did not intend it to operate as an inspection law, but as a tax pure and simple, levied upon sheep brought from a foreign state into the state of Idaho and levied in discrimination against the products of other states. The statute further provides generally for the inspection of livestock in each district, and if the theory of respondent be correct, sheep brought into the state from another state are required to pay a grazing fee and thereafter be subject to both special and general inspection under the provisions of the statute. We find that under the provisions of section 1205 of the Revised Codes, "The boards of county commissioners ⁴⁵⁰ of the several counties of this state, at the time of the annual levy of taxes, must levy a special tax of

... three mills on the dollar of the assessed valuation of all sheep within their respective counties. Such tax shall be collected in the same manner and at the same time as other taxes, and paid over to the state treasurer at the same time that other taxes are remitted, to be placed in, and to constitute a fund to be known, as the livestock sanitary fund, to be used in the payment of the salaries and expenses of the officers provided for in this chapter, except the salary of the state veterinary surgeon, which shall be paid as hereinbefore provided."

Under the provisions of this statute, the person bringing sheep within the state, prior to the annual levy and having such sheep within the state at the time of such levy, is required to pay the tax thus provided for to be paid into and in support of the livestock sanitary fund, and thereby contributes to the livestock sanitary fund the same tax and assessments as are made against sheep produced within the state; and under the provisions of the act involved in this case, in addition thereto he is required to pay the grazing fee of five cents per head to the same fund for the same purposes as that for which the special tax levy is made. This grazing fee, whether or not it be used for the purpose of promoting the health and welfare of the stock within the state, is a fee that is exacted only from those bringing sheep within the state from another state, and not based upon the benefits arising from any duty performed by the state to the sheep brought in, in the way of inspection, or services rendered in or about the care of such sheep or the preservation of their health and general welfare.

A bare inspection of the statute, it seems to us, clearly indicates that its provisions are in the nature of a tax and not an inspection statute, and that it is levied for the purpose of discriminating against sheep brought within the state from another state. We are unable to discover any statute which in any manner provides for the payment of the same or a similar fee by the owners of sheep produced within the state. The grazing fee thus provided for is clearly in excess and in⁴⁵¹ addition to all fees, charges and assessments levied against sheep produced within the state, and is clearly a discrimination and a tax, and by reason of such discrimination is, to that extent, a burden upon interstate commerce and violates the provisions of the constitution of the United States. The mere fact that the fund realized from such assessment goes into the livestock sanitary fund and is generally used for the purpose of preserving the health and welfare of the sheep within the state, might be justified were the same requirement found in the provisions of the law applicable to sheep produced within the state, or if any duties were imposed upon the state livestock sanitary board in re-

turn for the levy of such assessment; but we find that independent of this statute, full and complete provisions are made for the inspection of all sheep brought within the state and produced within the state, and that a special levy is made for the purpose of raising a fund to meet such expenses, and that sheep brought into the state from another state are subject to these statutory provisions and contribute their proportionate share of the special levy to such sanitary fund; so, when the legislature attempted to require the payment of a grazing fee upon all sheep brought from another state into the state, they thereby added a burden not imposed upon property produced in the state, and to that extent the act contravenes the provisions of the constitution of the United States.

Under the authorities heretofore cited, we have no doubt but that the state has the power to pass an inspection law requiring that all livestock brought into the state shall be inspected, and requiring a duty to be paid for such inspection and to carry into effect such inspection law; and the legislature, having already provided for the inspection of livestock brought into the state, need only have provided for the fee or duty to be charged for such inspection, and had it been intended that the act under consideration should be treated or construed as an inspection law, the legislature no doubt would have so indicated in the act involved in this case and not provided for charging a grazing fee for all sheep brought within the state from other states and territories.

⁴⁵² If the contention of counsel for respondent be correct, then the legislature has done indirectly what it could not have done directly. It is not within the power of the legislature to violate a plain provision of the constitution by doing the thing prohibited in an indirect and circuitous manner. It must at once be conceded that the legislature of the state could not enact a law requiring sheep brought within the state to pay a grazing fee when no such tax was imposed upon sheep produced within the state; and if such legislation is prohibited by the provisions of the constitution, it cannot be enacted under the pretense and name that the fund realized therefrom is to be paid into a sanitary fund when a like requirement is not exacted of sheep produced within the state. If the construction is given to this statute contended for by respondent, then the title of the act clearly violates article 3, section 16, of the constitution of this state. This section requires, "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." The title to this act does not disclose that the subject of the act is the inspection of livestock or has anything whatever to do with the inspection of livestock or the health or welfare of the livestock of the state. The title as

expressed would permit only such legislation as relates to the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories and matters relating thereto, and would not authorize the incorporation in the act of provisions relating to an entirely different subject.

We are for these reasons clearly of the opinion that the act involved in this case is unconstitutional and void. The judgment of the lower court is reversed, and the trial court directed to sustain the demurrer. Costs awarded to appellant.

Sullivan, C. J., and Allshie, J., concur.

A Statute Making It Unlawful to Bring Sheep into a State without having them inspected and dipped is held repugnant to the commerce clause of the federal constitution in State v. Duckworth, Idaho, 642, 95 Am. St. Rep. 199. But in Patrick v. State, 17 Wyo. 260, 129 Am. St. Rep. 119, it is held that a statute making it criminal to bring into the state sheep infected with scab or other infectious or contagious disease, or that have in any manner been exposed thereto, is not an attempt to regulate interstate commerce, but is a reasonable exercise of the police power. And in State v. Asbell, 74 Kan. 397, 121 Am. St. Rep. 345, it is decided that a statute prohibiting the bringing of cattle into the state from below its southern line at all seasons of the year, unless inspected by some inspector authorized by the livestock commissioner or by the bureau of animal industry of the interior department of the United States, and passed under a health certificate, and making persons violating the statute guilty of misdemeanor and punishable, does not impose an unreasonable restraint upon interstate commerce.

PEASLEY v. NOBLE.

[17 Idaho, 686, 107 Pac. 402.]

CONDITIONAL SALE—Passing of Title to Vendee's Purchaser.

A conditional sale and delivery of the property to the vendee, reserving title in the vendor, and conferring power and authority on the vendee to sell such property, has the effect of passing title to one who makes a bona fide purchase from such conditional sale vendee, and upon such sale the original vendor's title is divested and at once transferred to the purchaser. (pp. 273, 274.)

CONDITIONAL SALE—Duty of Vendee's Purchaser to have Money Applied.—Where the vendee of property under conditional sale is vested with the power to sell such property and deliver the proceeds to the vendor, a purchaser in good faith is under no obligation to follow the purchase price and see that it is delivered by the agent to the original vendor. (pp. 273, 274.)

CONDITIONAL SALE—Forfeiture for Nonpayment.—Where a conditional sale contract, accompanied with a delivery of the possession of the property to the vendee, provides that a failure to make payment at the times and in the manner specified in the agreement shall work a forfeiture of all rights under the contract and entitle the seller to immediately take possession of the property sold, the mere fact of a

failure to make any payment at the time or in the manner specified does not per se work a forfeiture of the contract, but in order to effect the forfeiture, it is necessary for the vendor to demand or reclaim the property. A breach or mere failure to pay does not terminate the contract, but has the effect of conferring upon the vendor the option to declare a forfeiture and repossess himself of the property he has contracted to sell. (p. 275.)

CONDITIONAL SALE—Sale by Purchaser After His Default in Payments.—Where N. delivered possession of a band of sheep to N. & Co. under a conditional sale agreement providing that title should remain in N., and authorizing N. & Co. to make sales from time to time of any part or all of such property, and providing further that upon failure to make any payment at the time and in the manner specified in the agreement, N. & Co. should forfeit all rights under the contract, and that N. might thereupon take possession of the property, held, that notwithstanding a failure of N. & Co. to make payments as stipulated, if N. fails likewise to demand or take possession of the property, the contract is still in force and the agency to sell still exists, and that N. & Co. can transfer a good title to a bona fide purchaser until such time as N. either demands or takes possession of the property. (pp. 271, 272, 276.)

(Syllabi by the court.)

Hawley, Puckett & Hawley and Morrison & Pence, for the appellant.

Rice, Thompson & Buckner and W. E. Borah, for the respondent.

690 AILSHIE, J. This action is in claim and delivery. The complaint is in the usual form for such actions. The answer denied the ownership of the plaintiff and his right to the possession of the property, and also set up a separate and independent defense. The case was tried on the issues thus made, and judgment was entered in favor of the plaintiff. Defendant moved for a new trial, and has appealed from the judgment and order denying his motion.

The transaction out of which this action has arisen is substantially as follows: On January 1, 1901, George H. Stewart, John M. Haines and Lewis E. Newland, whom we shall hereafter designate as "Newland & Co.," entered into a contract with the appellant, Robert Noble, whereby Newland & Co. agreed to purchase and Noble agreed to sell ten thousand head of sheep. The material and essential part of the contract, and that upon which the decision of this case must eventually turn, is as follows:

"That to the end of perfecting said sale, the said sheep have been delivered into the possession of the said parties of the second part, but that title is to remain absolutely in the party of the first part of all of said sheep, together with the increase and the wool, until fully paid for. That the payments for the same are as follows: Ten thousand dollars (\$10,000.00) on or before Jan. 1, 1902, fifteen thousand dollars (\$15,000) on or before Jan. 1, 1903, and fifteen thousand

dollars (\$15,000) on or before Jan. 1, 1904, each and all of said payments bearing interest at the rate of eight per cent per annum from Jan. 1, 1901, said interest payable ⁶⁹¹ annually; that immediately upon full payment for said sheep, the title of the same, together with all increase and the wool clip, is to pass to the parties of the second part and they are to become the sole owners thereof, and to that end the party of the first part is to execute a bill of sale for the same to the said parties of the second part.

"It is further agreed and understood that the said parties of the second part are to care for and manage said sheep in a good husbandman-like manner at their expense, and that they are to have the authority and power to sell said sheep or any part of the same or the wool or the increase at a fair market value, but are to immediately apply all amount realized from said sale upon the purchase price herein stipulated.

"It is further agreed and understood that in the case of failure upon the part of the parties of the second part to pay the amounts above specified at the time specified and in the manner specified, that they are to forfeit all right to purchase said sheep, and the party of the first part shall be entitled to immediately take possession of said sheep and the increase and any clip of wool that may be on hand, and any expenses incurred by parties of the second part or outlay shall be treated and considered as liquidated damages for all claims to be made by the party of the first part against the parties of the second part hereunder and this contract shall be at an end."

Newland & Co. took possession of the sheep and carried on the business, paying Noble from time to time on the purchase price until they had paid an aggregate sum of about twenty-six thousand dollars. They failed, however, to make the payments as they fell due, and it appears from the evidence of both Stewart and Haines that they each notified Noble on several occasions that they could not meet their payments, and that "if he wanted the sheep to come and get them." He did not reclaim the sheep, however, nor did he take possession or demand possession of them until the happening of the event which precipitated the action in this case. About November 1, 1904, Newland & Co. sold to the respondent herein, Ed ⁶⁹² Peasley, about three thousand two hundred head of sheep from the flock received from appellant and its increase. Respondent took charge of the sheep thus purchased from Newland & Co., and cared for them until about the 25th of March, 1905, on which latter date the appellant seized the sheep on the range and removed them and took possession and charge of the same. The re-

pendent thereupon commenced this action in claim and delivery to recover the sheep or the value thereof.

It is claimed by the appellant that the contract of sale hereinbefore set forth and out of which this controversy arises is indisputably a conditional sale contract, and did not vest title to the sheep in Newland & Co. as vendees. This contention must be sustained. The contract entered into between Noble and Newland & Co. did not at the time vest the title to the property in the vendees. On the contrary, the title remained in the vendor. This is a well-established rule of law, and has been repeatedly recognized by this court: *Mark Means Transfer Co. v. Mackinzie*, 9 Idaho, 165, 83 Pac. 135; *Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 23; *Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, 30 L. ed. 35. It is urged by the respondent, however, that the power conferred upon the vendees to sell any part of the property modified the previous reservation of title in the vendor so that the vendees could sell the property and give a good title, and that under this power the moment the vendees made a sale title passed to the purchasers through the agency conferred on the vendees to make a sale. The rule is so general that it needs no citation of authority that a contract or agreement must be construed as an entirety, and effect must be given, if possible, to every part of the agreement. Indeed, that is the whole tenor of the case of *Rodgers v. Bachman*, 99 Cal. 552, 42 Pac. 448, cited and quoted from at length by appellant. So let us pursue the intent of this agreement. In the contract under consideration, it was stipulated in one paragraph that the "title is to remain absolutely in the party of the first part," and immediately following that in the next paragraph it stipulates, "it is further agreed and understood that the said parties of the second part . . . have the authority and power to sell said sheep, or any part of the same, or the wool or increase, etc." A sale contemplates a transfer of title. It could not have been the intention of the parties that the vendees might transfer any of the property covered by the contract and still be unable to give a good title. This is emphasized by the fact that the contract further provides that in the event any sale is made the second parties are "to immediately apply all amounts realized from the said sale upon the purchase price herein stipulated." This latter clause, however, is not a condition precedent to the vesting of title, for the reason that the purchase price could not be realized until the sale was made. A purchaser of such property would not be expected to follow the purchase price into the hands of Noble and see that it was applied on the contract. That is purely

a matter of trust and confidence on his part, and was likewise an agreement upon the part of Newland & Co. that they would apply all moneys received from such sales upon the contract. If they should fail to do so, Noble could not bring any reasonable interpretation visit the penalty for such failure upon an innocent purchaser of the property. He must rely upon his rights under the contract.

The opinion of the court in the New Haven Wire Co. Case, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300, deals with the identical principle here involved, and subdivision 5 of the syllabus to that case states the holding of the court as follows: "The effect of a conditional sale and delivery of the property to the vendee with power to sell it as the property of the vendor and deliver the proceeds to him, is that, upon a sale by the vendee of the property, it ceases to be security to the vendor, and the purchaser acquires a good title, and if the vendee does not pay to the vendor, but retains the proceeds of the sale and uses them, the vendee becomes a debtor to the vendor therefor, and the latter has no priority over other creditors."

That was a case of a sale of steel rods and wire where the title remained in the vendor with power of sale conferred on the vendee. In course of the consideration of that case the court says: "The legal effect of the conditional sale and delivery of rods to the vendee with power to sell them as the property of the vendors and deliver the proceeds to them is that, upon such sale, the rods ceased to be security to the applicants, and inasmuch as the wire company did not pass over to them the identical proceeds of any sale, but retained the proceeds of all sales and mingled the money with and used it as its own, indistinguishably, it became their debtor and they became its creditors, upon the same footing as all other creditors, without right of priority. After sale their security was only the fidelity of the wire company to its agreement to hold the proceeds of their rods apart and pass them over."

The principle enunciated in this case is sustained by the following authorities: Winchester Wagon Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707; Bent v. Jerkins, 112 Ala. 485, 20 South. 655; Wilder v. Wilson, 1 Lea (Tenn.), 548.

Appellant urges that upon a failure on the part of Newland & Co. to make payment, their rights under the contract were forfeited, and that they no longer had the right to make sales of any of the property; that their agency to sell ceased upon a forfeiture of their rights under the contract. The clause of the contract under which this contention is made provides "that in case of failure on the part of the parties of the second part to pay the amounts above specified

at the time specified and in the manner specified, they are to forfeit all rights to purchase said sheep. . . . And this contract shall be at an end." In support of this contention, they cite Page on Contracts, sec. 1160; Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Hicks v. Aylsworth, 13 R. I. 562; Slater v. Emerson, 60 U. S. 224, 15 L. ed. 626; Jennisons v. Leonard, 88 U. S. 302, 22 L. ed. 539. Without an analysis of the authorities cited, it is sufficient to say that they do not sustain the contention made as applied to the facts of this case. We recognize the rule as stated by Page on Contracts, that "at law the general rule is that time is of ⁶⁰⁵ the essence of the contract unless a contrary intent appears upon the face of the contract." The author then proceeds to cite a variety of contracts of which time is of the essence. It should be remembered, however, that the application here has more particular reference to the forfeiture instead of the right to purchase. This contract was in part executed. The possession of the property had been delivered to the vendees, and a large part of the purchase price had been paid. The forfeiture clause in the contract was purely and wholly for the protection of the vendor. The forfeiture did not take place, however, by operation of law. It was necessary for the vendor to do some specific act in order to put an end to the contract. He was empowered to "immediately take possession of said sheep and increase and any clip of wool, etc." The vendor failed and neglected to avail himself of this provision of the contract until after the vendees had disposed of the sheep involved in this action. So long as he allowed the parties to continue in possession of the sheep without any change or alteration in the original contract, they will be deemed to have still been operating under the contract; indeed, this is the evidence of two of the vendees, Stewart and Haines, that he had so informed them, and that he declined to take possession of the property, but insisted upon them continuing in the possession of the property in the same manner as they had been prior to the breach of the contract. Although the time for payment had expired and the vendor was entitled to reclaim the property, we apprehend that the vendees could have acquired a good title thereto by tendering the balance of the purchase price at any time before the vendor demanded possession of the property. It would have involved an entirely different question if this had been a mere agreement to sell, unaccompanied with a delivery of possession or any change in the respective and relative positions of the parties with reference to the property.

Newland & Co. came into possession of this property by and with the consent of Noble, and their possession was therefore rightful and lawful. Such possession could not be con-

verted into a wrongful and unlawful possession until a breach of the contract and a demand made by the vendor for possession ⁶⁹⁶ of the property. Until such event should happen, the possession of Newland & Co. was rightful and in accordance with the terms of the contract. Noble made no demand and did no act which indicated a purpose on his part to avail himself of the right to declare the forfeiture. The possession, therefore, must be viewed and considered as continuing under and by virtue of the terms of the contract and the terms of the agency remained equally as applicable as they did before the time the vendor had the right to avail himself of the forfeiture. Failure to pay at the maturity of any installment did not per se terminate the contract. It is not so stipulated in the contract, and the purpose and intent of the contract clearly negatives such a conclusion. The termination of the contract upon failure to pay was an option running in favor of the vendor alone. To have availed himself of that option would have transferred the possession of the property to the holder of the legal title, and would have likewise terminated the power and agency contained in the agreement, authorizing the vendees to sell the property and vest title in the purchaser. It has been frequently held by the courts that a conditional sale vendor may do a great many acts which will have the effect of waiving his right to the possession of the property and which will result in vesting the title in the vendee. For instance, it has been held by this and other courts that the commencement of an action against the vendee for the recovery of the purchase price has the effect of vesting absolute title in the vendee: *Mark Means Transfer Co. v. Mackinzie*, 9 Idaho 165, 73 Pac. 135, and cases there cited; *Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974. The vendor, however, cannot both pursue the property in rem and at the same time pursue the vendee with an action in debt for the purchase price: *Bailey v. Hervey*, 135 Mass. 172.

In *Kimball v. Farnum*, 61 N. H. 348, the court was considering the right of a vendor to maintain the action of replevin for the possession of property contracted under conditional sale, and said: "There was no unlawful taking of the property by the defendant, for he took possession of it by the consent of the vendor, under an agreed right to take and use the property ⁶⁹⁷ and acquire title by payment within a year. There was no unlawful detention, if the defendant had the right of possession until the property was paid for. The vendor extended the time of payment, and made no demand for the property. He did not assert his right to take it, nor claim a forfeiture of the defendant's right to retain the property and complete the payment. He afterward received money, and applied it upon the unpaid

the finding was warranted that the defendant made payment after the year expired, with finding that he still had the right of possession of the full title by completing payment, and that he was estopped from denying that right." The plaintiff acquired a good title to the property by virtue of the contract from Newland & Co., and the taking by the plaintiff was therefore wrongful and without authority in fact. The judgment is affirmed, with costs in favor of the plaintiff.

J., concurs.

was not present at the hearing and took no part in the decision.

ON HOLDING PROPERTY UNDER A CONDITIONAL SALE MAY TRANSFER A PERFECT TITLE.*

With Respect to Bona Fide Purchasers from Vendor Under a Contract of Conditional Sale, 278.

Implying Vendor's Authority to Resell.

General, 279.

Implied Authority is Implied.

General, 281.

Application of Rule as to Implied Authority to Sell, 285.

I. Scope.

In conditional sales, the distinction between such transactions, the general operation and effect of the contracts not only as between the parties thereto but also as between persons including bona fide purchasers from the vendor is more or less discussed in the notes of this series.

Our attention now will be confined, as far as the main point involved in the principal case (ante), to the question whether the vendee in a contract of conditional sale has authority to resell the property can, before perfection of title, pass a perfect title to the property to a purchaser from him, notwithstanding absolute reservation of title by the conditional vendor. And cash, bank notes, bills payable, in short, whatever falls under the general notion of personal property is not included within the term "personal property" as used for the law with reference to these is founded on necessities of currency and trade and regulated by deci-

REFERENCES TO MONOGRAPHIC NOTES.

Conditional sales: 46 Am. St. Rep. 295.

On conditional sales and other transactions: 94 Am. St. Rep.

Effect of condition upon third persons including bona fide purchasers: 42 Am. St. Rep. 105; 8 Am. St. Rep. 195; 94

Am. St. Rep. 886.

Conditional vendee only prima facie evidence of title: 42 Am. St. Rep. 195.

sions and usages peculiar to itself, and would throw no light on the question raised in the principal case.

But aside from these, the various questions which arise with reference to contracts of conditional sales when the rights of third persons have intervened are so intimately connected, that a knowledge of the general principles as given in our former notes will throw much light on the particular point we now wish to consider; hence we shall first note briefly the general principles to be deduced from these former notes before directing attention singly to what may prove only an exception to or modification of the prevailing rule with regard to the rights of a conditional vendor as against a bona fide purchaser from his vendee, who takes title from such vendee without the conditions in the original contract of sale having been performed.

II. General Rule With Respect to Bona Fide Purchasers from the Vendee Under a Contract of Conditional Sale.

In many of the states bona fide purchasers from the vendee in contracts of conditional sales, with title reserved in the vendor till performance of the conditions, are protected by statutory provisions declaring such contracts void as against third persons unless filed or recorded.

But aside from any such statutory regulations it was shown by our former notes that according to the overwhelming weight of authority, the rule that a sale and delivery of chattels on condition that the title is not to vest until the purchase money is paid does not pass the title to the vendee until the condition is performed, applies to bona fide purchasers from such vendee, because one who himself has no title to property can give none.

This doctrine is based upon the fundamental principle that no man shall be deprived of his property, without his assent, except by due process of law, the maintenance of which principle, as was well said by Justice Field in *Western Union Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047, "is essential to the peace and safety of society and the insecurity which would follow any departure from it would cause far greater injury than any which can fall, in cases of unlawful appropriation of property, upon those who have been misled and defrauded."

But though the rule as above stated is sanctioned by the highest court in the land, and, as shown by our former notes, is supported by the overwhelming weight of authority, in both the state and federal courts, it is not universal.

It seems to have first met opposition from the supreme court of Pennsylvania where it was held in the early case of *Martin v. Mathiot*, 14 Serg. & R. 214, 16 Am. Dec. 491, that a bona fide purchaser from a conditional vendee was protected against the title of the original vendor; and this ruling made in 1826 has been consistently followed by the courts of that state ever since: *Stadtfeld v. Huntsman*, 92 Pa. 53, 37 Am. Rep. 661; *Brunswick v. Hoover*, 95 Pa. 508, 40 Am. Rep. 674; *Forrest v. Nelson*, 108 Pa. 481; *Dearborn v. Raysor*, 132 Pa. 231, 20 Atl. 690; *Ott v. Sweatman*, 166 Pa. 217, 3 Atl. 102.

The Pennsylvania doctrine has also been followed in Illinois *Young v. Bradley*, 68 Ill. 553; *Elliott v. Emerson P. Co.*, 80 Ill. App. 51; *Gilbert v. National Cash Reg. Co.*, 176 Ill. 288, 52 N. E. 22.

Burford Furniture Co., 106 Ill. App. 583; and this support in some cases from Kentucky and Maryland, 10 Bush, 337; Hall v. Hinks, 21 Md. 406; 68 Md. 299, 6 Am. St. Rep. 446, 11 Atl. 848.

which the courts, in all of those cases, base their general rule given, was stated by the supreme court in the earliest case (Martin v. Mathiot, 14 Serg. Dec. 491): "Possession of personal property is the index; it is almost the only index which the world looks to."

It might be said in favor of a rule which would make possession of personal property conclusive proof of ownership, but our former notes and particularly in the ones upon V. Woods, 42 Am. Rep. 105, and Velsian v. Lewis, 5, the law does not regard possession as title, but as evidence of title—nothing more, and a buyer who takes upon titles which prove false or delusive takes the risk of the result.

Now, it is not surprising that, except in those states where a reservation is required, the opposition to the general rule of conditional sale with reservation of title till payment of the purchase price is valid and enforceable even against bona fide purchasers from the vendee, is confined to a few jurisdictions.

Applying general principles controlling the rights of a vendee against a subsequent bona fide purchaser from the vendor, it is clear that if such vendee can, before perfection of the sale, pass a perfect title to one who buys the property in good faith and without notice of the conditions, the bona fide purchaser is protected, not because of the mere possession of the property in his vendor, but because of some further indicia of title in him which is inconsistent with the previous title in the original vendor, and falls within some exception to the general rule we have stated.

We confine our attention to the effect of authority given to the vendee to resell the property—although title is reserved to the vendor.

Effect of Giving Vendee Authority to Resell.

A notable exception to the rule that a vendor can only pass a greater title than he himself has is that, when the vendor, intentionally or by negligence intrusts the property, in addition to the title of the property, with further indicia of ownership, and gives authority to resell it, the title of a bona fide purchaser from such vendee will be protected against the original owner, notwithstanding the agreement contains a reservation of title in the original vendor until full payment of the purchase price.

This rule was upheld in the principal case (ante, p. 270) where it was held that a contract must be construed as an entirety, and that, if possible, to every part of the agreement; and that, if it contemplates a transfer of title, a stipulation authorizing the vendee to resell the property is inconsistent with an intention that the property should remain absolutely in the vendor.

In *Cowdrey v. Vandenburg*, 101 U. S. 572, 25 L. ed. 923, the preme court of the United States speaking through Justice Field said: "When the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected," and is quoted as the reason therefor from the opinion in *McNeil v. Terrell*, Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341: "Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

So, also, in *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 55 Ala. St. Rep. 550, 19 South. 232, 32 L. R. A. 260, the plaintiff had conditionally sold to one S. certain buggies, the contract providing that the title should remain in the vendor till full payment of the purchase price, but also stipulating that S. might resell the buggies. S. sold the buggies to defendant, who had no knowledge that S. was not the absolute owner, and plaintiff brought this suit in replevin to recover the buggies from defendant. In affirming a judgment in favor of defendant, the court, after stating that the contract showed a retention of title in the seller until full payment, but also expressly authorized the buyer to resell, said: "Now, what effect shall be given to these conflicting and inconsistent terms of the contract? . . . This case falls within a well-recognized exception to the general rule that no one can convey to another any better title than he himself has." Benjamin, in his work on Sales (sections 448, 449), states with perspicuity this exception. In section 448, volume 1, fourth American edition, the author uses this language: "The seller may be estopped from claiming title as against a bona fide purchaser from the buyer in possession by giving the buyer evidence of title or authority to sell." And in the succeeding section an elaborate citation from *Leigh v. Mobile & O. R. R. Co.*, 58 Ala. 165, is made, in which the exception to the maxim, "Nemo dat quod non habet," is strongly presented. Said Brickell, C. J., in that case: "If the person intrusted with the possession of the goods and with the indicia of ownership or authority to sell or otherwise dispose of them in violation of his duty to the owner sells to an innocent purchaser, the sale will prevail against the right of the owner."

Again in *Wilder v. Wilson*, 16 Lea, 548, the court, after stating that it was the settled law of Tennessee that a contract for the sale of personal property is valid, by which the possession passes to the purchaser, while the title is retained by the seller until the purchase money is paid, and that a subvendee of such property would acquire no title, said: "On the other hand, our courts have also held that if a person is put in possession of personalty by the owner, and at the same time clothed with the usual indicia of title which give authority to sell, a subpurchaser may acquire a title good against the owner: *Cherry v. Frost*, 7 Lea, 1; *Taylor v. Pope*, 5 Cold. 413. It seems to follow as of course that if the purchaser of such property, though by conditional sale, be expressly given the power to sell, and he does sell, the subvendee would get a good title."

And the foregoing exceptional rule is recognized by the overwhelming weight of authority: *Leigh v. Mobile & Ohio R. R. Co.*,

Jenkins, 112 Ala. 485, 20 South. 655; Wright v. 64, 79 Am. Dec. 196; Baring v. Galpin, 57 Conn. 5 L. R. A. 300; South Bend Iron Works v. Reedy, 361, 60 Atl. 698; American Process Co. v. Florida Ck Co., 56 Fla. 116, 47 South. 942; Ezzard v. Frick, v. McNatt, 132 Ga. 610, 64 S. E. 795; Barbour v. p. 613; Winchester Wagon Works Mfg. Co. v. Car- 58 Am. Rep. 382, 9 N. E. 707; Rogers v. White- ; Lewenberg v. Hayes, 91 Me. 104, 64 Am. St. Rep. Spooner v. Cummings, 151 Mass. 313, 23 N. E. 839; ns, 39 Mo. App. 318; Baker v. Tolles, 68 N. H. 73, s v. Everett, 20 Wend. 267, 32 Am. Dec. 541; Lud- Barb. (N. Y.) 650; Fitzgerald v. Fuller, 19 Hun k v. Gross, 60 App. Div. 446, 69 N. Y. Supp. 924; Steiner Mfg. Co., 86 N. Y. Supp. 162; Velsian v. 9, 3 Am. St. Rep. 184, 16 Pac. 631; Christensen v. 3, 63 Pac. 648; Mayer v. Catron (Tenn. Ch. App.), mington v. Houston, 38 Vt. 448, 91 Am. Dec. 366; ster, 69 Vt. 542, 38 Atl. 239; Eisenberg v. Nichols, Am. St. Rep. 917, 60 Pac. 124; Mississippi River iller, 109 Wis. 77, 85 N. W. 193.

rule upheld by these cases is supported by analogy ll v. Old, 88 Ark. 99, 113 S. W. 1023, where it was itional vendor who consents that his vendee may erty waives his reservation as to the mortgagee and der him.

by the seller in a conditional sale that the property d to a certain corporation does not authorize its er corporation, and hence the seller is not estopped against such other corporation: Lorain Steel Co. v. Ry. Co., 187 Mass. 500, 73 N. E. 646.

b. When the Authority is Implied.

—The exceptional rule that a vendee in a contract e who is given authority to sell the property can le to a purchaser of the property from him, applies authority to sell is implied as when it is express. stated in Mechem on Sales, volume 1, section 601, says: "But the rule permitting the conditional ven- goods in case of default, even from a bona fide s conditional vendee, very obviously should not and those cases in which the goods have been delivered l vendee for the very purpose of being resold to , as where a retail dealer obtains goods from a upon the agreement that the title to the goods as a n in the latter, but the retail dealer is impliedly, permitted to sell from the bulk in the usual course of the goods in bulk might be deemed unauthorized e, but the retail purchaser in the usual course of hen such sales were expressly or impliedly author- od title, though the retail dealer might fail in pay- " And the text thus quoted is fully sustained by the

ner, by his own act or consent, has given another the right to sell or otherwise dispose of his goods

as, according to the customs of trade, or the common understanding of the world, usually accompanied the authority of sale or disposition," as when a manufacturer delivers property, retaining title, to a retail dealer, for the purpose of sale by the latter, a sale by the person thus intrusted with the possession of the goods and with the indicia of ownership, or of authority to sell or otherwise dispose of them, in violation of his duty to the owner, to an innocent purchaser for value, will prevail against the reserved title of the owner. *Bent v. Jenkins*, 112 Ala. 485, 20 South. 655.

One of the most forcible statements of the exception we are now considering to the general rule that no one can transfer to another a better title than he has himself is found in *Saltus v. Everett*, 1 Wend. 267, 32 Am. Dec. 541. In this case the court, speaking through Verplanck, Senator, after remarking that the question of what rule ought to govern between the conflicting rights of bona fide purchasers of personal property, bought without notice of any opposing claim, and those of the original owner divested of the possession and control of his property by misplaced confidence, said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent, and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. . . . To whatever and however numerous exceptions this rule of our law may be subjected, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs." The opinion then goes on to say that one of the most remarkable classes of these exceptions relates to commercial paper which comes under the general notion of currency, but setting aside the question as to this class of paper which is founded on the peculiar necessities of currency and trade and regulated by decisions and usages peculiar to itself, continues: "After a careful examination of all the English cases and those of this state, that have been cited and referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstance which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has, by his own direct voluntary act, conferred upon the person from whom the bona fide venditor desires title, the apparent right of property as owner, or of disposal as agent." The court then says that the owner loses his right of following and reclaiming his property "where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal; or to use the language of Lord Ellenborough, where the owner 'has given the external indicia of the right of disposing of his property.' Here it is well settled that, however the possessor of such external indicia may abuse the confidence of his principal, a sale by a fair purchaser divests the first title, and the authority to sell conferred, whether real or apparent, is good against him who gave it. . . . The owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person

sell and dispose of them; and this, not only by authority to him, but by conferring an implied authority may be implied by the assent to and or similar dealings, so as to hold such person out m he is in the habit of trading as authorized to 'If a man,' says Bayley, J., in *Pickering v. Buck*, goods into another's custody, whose common business confers an implied authority to sell."

h recognize the doctrine that a bona fide purchaser in a contract of conditional sale, who has implied the property, will be protected against the title mer are numerous: *Wright v. Solomon*, 19 Cal. 64, *South Bend Iron Works v. Reedy*, 5 Penne. (Del.) *Clarke v. McNatt*, 132 Ga. 610, 64 S. E. 795; *Wink & Mfg. Co. v. Carman*, 109 Ind. 31, 58 Am. 707; *Rogers v. Whitehouse*, 71 Me. 222; *Lewen-Me.* 104, 64 Am. St. Rep. 215, 39 Atl. 469; *Spooner Mass.* 313, 23 N. E. 839; *Columbus Buggy Co. v. 9, 55 Am. St. Rep.* 550, 19 South. 232, 32 L. R. A. *Owens*, 39 Mo. App. 318; *Ludden v. Hazen*, 31 *ald v. Fuller*, 19 Hun, 180; *Wilder v. Wilson*, 16 *. Catron* (Tenn. Ch. App.), 48 S. W. 255; *Arming-Vt.* 448, 91 Am. Dec. 366; *Mississippi River Log-109 Wis.* 77, 85 N. W. 193; *Stubbings v. Curtis*, W. 325.

Wester Wagon Works & Mfg. Co. v. Carman, 109 *ep.* 382, 9 N. E. 707, plaintiff, a manufacturer and wagons, sold to S., a retail dealer therein, a car- be paid for in installments evidenced by three s stipulated in the contract of sale and evidenced that the title to the wagons should remain in plain- s were fully paid. S., without having paid the the wagons to W., and W., "several days after- to defendant, from whom plaintiff sought in this possession. Judgment in favor of defendant was saying: "The law seems to be well settled in this the owner of personal property sells and delivers it t for the purpose of consumption or resale, at an ole at a future day, upon the express condition and title to such property should remain in the vendor purchase price was fully paid, the vendee of such such payment, can neither sell nor encumber the manner as to defeat the title of the original owner t.

ere, it appears that a manufacturer and wholesale of personal property sells upon credit, and delivers es to a retail dealer therein, for the apparent or resale by such vendee, it is clear, we think, that ation to conditional sales cannot apply to or gov- a controversy as to such article between the orig- e purchaser thereof from the original vendee. For purposes for which the possession of the property the original vendee are inconsistent with the con- hereof by the original vendor, and for this reason a which the sale and delivery were made must be

deemed fraudulent and void as against purchasers from the original vendee of the property."

So, too, in *Lewenberg v. Hayes*, 91 Me. 104, 64 Am. St. Rep. 239 Atl. 469, plaintiff sold to D., a tradesman, certain merchandise half cash and half in thirty days, and delivered the goods without exacting the cash. Aside from the question whether delivery of goods without exacting the cash payment constituted a waiver of cash payment and passed title to D., which the court said might fairly be inferred, it was held that plaintiff was estopped as against an innocent purchaser from D. from claiming that the sale was conditional and that the title had not passed, because of the implied authority he had given D. to sell the goods. "The plaintiff allowed the defendant to be deceived," said Haskell, J., "and he cannot now be permitted to take advantage of his own fault. Merely intrusting goods to another, without knowledge that they were to be put on sale, would not raise an estoppel; but knowledge that they are to be put on sale and acquiescence in allowing them to be so exposed is equivalent to authority to sell them, and may well raise an equitable estoppel."

And in *Spooner v. Cummings*, 151 Mass. 313, 23 N. E. 839, it was held that a bona fide purchaser of a horse from a vendee, in possession thereof under a contract by which the title was to remain in the vendor until the price was paid, may, in replevin by the vendee under a general denial, show that the conditional vendee had been given implied authority to sell the horse, though not paid for; and that evidence that many horses had previously been delivered by the vendor to the vendee under similar contracts and that the vendee had sold them and returned the money to the vendor, who applied it as he saw fit, and that he used to urge the vendee to sell, was sufficient to show an implied authority to sell the horse in question. Said court: "If the plaintiff expressly or impliedly authorized the sale by Pope [the vendee] to him [defendant], he, having bought in good faith from the apparent owner, acquired a good title. It is immaterial whether his right depends upon an actual authority to make the sale, or upon facts which estop the plaintiff from denying the validity of the sale."

Likewise in *Lawrence v. Manning*, 39 Mo. App. 318, it was held that, when wholesale merchants furnish goods to retail dealers, with the understanding that the goods are to be sold to others, with the implied understanding that the goods are to be disposed of, they are estopped from claiming a lien or charge for the balance of the purchase price as against one who has in good faith bought and paid for the goods.

The case of *Mississippi River Logging Co. v. Miller*, 109 Wis. 85 N. W. 193, furnishes an excellent illustration of the doctrine that the vendor in a contract of conditional sale who impliedly authorized his vendee to sell the property will not be allowed to assert his title as against one who in good faith has purchased the property from such vendee relying on his apparent title.

In this case the owner of pine lands had conditionally sold a large amount of standing timber to a logging company. The contract secured to the owner a paramount title to the timber until the purchase price was paid. The owner knew that the logging company had pine lands of its own, and a mill, and was manufacturing and selling lumber, and that it was to cut the timber right away, and put it out with its own timber, and that it intended to manufacture

the lumber. The seller caused no mark to be put, and tacitly acquiesced in the buyer putting its mark on the logs, so that they were to be mixed indiscriminately with the logs of the original owner. The buyer manufactured the timber into lumber, and sold it to the defendant, who bought in the ordinary course of business without knowledge of title in the original owner of the logs. The court held that, notwithstanding the seller had no title, what was done with the logs after they were sold to the buyer was valid as against an innocent purchaser.

In the decision the court first said, that until the price of the lumber was paid, the selling company had no perfect title to the timber, and therefore could convey no title; that it did not violate the general principle that, in the absence of a reservation, a conditional sale is valid as well against the parties to the transaction and that the contract of sale cannot convey the title until the condition of the agreement to sell has been performed. "But," it said, "if a vendor conditionally sells to a vendee goods, and the vendee takes possession, with the agreement, expressly or impliedly, to sell them as his own, then there can be little doubt that the vendor will be estopped from asserting title against an innocent third person who has purchased of the vendee without notice of any infirmity or reservation of title."

Rule as to Implied Authority to Sell.—While it is true that when the vendee in a contract of conditional sale, either expressly or impliedly, to resell the goods, takes a perfect title thereto to one who buys from him without notice of the conditions, still when the contract is conditional, "the implied authority must arise from the facts, and the interpretation of facts according to the habits of the trade": *Saltus v. Everett*, 20 Wend. 267, 66 Am. Dec. 101.

The delivery of a stock of goods to a shopkeeper to sell, or for sale, but upon condition that the title shall remain in the vendor until payment of the price, does not enable him to convey a title to his entire stock of goods by a sale in the ordinary course of business: *Burbank v. Crooker*, 7 Cal. 470; and this principle was also recognized in *Standard Implement Co. v. Standard Implement Co.*, 21 Ind. App. 444, 52 N. E. 85, *Standard Implement Co. v. Standard Implement Co.*, 51 Kan. 544, 33 Pac. 362, and *Pratt v. Burhaus*, 100 N. D. 703, 47 N. W. 1064. In the case last cited, the defendants were manufacturers of cigars, delivered to a dealer, who sold a large quantity of cigars, reserving title until the price was paid. Shortly thereafter the retailers of the stock including the cigars shipped by plaintiff, sought to recover possession of the cigars in replevin. In reversing a judgment in favor of the retailers, the court said: "The defendant did not buy them in the usual course of business. Those who purchased in the usual course of business took good title. Those who did not purchase in the usual course could not rely upon the bare possession of their cigars as evidence of title."

MEHOLIN v. CARLSON.

[17 Idaho, 742, 107 Pac. 755.]

CORPORATE STOCK—Unpaid Subscription, Secret Limit Liability to Pay.—Where an agreement was entered into by the bank and C. on the 16th of December, 1905, whereby the bank agreed to sell and issue to C. a certificate for ten shares of a new issue of capital stock for one hundred and forty dollars per share, and C. agreed to execute and deliver to the bank his promissory note for fourteen hundred dollars, that being the purchase price for said stock, and it was understood and agreed that said promissory note should be paid out of dividends arising on said stock, and that the bank would not be called upon otherwise to pay said promissory note, and that he should be held out to the general public as a stockholder of said bank, held, that that part of the contract as to the manner of payment for said stock is void, and that an action may be maintained on said note to enforce the collection of the purchase price of said stock. (p. 292.)

CORPORATE STOCK—Unpaid Subscription, Secret Limit Liability to Pay.—A suit to recover the purchase price of corporate stock may be maintained by the receiver of a bank, and any such agreement between the bank and a purchaser of stock limiting the purchaser's liability on his unpaid subscriptions is void as against the corporate creditors. (p. 292.)

CORPORATE STOCK—Subscription on Special Terms Prejudicial to Creditors.—A corporation has no authority to accept subscriptions to its capital stock upon special terms, where the terms are such as to constitute a fraud upon other subscribers or upon persons who become creditors of the corporation. (pp. 292, 293.)

CORPORATE STOCK—Fraudulent Subscription, Enforcement by Receiver.—Such fraudulent or unauthorized stipulations are void, and the subscriber is liable, and the subscription may be enforced by the receiver of the corporation for the benefit of the creditors. (pp. 292, 293.)

CORPORATE STOCK—Fraud Inducing Subscription, Duty of Subscriber to Discover.—Where false and fraudulent representations are alleged as a defense, the purchaser must use the utmost diligence to discover the fraud and repudiate the contract, and unless he does so, he cannot avoid payment of the purchase price. (pp. 292, 294.)

CORPORATE STOCK—Fraud Inducing Subscription, Estoppel of Subscriber to Urge.—In case of corporate insolvency, the equities of the creditors supersede those of the stockholder, even when the subscription has been induced by fraud; and when the subscriber has waited until suit has been brought by a receiver, then it is too late for him to plead fraud and misrepresentations. (pp. 292, 295.)

CORPORATE STOCK—Fraud Inducing Subscription, Estoppel of Subscriber to Urge.—Where a stockholder has for a considerable period of time prior to the failure of a corporation occupied the position of one of its stockholders, and exercised and enjoyed the rights, privileges and fruits of that relation, and received dividends on the stock, after the failure of the corporation it is too late to rescind the contract for the purchase of the stock on the ground of false representations. (pp. 292, 296.)

CORPORATE STOCK—Defenses to Enforcement of Subscription.—Held, that the affirmative defenses set up by the answer were not legal or valid defenses, and were properly stricken out by the court. (p. 296.)

THE STOCK—Pledge of to Pay Price of Subscription.—The case shows that the stock certificate was pledged or for the payment of the promissory note given for the same thereof. (p. 296.)

Accepting Its Own Stock as Collateral.—Under the provisions of 1907, Revised Codes, a bank is prohibited from accepting its own capital stock, except in cases where the collateral shall be necessary to prevent loss upon a contract made in good faith. That section prohibits a bank, but fails to impose any penalty or forfeiture and the creditors of the bank should not be punished for stock so accepted by permitting him to avoid the reason that it is prohibited by the statute. (pp. 297,

ULTRA VIRES—Ultra Vires, Who cannot Plead After Injury.—When a corporation enters into a contract not authorized by the corporate grant or the statute, the doctrine of ultra vires is raised by the person with whom it has dealt, as a breach of his obligation, after the corporation has become in-

ULTRA VIRES—Ultra Vires not Permitted to Work Injustice.—The doctrine of ultra vires should not be applied when it would do injustice or work a legal wrong. (p. 299.)

ULTRA VIRES—Ultra Vires, Basis of Plea.—The defense of ultra vires is not sustained out of regard for a defendant, but only where the public policy requires it. (p. 299.)

ULTRA VIRES—Ultra Vires, Necessity of Pleading.—The defense of ultra vires must be pleaded, and cannot for the first time be raised in an appellate court. (pp. 299, 300.)

NOTE RECEIVED IN PAYMENT OF STOCK SUBSCRIPTION.—The provisions of section 9, article 2, of the constitution of 1907, which permits a corporation to issue stocks or bonds except for services performed or money or property actually received in payment of the promissory note received in payment for corporate property, was a thing in action or evidence of a valid consideration given for the stock purchased and was an asset of the bank that might be set off in discharge of its debts. (p. 300.)

(Syllabi by the court.)

Johnson and L. F. Clinton, for the appellant.

W. H. Lyman, for the respondent.

OPINION, C. J. This action was brought by the plaintiff, to foreclose an alleged pledge agreement for certain purposes. It is alleged, among other things, that the defendant and appellant, Carlson, in 1907, executed and delivered to the Capital Bank a promissory note for fourteen hundred dollars, the payment of which he pledged to the bank ten shares of capital stock represented by certificate No. 183; and the stock certificate came into respondent's possession over of said bank; that said promissory note was not paid, and prays for a decree of foreclosure and

sale of said stock certificate and for attorney's fees and for a deficiency judgment against the defendant.

The answer admits the formal allegations as to the corporate existence of said bank and the appointment of the receiver, also the execution of said promissory note, but denies its delivery as well as the ownership and pledging of the bank stock, and as an affirmative defense certain matters are set out relating to the manner in which the stock was issued to him, claiming that by a contemporaneous oral agreement he was not to be liable upon said promissory note; that the dividends of the stock were to pay the note, and that he was induced to enter into the transaction by reason of false and fraudulent representations.

On motion of plaintiff, all of the affirmative defenses were stricken from the answer. The action was thereafter tried before the court and the receiver was the only witness who testified on the part of the plaintiff. He testified, in substance, that he received the note and stock certificate when he took charge of the affairs of the bank as receiver; that there were no indorsements on the certificate and the blank assignment of the stock was not filled out; that he found no written pledge agreement, and the only evidence of any kind by which it was attempted to show a pledge agreement was an alleged admission which the receiver testified the defendant made to him about two or three months after he took charge of the bank as receiver; that at the time of said conversation with the defendant, the latter explained to him the condition under which the stock was issued and the note given. The court permitted him to testify, over the objections of the defendant, what was said by the defendant, and he testified that the defendant stated he was solicited to take the stock, and that the bank officials promised him the dividends from such stock would pay for it or pay said promissory note. The defendant testified in his own behalf that he had not delivered the note to the bank or to any of its officials, that the certificate of stock had never been delivered to him, that he never had it in his hands, and that he is not now, and never has been, the owner of said stock.

Judgment was entered in favor of the plaintiff. The appeal is from the judgment.

The first error assigned is the striking out of the affirmative defense of the answer and excluding the evidence offered in support thereof. In support of that assignment counsel contend ⁷⁵⁰ that the receiver took the assets of said bank as he found them, subject to all defenses and equities that might exist against them. This rule, as a rule of law, is conceded to be correct by counsel for respondent, but it is contended that it has no application to the facts of this case.

that the original transaction, out of which said note arose, was entered into two years prior to the date of said note, and was a subscription to a new issue of stock and the purchase of that stock by the defendant in alleged secret agreement between the defendant and the plaintiff, that he should never have to pay the note, and that the dividends of the stock would pay it. The eighth, ninth, tenth and eleventh paragraphs of said complaint follow:

That the defendant avers that on the sixteenth day of December, 1905, he was induced by the plaintiff to purchase some of the new issue of stock of said bank, for the reason, as stated by the plaintiff, that it would be a benefit to said bank and tend to the success of the business to have defendant's name connected with said bank. That defendant declined on the ground that he did not wish to do so by such means. That the said bank thereupon fraudulently represented to defendant that the said bank was worth a premium of forty per cent over its face value, or the sum of one hundred and twenty dollars per share, and that the dividends therefrom for a very short time equal the value of said stock, and that the plaintiff there represented to defendant that if he would use the name of his name as being interested in said bank, it would cause new business to be attracted to said bank, and that cause to be issued in his name ten fully paid-up shares of said stock, and would continue until dividends thereon would equal the sum of one hundred dollars, the alleged value of said stock, and that, upon the happening of that event, the said stock should be transferred to him and become the property of defendant.

That the said bank thereupon and by means of said fraudulent representations, and without any consideration, induced defendant to execute a note for the sum of fourteen hundred dollars, dated on said sixteenth day of December, 1905, which note, except as to payment, was in tenor and effect the same as set forth in said complaint, but the said bank agreed that said bank would never call upon defendant to pay the note, and that the note together with the certificate should constitute a memorandum of the transaction, and that the plaintiff would be liable whatever on the part of defendant to pay any part thereof, or to pay for the said certificate, except as the same should be paid for out of the dividends therefrom. That certain dividends declared by the bank in accordance with agreement by the bank but not paid, and that the plaintiff should say how much.

That the indebtedness of any kind was ever due from the plaintiff to the said bank, and the said certificate of stock was

never delivered to defendant, and defendant never delivered the said note to said bank, and no consideration whatever passed to defendant for or on account of the execution thereof, and the said plaintiff has never at any time parted with anything of value, for or on account of said transaction.

"10. That the said representations were false and the actual value of the capital stock of said bank at the time said representations were made did not, upon the best information and belief of defendant, exceed twenty-five dollars a share; and the said ten shares of said stock, purporting to be represented by said certificate No. 183 were at no time of any value whatever, for the reason that the said stock which they purported to represent was not issued for labor done, services performed or money or property actually received, and was therefore wholly fictitious and void. And defendant further avers, upon his information and belief, that said bank was at that time and at all times subsequent thereto in a failing condition, and if called upon at that time or any time thereafter to meet its just obligations, would have been unable to do so, and said bank has since become insolvent and has been placed in the hands of receivers, and its capital stock is of no value whatever. And defendant further avers, upon his information and belief, that at the time the said certificate of stock attached to said complaint and marked 'Exhibit 752' was filled out and signed by George D. Ellis, as president, and H. E. Neal, as cashier, the said Neal was engaged in numerous fraudulent and criminal transactions in connection with the assets and funds of said bank, by reason of which the actual value of the capital stock of said bank was at that time greatly depreciated, and it was at that time of little or no actual value whatever, and that all of these facts were well known to said plaintiff but were entirely unknown to defendant, and the defendant was misled thereby and executed said note, as well as the note mentioned in said complaint, relying wholly upon the representations and promises at plaintiff, as aforesaid.

"11. That no demand was ever made upon the defendant for the payment of said first note, but, on the contrary, said plaintiff thereafter requested defendant to sign the note set forth in plaintiff's complaint in place of the said promissory note, and at the same time repeated said representations and promises set forth in the three preceding allegations hereof, and promised and agreed with defendant that said note was never to be paid. That these promises together with the other representations made by plaintiff, as aforesaid, were the only inducements for the signing of said last-mentioned note by defendant, and the said note was never delivered to plaintiff, but was held by said plaintiff, together with said certificate of stock, in all respects in the same manner as

purposes as the previous note signed by defendant before fully set forth."

Facts show that in becoming a subscriber and stockholder, the bank entered into an agreement by which the stock itself was to be a gift, that defendant was to be paid for by appellant, his note to be a security for the bank to represent to the public that the bank was a prominent business man and a meritorious stockholder of the bank; that he had paid for the money had gone into the assets of the bank; that the stockholder liability was available to creditors in case of a failure of the bank; that its affairs were under the supervision of defendant as one financially interested in its stability, and the honesty and integrity of defendant. It is contended that these facts show that defendant was nothing but a delusion and a snare to do business with the bank, and that new investors were attracted and new depositors obtained by defendant that the respondent was a stockholder in

defendant, is directly presented whether said defendant can get the law will recognize—one that can be used against the issues made by the com-

In the third paragraph of the separate defense above defendant avers, "and it [the bank] then and thereby induced defendant that if he would permit the bank to be interested in said bank and thereby induce new investors to be attracted to said bank, it would issue stock in his name ten fully paid-up and non-assessable shares of said stock, and would hold the same until the sum would equal the sum of fourteen hundred dollars of value of said stock, and that, on the happening of the event, the said stock should be delivered to defendant as property of the defendant."

In the fourth paragraph it is averred: "And without any consideration whatever, induced defendant to execute a note for the sum of fourteen hundred dollars, dated on said sixteenth day of December, 1905, which note, except as to purchase price, was in six months, was in tenor and effect the same as set forth in said complaint, but the said bank never called upon defendant for the said note, and that the note, together with the certificate, constitute a memorandum of the transaction between defendant and the bank, and the bank's liability whatever on the part of the defendant to pay for any part thereof, or to pay for the said note, except as the same should be paid for by the bank, and the bank's liability therefrom."

Those averments must be taken as the agreement and understanding between the bank and the appellant at the time a stock purchase agreement was entered into in the decision said motion. Counsel for defendant contend that he was induced ⁷⁵⁴ to subscribe for said stock by false and fraudulent representations. Whether such a defense is available or has been discussed by Thompson in his Commentaries on Law of Corporations, second volume, section 1361 et seq., he arrives at the conclusion that where the corporation ceased to be a going concern, and the proceeding against stockholder is by one who represents creditors, and who consequently stands in a higher right than that of a mere representative of the corporation, such a defense is unavailing to the stockholder; and it has been so held where the proceeding was by an assignee in bankruptcy or by a receiver or by a trustee representing creditors: See 3 Thompson on Corporations, sec. 3707. To hold otherwise would open the door to the perpetration of frauds of the worst kind upon both stockholders and creditors.

The rule is well established that a secret agreement which a purchaser of stock from a corporation is to get advantage over other stockholders, such as that he shall pay the purchase price for his stock, is void, and constitutes no defense to an action brought to recover the purchase price by a receiver of an insolvent corporation; and that where false and fraudulent representations are alleged as inducing the purchase of said stock, the purchaser must use the utmost diligence to discover the fraud and repudiate the contract, and that unless he does so, he cannot avoid payment, even where the corporation, whose stock has been purchased under such representations, has become insolvent or has been thrown into the hands of a receiver, no such defense is available. The defendant averred in his affirmative defense that he was urged to subscribe for said stock, he entered into an agreement under which said stock was issued to him in his name, and that he gave said note to the bank for the purchase price of said stock with the understanding that he should incur no liability upon the note nor for the stock, but that the dividends should pay the note and that the stock should thereupon become his own. We think the rule is well established that under that state of facts the law avoids the secret understanding but enforces the contract of purchase.

⁷⁵⁵ In section 210 of Cook on Corporations, the rule is stated as follows: "Any secret agreement limiting the liability of a stockholder on his unpaid subscription is void against corporate creditors": Jones on Insolvent and Failed Corporations, sec. 399.

In Clark & Marshall on Private Corporations, page 14 the author states: "A corporation has no authority to acc

on special terms, where the terms are such a fraud upon the other subscribers, or upon y become creditors of the corporation in bona fide and regular subscription of the l stock. In such a case, however, the sub- void. The fraudulent and unauthorized void, and the subscriber is liable on his sub- o such stipulations had been inserted. It erefore, in many cases, that any secret agree- subscriber for stock in a corporation and or its agents or promoters, by which he is rcribe upon different terms than other sub- is a fraud upon the latter, and any secret ich he is to be released in whole or in part his subscription, since it is a fraud both subscribers and upon persons who afterward of the corporation, is void, and the sub- enforced by the corporation, or by or for editors, as if no such agreement had been

0 Cyc., page 433, as follows: "Hence it will an action to enforce the subscription that was colorable merely, not intended to be paid, as a secret agreement that it should not be was intended merely to enable the corpora- ent stock subscribed to enable it to become er the law, to induce others to subscribe for credit to the concern. The rule extends so ll secret conditions annexed to the contract sscribers, by which their engagement is ren- ous to the corporation, more favorable to ny respect different from that named in the and in the governing statute, and to hold ble to the obligations of a bona fide share- is illustrated by a variety of decisions cited re": 26 Am. & Eng. Ency. of Law, 914.

2 and 253, Purdy's Beach on Private Cor- thor states the rule to be that though such are void, the contract itself stands and may

nk that there is any considerable authority upon the question under consideration.

Morrill, 20 Vt. 509, the court said: "Here l consisted in the agreement not to enforce This portion of the contract was in bad Perhaps it is so. But if so, the defend- fault with the agent; the rest of the asso- hing of any such secret agreement. The the subsequent signers were to be decoyed

by his name. Clearly, then, he ought to be held to his contract."

Counsel for appellant, however, urges that he was induced to enter into the contract for the purchase of said stock by false and fraudulent representations as to the financial standing of the bank, and that the dividends of such stock would "in a very short time equal or pay the note." Appellant also alleges that it was represented to him that said shares of stock were worth one hundred and forty dollars each at the time of the purchase in 1905, and that such stock was worth, in fact, more than twenty-five dollars per share, and that said bank has since become insolvent and the stock of no value whatever. The appellant further alleges in his answer that dividends were declared upon the stock in question and were applied in partial payment of said note, but it is not alleged just how much said dividends amounted to, it is averred in the answer that under the contract for purchase of said stock, it was represented that said dividends would be sufficient in "a very short time" to pay the note. However, it does appear from the record ⁷⁵⁷ that the first note was given in December, 1905, and that they were renewals and that the note sued upon was given in December, 1907, and the bank did not fail until January, 1908. There are no indorsements on said promissory note and the note sued on is for fourteen hundred dollars—the amount of one given in 1905. Where false and fraudulent representations are alleged as inducing the purchase of corporate stock, the purchaser must use the utmost diligence to discover the fraud and repudiate the contract, and unless he does so it is a well-established rule that he cannot avoid the payment.

Morawetz on Corporations, section 108, says: "If a person has been induced by fraudulent representations to become a member of a corporation, he must proceed with the utmost diligence if he desires to annul his contract."

And at section 839: "It has accordingly been settled that if a corporation is insolvent, a stockholder whose contract of subscription was obtained by the fraud of the company's agents cannot diminish the security of bona fide creditors by rescinding his contract to contribute the amount of capital subscribed by him."

To the same effect is Jones on Insolvent and Failing Corporations, section 399.

Purdy's Beach on Private Corporations, at section 10, lays down the following rule: "In case of corporate insolvency, the equities of the creditors supersede those of the subscriber, even when his subscription has been induced by fraud. While ordinarily the law does not readily presume acquiescence or waiver in the case of subscriptions procured

nor hasten to impute laches to subscribers the corporate agents, yet when the corporation insolvent, a contract of subscription pro-fraud cannot be rescinded to the prejudice of creditors. . . . And when the subscriber's suit has been brought by a receiver, it is for him to plead fraudulent misrepresentations, and was not discovered until after insolvency." At bar, the contract for the purchase of stock December 16, 1905, and this action was brought December 31, 1908, more than three years after said contract entered into, and no effort was made, so far as appears, to rescind the contract during that time. The plaintiff does not show diligence on the part of the defendant in upholding said fraudulent contract.

Upon the question, see *Ross-Meehan Co. v. Co.*, 72 Fed. 957; *Newton Nat. Bank v. Newton*, 135, 20 C. C. A. 339, 33 L. R. A. 727; *Wallace v. Wallace*, 11; *Scott v. Abbott*, 160 Fed. 573, 87 C. C. 11. In the last-cited case, the court said: "When a considerable period of time prior to the failure of the corporation occupied the position of one of its stockholders, exercised and enjoyed the rights, privileges and advantages of such relation, including the chance of enhanced profits and savings, when fortune frowns and the chances of success are small, it is too late to assert, as against creditors of the corporation, the right to rescind his contract of stock purchase on the ground of false representations after a considerable time has supervened, and after proceedings for the benefit of creditors have been instituted to be instituted": *Chubb v. Upton*, 95 U. S. 419, 23; *Martin v. South Salem L. Co.*, 94 Va. 28, 29; *Moosbrugger v. Walsh*, 89 Hun, 564, 35 N. Y. 221; *Upton v. State Bank*, 67 Minn. 267, 69 N. W. 904. In *Insolvent and Failing Corporations*, at section 100, of the effect of fraud on a contract of purchase of stock, the author says: "It is valid and binding on the defrauded party elects to treat it as void; or he may elect to repudiate it before the rights of innocent creditors have intervened, their equities to treat it as binding on him superior to his claim to avoid it. So if he has delayed in discovering the fraud and repudiating it, there will be no defense as to creditors of the corporation. That, in general, it will be too late for him to do so after the corporation has become insolvent."

The supreme court of the United States and other federal supreme courts of Connecticut, New York, Massachusetts, Indiana, Wisconsin, Georgia, Oregon and

other states, hold to the rule above quoted from Jones Insolvent and Failing Corporations. In the case at bar, appellant has fully and carefully pleaded his own participation in the fraud attempted to be perpetrated and set up as defense. The appellant admits that he was a party to the fraud and stood by it for about three years, and it is not too late for him to plead it as a valid defense since the bank has become insolvent and bankrupt. The creditors and other stockholders have rights in regard to the matter which cannot be defeated by that defense.

The appellant averred in his separate defense as follows: "Said note together with the certificate of stock should constitute a memorandum of the transaction," and it clearly appears from the allegations or averments of the answer and the evidence that the bank was to sell and issue the stock to the appellant, in his name, which it did, and the appellant gave his note to the corporation representing the amount of the purchase price, specifying therein the amount that should be paid, the date it should fall due, and the rate of interest which note was signed by the appellant. It is clear that the note and stock did in fact constitute a memorandum of the transaction, and there appears no fraud or mistake in any of the terms of said memorandum. The appellant contends that there was a contemporaneous oral agreement wholly varying its terms. That agreement, even if it were not fraudulent on the other purchasers of stock and on the creditors, is clearly inadmissible in evidence under the rule of evidence established by the foregoing citations. The alleged affirmative defense was no defense to the recovery in this action as the alleged secret contract was of itself a fraud, and the appellant has been guilty of laches in not repudiating it.

It is next contended by counsel for appellant that the evidence is insufficient to justify the findings of the court to the effect that there was a pledge of the stock. Taking all the evidence upon this question contained in the record, ⁷⁰⁰ we are satisfied that there was an understanding between the bank and the appellant that the stock should be held by the bank until it was fully paid for. The receiver testified in regard to a conversation had with appellant as follows: "In substance I told him that I held that [the stock] as collateral. He [Carlson] said Mr. Eagleson had delivered the stock to him; he took it and read it over and then returned it and said, 'John, you take this stock and hold it in the bank as security for my note.' " He also testified that when he took possession of the effects of the bank as receiver, he found this stock among the effects of the bank in the collateral pouch. We think that the court was justified in finding that the stock certificate was left with the bank collateral.

intended that the court erred in denying application to dismiss the action on the ground that the agreement was in violation of section 2976 of the codes of Idaho, was ultra vires and therefore made the basis of a suit. That part of said section applies to this case is as follows: "But no such stock, except in cases where the taking of such stock purchase, shall be necessary to prevent loss previously contracted in good faith."

and that this stock was not collateral to secure a prior indebtedness to said bank. It is the recognition of this pledge agreement said provisions of the statute and be a direct to banks to disregard its mandatory terms. The provision prohibits the bank from accepting its own collateral except to prevent a loss upon a debt contracted, it does not impose any penalty or its violation. The provision of the national prohibits certain acts by banks or their officers, no penalty for their violation.

In *St. Nicholas National Bank*, 146 U. S. Ct. Rep. 66, 36 L. ed. 956, the court said: "it has been repeatedly held by this court the provisions of the national banking act protects by banks or their officers, without imposing a forfeiture applicable to particular transactions have been executed, their validity can be questioned by the United States and not by private parties": *Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 107, 4 U. S. 210; *T. R. & W. Co. v. Trust Co. of N. A.*, 82 Fed. 1, 73.

In *Land*, 122 Cal. 167, 54 Pac. 839, the bank as plaintiff sought to foreclose a mortgage. The plaintiff said it was a security forbidden to the bank by the court said that if that be true, "it did not lie in plaintiff to raise this point": *Logan Co. Nat. Bank*, 139 U. S. 67, 11 Sup. Ct. Rep. 496, 35 L. ed. 107; *Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Bank v. Birch*, 130 N. Y. 221, 29 N. E. 127, 1.

The rule laid down in those cases might with application to the facts of this case under the provision section 2976. If the said insolvent bank had been a creditor of the stockholder had attached the bank would have been precluded by the provision from setting up the pledge agreement, the appellant himself might have replevined the stock had he desired to do so, in a suit between him-

self and the bank, during the solvency of the bank. But the bank has become insolvent and a receiver has been appointed to take charge of its affairs to protect its creditors as well as its stockholders, under the facts of this case the appellant cannot successfully plead the provisions of said statute and thereby defeat the foreclosure of said pledge.

Said motion to dismiss was made at the close of the trial and upon the pleadings as they then stood and the evidence introduced. The evidence shows that the contract for the purchase of the stock was completed. The appellant agreed to purchase the stock and the bank to sell and deliver it. The bank complied with its part of the contract by issuing ⁷⁶² the stock to appellant upon which he received at least three dividends; at any rate, it appears that three dividends were paid. Renewals were made and it is only fair to suppose that the dividends were applied in payment of the interest on the promissory note; at least, the promissory note given at the end of two years as a renewal, on which this suit was brought, was for the same amount as the first note given. It appears that it was an executed contract and, in payment for the stock issued to the appellant, he gave said promissory note to the bank. That contract, it appears, was entered into on the sixteenth day of December, 1905, and apparently it was considered by both parties to it for more than two years, and under all the evidence of this case, we think the appellant is estopped from evading the effect of that contract.

In *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, the court had under consideration a prohibited contract and said: "We cannot believe that it was meant that stockholders and perhaps depositors and other creditors should be punished and the borrower rewarded by giving success to this defense whenever the offensive fact shall occur": *Fort v. New Orleans Nat. Bank*, 112 U. S. 439, 5 Sup. Ct. R. 234, 28 L. ed. 764; *Union Gold Min. Co. v. Rocky Mount Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Weber v. Spokane Nat. Bank*, 64 Fed. 208, 12 C. C. A. 93; *Central Trust Co. v. Columbus H. V. & T. Ry. Co.*, 87 Fed. 815; *Farmers' Nat. Bank v. Robinson*, 59 Kan. 777, 53 Pac. 762.

Counsel contend that there has been no performance of the contract on either side, and for that reason it cannot be enforced. We think there was a full performance. The bank sold him ten shares of stock; he gave his note for four hundred dollars for the purchase price and then repeatedly renewed said note. The bank performed its part by issuing the stock; appellant has performed his original contract by executing said note: 29 Am. & Eng. Ency. of Law, p. 56, and authorities there cited.

question of ultra vires, a party who has had the agreement will not be permitted to question. It was said in *Security Nat. Bank v. St.*, 117 Wis. 211, 94 N. W. 74, as follows: "This series of decisions, has held that, when a corporation's business relations not authorized by its corporation, the doctrine of ultra vires cannot be used against a person with whom it assumes to deal as a party assuming the obligations assumed": *Zinc C. Co. v. St.*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 100; *German Bank v. Katz*, 57 Md. 128; *Merchants' Trust Co. v. Hansen*, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 100; *W. Agency v. Rea*, 63 Minn. 459, 65 N. W. 928. It is affirmed that the decided weight of authority is in favor of the decisions above cited. It is a general rule that a corporation will not be permitted to work injustice. It is not to permit the appellant to enter into the contract with the bank, to have the stock issued in his name, to hold out to the public as a stockholder for the purpose of securing new depositors, and then to escape liability as a stockholder on the ground that the bank had not said stock as collateral security to his note. *Idaho C. Co. v. Wells-Fargo & Co.*, 7 Idaho, 42, 60 N. W. 100. The court held: "The rule is that that doctrine (ultra vires) will not be applied when it would defeat the ends of justice or work a legal wrong."

Ry. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 100, 10 S. W. 2d 100. The court said: "The doctrine of ultra vires, when invoked against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong."

City Savings Bank v. Carson City Elevator Co., 30 Am. St. Rep. 454, 51 N. W. 641, the court held that the plea of ultra vires should not, as a general rule, be interposed for or against a corporation, when it would advance justice, but, on the contrary, would work a legal wrong.

Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 90 L. R. A. 79, the court held in effect that the plea of ultra vires should not, as a general rule, prevail when interposed for or against a corporation, when it would advance justice, but, on the contrary, would accomplish justice. The defense of ultra vires is never sustained for a defendant, but only where an exception of public policy requires it.

The plea of ultra vires was not pleaded in the case raised for the first time in the supreme court. The plea of ultra vires is special and is not available under

general denial, but must be specially pleaded and proven: Cyc., p. 1156; 5 Ency. of Pl. & Pr. 95; Commercial Bank King, 47 Iowa, 64.

It is next contended under the provisions of section 9 article 2 of the constitution of Idaho that the stock is void. Said section is as follows: "No corporation shall issue stock or bonds except for labor done, services performed, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." It is therein provided that no stock shall be issued except for labor done, services performed or money or property actually received. The word "property" includes both real and personal property, and "personal property" includes money, goods, chattels, things in action and evidences of debt: Rev. Codes, sec. 16. Said promissory note was actually received by the corporation, and was a thing in action or evidence of debt. That note was an asset of the bank, and it appears that the bank had the authority to issue the stock; that it was not a fictitious issue of stock but a valid issue. The bank then received said promissory note for said stock, which was "property" as defined in said section 16 of our Revised Codes.

Farmers' & Mechanics' Bank v. Jenks, 7 Met. 592, was a case where the defendant and others had given their note for stock in fraud of the banking laws, and that fact was pleaded in defense to the promissory note which they had given after the failure of the bank. In the course of the decision, the court said: "As to fraud, this, in point ⁷⁶³ fact, may, and appears to be, well sustained. . . . For to fraud the bank might have been amenable before the proper tribunal; but it is not competent for the maker of this note to take this objection to a recovery of the amount due thereon in an action instituted by a receiver appointed by this court and representing the creditors of the bank. It is assets that may well be collected for the purpose of discharging the debts of the bank, or the expenses of closing its concerns under the orders of the court."

We find no error in the record, and the judgment is affirmed with costs in favor of respondent.

STEWART, J., Concurring. I concur in the conclusion that this judgment should be affirmed. I do not think Carson is in a position to urge the provisions of section 29 Revised Codes, as against an action brought by the receiver to foreclose a pledge of stock given to secure an indebtedness due the bank. He cannot claim immunity in an action brought to repair the wrong done in violating the statute: *Farmers' & Mechanics' Bank v. Jenks*, 7 Met. 592; 34 Cyc. 405.

J., Concurring. I concur in the affirmance of this case, and agree with all that is said as of Carlson on the note sued upon. I agree, receiver is entitled to a judgment foreclosing stock. As to whether or not the bank itself, and a "going institution," would be allowed lien on its own capital stock taken in violation of Revised Codes, I reserve my judgment. I am of opinion, that after the bank became insolvent, quit and went into the hands of a receiver and the receiver commenced an action, as he has done in this case, to enforce the pledge, that the stockholder who pledged in violation of the provisions of the statute ought not to be estopped from pleading that the stock was taken in violation of the law. The receiver not only represents the bank, but he represents its creditors as well. So in representing the creditors of the bank, he is representing people who were not parties to this violation of the law and who are not chargeable with the misconduct of the directors in taking the bank's own stock as collateral. The stockholder should not, therefore, be allowed to plead against the innocent creditors of the bank.

Receiver of a Corporation is Answerable for its debts to the extent of the amount unpaid on his stock: *Sprague v. National Bank*, 111 Ill. 149, 64 Am. St. Rep. 17; *Warfield, Howell & Co. v. Iowa*, 172 Iowa, 666, 2 Am. St. Rep. 263. Stockholders are liable for the debt of the corporation in an amount equal to the unpaid subscription on nominally paid-up certificates of stock issued to them: *Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529. And a stockholder cannot release a stockholder from liability to existing creditors by rescinding the transaction and restoring him to his original position: *Moore v. United States Barrel Co.*, 128 Am. St. Rep. 153. The issue of stock gratuitously to new subscribers without the rights of other stockholders and creditors of the corporation is void, though the directors believe that all the stock will be paid for: *Hinkley v. Oil and Pipe Line Co.*, 132 Iowa, 396, 100 Am. St. Rep. 564.

Unpaid Stock Subscription is to be discharged in property, up to the money value. In other words, the value of the stock is to be equivalent to the amount of the subscription: *Field*, 45 Or. 553, 106 Am. St. Rep. 670; *O'Bear-Nester v. Texplo Co.*, 101 Tex. 431, 130 Am. St. Rep. 865.

Ultra Vires in relation to the contracts of private corporations is subject of a note to *In re Assignment Mutual etc.*, 111 Ill. 156. Generally, this doctrine should not be applied where it will defeat the ends of justice or work a hardship: *Wells v. Kirkland*, 102 Minn. 213, 120 Am. St. Rep. 621; *Naval Stores Co.*, 56 Fla. 505, 131 Am. St. Rep. 160.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

ESTATE OF GRAVES.

[242 Ill. 23, 83 N. E. 672.]

CHARITY—What Constitutes.—A Charity, in a Legal Sense may be defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either bringing their hearts under the influence of education or religion, relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. (p. 304.)

CHARITY—Name of Purpose.—In Determining Whether a Gift is a charity it is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. (p. 304.)

CHARITY—Policy of Law to Uphold.—Inheritance Tax.—It is the policy of the law to uphold charitable bequests and give effect to them whenever possible, and the fact that they are exempt from the operation of the inheritance tax statute is no reason for departing from this rule of construction. (p. 304.)

CHARITY—Identification of Donor's Name With Gift.—A gift is not rendered less charitable by the fact that the name of the donor is, in some manner, by inscription or otherwise, identified with the gift perpetuated by the gift. (p. 305.)

CHARITY—Motives of Donor.—In Determining Whether a Gift is charitable courts do not look to the motives of the donor, but rather to the nature of the gift and the objects which will be attained by it. (p. 305.)

CHARITY—Gift for Statue and Drinking Fountain for Horses.—A bequest of money to erect in a public park a drinking fountain for horses, in connection with a statue of a certain horse, the statue to bear the donor's name and the name of the horse, with the record of the speed the horse once made, is a charity. (pp. 303, 305.)

W. H. Stead, attorney general, and Walter K. Lincoln, inheritance tax attorney, for the appellant.

Holland & Elliott, for the appellees.

²⁵ **FARMER, C. J.** This is an appeal from a judgment of the county court of Cook county holding that a gift of

(302)

will of Henry Graves, deceased, to the board of commissioners of the city of Chicago for the erecting fountain or drinking basin for horses, and therewith a bronze statue of a horse named "Ike" subject to taxation under the inheritance tax

made by the fourth clause of the will of the reads as follows:

is my will and I hereby direct my executors the board of South Park Commissioners of Chicago the privilege and right to erect ²⁶ on the fifty-fifth street boulevard, at a point opposite the way or trotting place for horses in said park, fountain or drinking basin for horses, and in connection in addition thereto a monument, which shall be a life-size, bronze statue of a horse named 'Ike' to trot in 2:30 over a mile track in the city for a wager of \$2000, \$1000 a side, in the city of the Garden City race track, and to inscribe said monument and fountain, in a conspicuous place as the person erecting said monument, the date and the time or record of speed said horse trotted over the Garden City race track in 1856, as follows, and erected by Henry Graves; Ike Cook trotted over the Garden City race track, located about one-half mile from this spot in the direction in which he is now to be looking east when erected, in the city of the Garden City race track. And my said executors are to expend for such last named monument and fountain, out of my estate, the sum of forty thousand dollars. Said South Park Commissioners to maintain in good repair said monument and drinking basin at the expense to my estate."

As to the amount to be expended for the drinking fountain was afterward modified by the court, when read, "not to exceed \$40,000."

The will was submitted to the court upon an agreed statement of facts, which was, among other things, stipulated "that the fountain for horses and monument shall consist of a structure, and that the place at which said monument and fountain shall be erected, as provided by said will, is upon the property of the board of South Park commissioners for

the act providing for a tax on gifts, legacies and bequests is exempt from taxation thereunder ²⁷ property, gift, bequest or otherwise, for various purposes which are mentioned benevolent or charitable

purposes. The question then to be determined is whether gift in this case was for a benevolent or charitable purpose. If it was, it is exempt from the tax provided for by the inheritance tax law and the judgment of the county court is correct.

In *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. 454, this court adopted the legal definition of a charity given in *Jackson v. Phillips*, 14 Allen, 539, which is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, relieving their bodies from disease, suffering or constraint by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, it is so described as to show that it is charitable in its nature. Some of the definitions of "charity" given by lexicographers are: "benevolence"; "any act of kindness or benevolence"; and "charitable" is defined as pertaining to or characterized by charity, benevolence and kindness.

It has always been the policy of the law to uphold charitable bequests and give effect to them whenever possible, and because our statute now exempts these bequests from the payment of the inheritance tax is no reason for departing from or modifying the ancient rule of construction favoring these charitable gifts. It will be seen from the definition above quoted that the meaning applied to the word "charity" is comprehensive and not restricted, and includes the erecting and maintaining of public buildings or works or otherwise lessening the burthens of government. This bequest could be upheld for these reasons alone. The sum of \$30,000 is to be expended on this monument and drinking ²⁸ fountain. Its design is to be approved by and its erection will be under the control of the South Park commissioners, and we can reasonably assume that when completed it will be artistic and ornamental. It is to be located in a conspicuous place in the park, will add to the beauty of the driveway and the grounds surrounding it, and render that portion of the park more attractive and pleasing to the public who may view it, and thus aid in the fulfillment of the purpose for which parks are established and maintained, which is the pleasure and recreation of the public. It is provided in the will that the fountain shall contain a drinking basin for horses. This also renders the bequest charitable in its nature. Kindness and consideration for dumb animals are now universally regarded as commendable, and are encouraged and promoted by numerous humane societies which are organized and maintained with this sole purpose in view. The motive

bequests intended to relieve the suffering or comfort and enjoyment of animals should be, and be charitable, and should receive the same favor as is accorded like sentiments when manifest in human beings. It would clearly be within the province of the commissioners to erect drinking fountains or monuments within the park. It is also proper that they should be ornate and in other ways beautify and improve the grounds under their control. The funds for this purpose may be derived from taxation or from charitable bequests. There is here provided for; and thus again it will be seen that the bequest is within the meaning of the definition above given, in that it may reduce taxation and lighten the burdens of government.

It is by appellant that the purpose of the testator's bequest was personal and selfish and in no way charitable; that it was to perpetuate his pride in the fact that he owned the horse Ike Cook, the first horse to trot a mile in the state of Illinois. It does not matter the stipulation that the testator was the owner of the horse Ike Cook, but whether he was or not could make no difference. It will be observed from the inscription on the monument to be placed on the monument that the only inscription on the testator is, "Donated and erected by Henry Cook." It is certainly not unusual to find a condition attached to a gift of a public nature—whether it be a monument, a library or other public building—that the donor shall in some manner, by inscription or otherwise, identify the gift with and perpetuated by the gift. It is considered that this fact would render such a condition valid. It is doubtless true that during his life the testator was a lover of horses, and desired by his will to perpetuate his affection by the bequest for the erection of a monument and drinking fountain, but the life-size statue of a horse will not make the monument less charitable. Nor is it inappropriate that there should be a part of the fountain and drinking basin erected in honor of horses by supplying water to quench the thirst of a statue of a horse—an animal which has been so useful in our country and has filled so important a part in the history of our country. Courts, in determining whether a bequest is charitable, will not look to the motives of the testator, but to the nature of the gift and the object intended by it: *Smith's Estate*, 181 Pa. 109, 37 Pa. 467; *Ex parte Williams*, 145 Ill. 625, 34 N. E. 467, 21 L.

The devise was for a charitable purpose, and the county court is affirmed.

A Charitable Trust is a Gift for the Benefit of Persons, either bringing their hearts and minds under the influence of education, religion, by relieving their bodies of disease, suffering or constraint by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers: *Estate of Lennon*, 1 Cal. 327, 125 Am. St. Rep. 58; *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241; *Kemmerer v. Kemmerer*, 233 Ill. 327, 122 Am. St. Rep. 169. What is a charity is the subject of a note to *Hoeffer v. Clogan*, 63 Am. St. Rep. 248.

Bequests for the Benefit of the Massachusetts Society for the prevention of cruelty to animals, and for the benefit of the Animals' Rescue League of Boston, are bequests for public charities: *Minns v. Billings*, 183 Mass. 126, 97 Am. St. Rep. 420.

In Determining What is to be Regarded as a Charitable Gift, it is immaterial whether the purpose is called "charitable" in the gift itself, if it is so described as to show that it is charitable in its nature: *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241.

True Test of a Legal Public Charity is the Object Sought to be attained, the purpose to which the gift is to be applied, and not the motive of the donor: *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 6 Am. St. Rep. 745.

Inheritance Taxation is the subject of a note to *English v. Crenshaw*, 127 Am. St. Rep. 1035.

COMMERCIAL LOAN AND TRUST COMPANY v. MALLERS.

[242 Ill. 50, 89 N. E. 661.]

PLEADING—Capacity of Corporation to Sue, How Raised.—A defendant who desires to raise the question of the capacity of the plaintiff corporation to sue should do so by plea in abatement. Failure in this, a judgment against him in the name of the plaintiff is valid and enforceable by execution. (p. 307.)

JUDGMENT—Res Judicata—Capacity of Corporation to Sue.—A judgment in favor of a plaintiff corporation is res judicata of questions which were or could have been interposed by the defendant, including the capacity of the plaintiff to maintain the suit. (p. 308.)

CORPORATION—Status After Dissolution.—Upon the dissolution of a corporation, no matter how effected, the corporation is regarded as still existing for the purpose of settling its affairs. (p. 309.)

CORPORATION—Prosecution of Suit After Dissolution.—Where a corporation commences a suit while a going concern, it may prosecute the same to judgment for the purpose of collecting its assets and settling its affairs, although it goes into voluntary liquidation pending the litigation. (p. 308.)

BANKING CORPORATION—Time to Enforce Demands After Dissolution.—The Illinois statute giving corporations "organized under this law" two years in which to collect their debts and dispose of their property does not apply to banking corporations. They, after dissolution, may enforce collection of claims for the purpose of closing up their affairs until the indebtedness becomes barred by the general statute of limitations. (pp. 308, 309.)

afford and Hume, for the plaintiff in error.

one and Ira C. Wood, for the defendant in error.

J. This is a writ of error sued out from this appellate court for the first district to review the that court in refusing to quash an execution the office of the clerk of that court on January vor of the defendant in error and against the or.

from the record that the defendant in error, the an and Trust Company, a banking corporation er the laws of this state, in 1895 brought suit court of Cook county against John B. Mallers, a error, as guarantor upon a promissory note; erous trials a judgment was rendered in that of the plaintiff in error, which judgment was out remanding, by the appellate court for the d a judgment for four thousand seven hundred dollars and fifty-five cents and costs was ren- court in favor of the defendant in error against a error, which judgment was affirmed by this the case being remanded to the appellate court ought to be quashed was issued by the clerk of court to enforce the collection of said judgment n the real estate of the plaintiff in error.

of the motion to quash is, that the defendant into voluntary liquidation on December 2, 1898, ason of that fact, it is said, it is without legal e out an execution on the judgment rendered a the appellate court, and that said execution is void and should be quashed.

agree with the contention that said execution sued out for want of capacity in the defendant e out execution upon said judgment, for the ns:

aintiff in error desired to raise the question of f the defendant in error to sue, he ⁵³ should in the trial court by a plea in abatement or etzell v. Fullerton, 44 Ill. 108; Life Assn. of ssett, 102 Ill. 315); and having failed so to do, rendered against him in the name of the defend- as a valid and binding judgment, and if the a binding and valid judgment, the defendant e the statute, had the right to enforce its collec- tion. The suit was commenced in 1895, and error went into voluntary liquidation in 1898 ment was rendered in 1908. About ten years een the voluntary dissolution of the defendant

in error and the date of the judgment, during which time the plaintiff in error failed to raise the question of the capacity of the defendant in error to sue, and we think it too late for him to raise that question after the case has passed through the circuit, appellate and supreme courts and final judgment has been rendered against him in the appellate court. The judgment in favor of the defendant in error was *res judicata* of all the defenses which were or could have been interposed by the plaintiff in error, including the capacity of the defendant in error to maintain its suit: *Rogers v. Higgins*, 57 Ill. 244; *Kelly v. Donlin*, 70 Ill. 378.

2. It was held in *Life Assn. of America v. Fassett*, 102 Ill. 315, that it is a part of the settled public policy of this state that upon the dissolution of a corporation, no matter how the dissolution may be effected, the corporation shall nevertheless be regarded as still existing for the purpose of settling up its affairs. In this case the suit was commenced while the defendant in error was a going corporation, and we see no reason why it should not be permitted to prosecute its suit to final judgment for the purpose of collecting its assets and settling up its affairs, even though it went into voluntary liquidation pending the litigation. In *Singer & Talcott Stock Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622, it was held that a writ of error—a new suit—might be sued out by a corporation to review a judgment rendered against it, notwithstanding two years had elapsed after its dissolution.

It seems to be conceded by the plaintiff in error that the defendant in error would have had power to take out execution on its judgment against the plaintiff in error but for the two years' limitation found in section 10 of chapter 32 of the Revised Statutes, which section reads as follows: "All corporations organized under this law whose powers may have expired by limitation or otherwise, shall continue their corporate capacity during the term of two years, for the purpose only of collecting the debts due said corporation, and selling and conveying the property and effects thereof." It will be observed that said section applies only to "corporations organized under" the act of which said section forms a part, and from an examination of section 1 of said act it will appear that the act does not apply to corporations organized for "banking" purposes. We can see no reason why a banking corporation should not be held to fall within the general public policy of the state which permits a corporation to do such acts as may be necessary to collect its debts and settle up its affairs after dissolution. If such public policy does apply to a banking corporation, as we hold it does, and the two years' limitation does not apply to such corporation, then the defendant in error might rightfully enforce collection of its claim.

ors in the courts of this state, for the purpose
s affairs, until such indebtedness had become
general statute of limitations.

the opinion that the appellate court did not err
quash the execution sued out by the defendant
s judgment against the plaintiff in error ren-
court, and that the judgment of that court
ed.

t of the appellate court will be affirmed.

PROCEEDINGS OF DISSOLVED CORPORATIONS.

ement of the Effect of the Dissolution of Corpora-

to Act in the Name of the Dissolved Corporation.

eral Rule, 310.

g Title and Rights, 310.

and Carrying Out Contracts, 310.

cing Actions and Suits, 311.

ing Pending Suits—Abatement, 311.

ngs Under Execution, 312.

ring Stock, 312.

tension of Right and Power.

Nature of, 312.

tutory Remedies Exclusive, 313.

ng the Corporate Powers for Some Designated Time
urpose, or Authorizing the Further Use of the Name,

ement of the Effect of the Dissolution of Corporations.

ration of the principles of the ancient common law,
statement the principles of equity jurisprudence and
ral saving statutes; the effect of the dissolution of
to put an end to its existence for all purposes what-
troy every one of the faculties possessed by it; so
can neither make nor take contracts, nor sue nor
at all debts to or from it become extinguished, and
against it abate; and so that its real property re-
ors or donors thereof or their heirs; and its personal
to the crown or to the state": 10 Cyc. 1310 G, 1, a;
e Bank v. State, 12 Am. Dec. 239; May v. State
. 737; Miners' Ditch Co. v. Zellerbach, 99 Am. Dec.
Brien, 7 Am. St. Rep. 717. But the statement is
greater portion, if not in all, of the United States,
no application to suits in equity. Whatever may
e law in England, it is certain that in this country
s, respecting the matters here under consideration,
tributes of a partnership whose rights and prop-
withstanding its dissolution, and are capable of exer-
ment so far as may be necessary for the assertion
s creditors and stockholders: 10 Cyc. 1320; Life
02 Ill. 315; State v. Bailey, 16 Ind. 46, 79 Am. Dec.
issippi v. Duncan, 56 Miss. 166; People v. O'Brien,
Glahn v. De Rossett, 81 N. C. 467; Mott v. Penn-
0 Pa. 9, 72 Am. Dec. 664; Bacon v. Robertson, 18
ed. 499; Lum v. Robertson, 6 Wall. 277, 18 L. ed.

743; *Greenwood v. Union F. R. Co.*, 105 U. S. 13, 26 L. ed. 961; *Congregation etc. v. Texas & P. Ry.*, 41 Fed. 564; *Olmstead v. Distill etc. Co.*, 73 Fed. 44; *Wallamet F. C. L. Co. v. Kittredge*, Fed. C. No. 17,104, 5 Saw. 4, Fed. Cas. No. 17,105; *In re Independent Ins.* 1 Holmes, 103, Fed. Cas. No. 7017, 6 Nat. Bank. Reg. 260; and none hereinbefore cited. But, conceding the rights to continue after dissolution as affirmed by the foregoing notes and decisions, the question still remains, "May they be asserted by and in the name of the corporation after its dissolution, or the expiration of its charter?"

II. Of the Right to Act in the Name of the Dissolved Corporation

a. The General Rule.—Undoubtedly after a corporation has been finally dissolved, whether by lapse of time, by judicial proceeding by any other method or cause, the rule generally prevailing is that it can exercise no right and maintain no proceeding of itself or in its name, and conceding such right to exist and such proceeding to be maintainable, it must be prosecuted by or in the name of the person or persons beneficially interested, or by or in the name of persons authorized by statute: *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 761; *Crossman v. Vivienda W. Co.*, 150 Cal. 575, 89 Pac. 383; *Moultrie v. Smiley*, 16 Ga. 289; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, 77 Pac. 94; *Buck S. & R. Co. v. Vickers*, 80 Kan. 29, 101 Pac. 668; *Bank of Louisiana v. Wilson*, 19 La. Ann. 1; *Rankin v. Sherwood*, 33 Me. 5; *Campbell v. Talbot*, 132 Mass. 174; *Bank of Mississippi v. Wrenn*, 5 Smedes & M. 791; *Bradley v. Reppell*, 133 Mo. 545, 54 Am. St. R. 685, 32 S. W. 645, 34 S. W. 841; *Miami Exp. Co. v. Gano*, 13 O. 269; *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171; *May v. State Bank*, 2 Rob. 56, 40 Am. Dec. 726.

b. Acquiring Title and Rights.—After a corporation has been dissolved, it is difficult to see how any new rights can be acquired by it or in its name. A grant to or a contract with it must be ineffective because of the nonexistence of the grantee of the grant or the beneficiary of the contract: *White v. Campbell*, 5 Humph. 38; *Hopkins v. Whiteside*, 1 Head, 31. In one case an action to recover real property was sustained, although the plaintiff's title depended on a conveyance to a corporation after its dissolution (*Montgomery v. Merriam*, 18 Mich. 338), but the precise question here considered escaped the attention of the court. Under statutes, however, practically keeping the corporation alive for some specified purpose, a grant of a right it may be valid if in consummation of that purpose, as where it is authorized after dissolution to wind up its affairs, and the taking of title to some right or property is a necessary part of such winding up: *Muscatine Western R. Co. v. Horton*, 38 Iowa, 33. If the corporation has received a certificate of purchase and become entitled to a patent to public lands, the issuing of the patent after the dissolution of the corporation may be regarded as better and more complete evidence of that title: *Sayre v. Sage* (Colo.), 108 Pac. 160.

c. Making and Carrying Out Contracts.—After the dissolution of a corporation, it cannot enter into any new business or make any new contracts. Hence, such a new contract or a liability resulting from the new business can neither be enforced by nor against it: *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 668; *Green v. Seymour*, 2 Sand. Ch. 285; *Ervin v. Oregon S. N. Co.*, 22 Hun, 598; *Hubbel*

Works, 59 Hun, 620, 14 N. Y. Supp. 345; Walsh v. St. Rep. 189. There is a dictum to the effect that a corporation may sue for money borrowed after the dissolution (Mason v. St. Rep., 66 Fed. 391, 13 C. C. A. 532); but if so, this can be only if the corporation was, after its dissolution, authorized to continue in business, and the borrowing was essential to the carrying on of the business, and even then, the liability is limited by the statute. It cannot be enforced in some proceeding expressly or impliedly authorized by it. If a contract, though made before the dissolution, contemplates the existence of both parties to the contract, the dissolution of the corporation terminates the contract, and neither party is entitled to proceed with its execution: *M. I. Co.*, 91 N. Y. 174; *Griffith v. Blackwater B. Co.*, 101 N. Y. 125.

Actions and Suits.—If the dissolution terminates the authority of a corporation to receive something to which it would be entitled, as, for instance, to collect tolls for the use of a bridge, it can maintain no further action, because a cause of action no longer exists: *State v. Lawrence Bridge Co.*, 22 Kan. 125. If the liability of the defendant remains, the dissolved corporation may commence and maintain a suit, if by statute it is authorized to do up its business or to do any other act to the doing of which the enforcement of the liability is essential: *Commercial Trust Co. v. Mellers*, 242 Ill. 50, ante, p. 306, 89 N. E. 661; *Bewick v. R. Co.*, 39 Mich. 700; *Campbell v. Mississippi Union R. Co.*, 104, 5 Saw. 44, Fed. Cas. No. 17,105. On the other hand, if the dissolution is by express or implied statutory authority, no action may be commenced and maintained to enforce a liability or to sue the corporation but for its dissolution: *Salt Lake City & Merchants' Bank*, 17 Ala. 761; *Crossman v. R. Co.*, 150 Cal. 575, 89 Pac. 335; *Wilcox v. Continental R. Co.*, 16 Atl. 244; *City Ins. Co. v. Commercial Bank*, 100 Cal. 104, 32 Pac. 94; *Rae v. Kansas C. P. Co.*, 69 Kan. 457, 77 Pac. 94; *Rankin v. Wilson*, 19 La. Ann. 1; *Rankin v. Sherwood*, 100 Mich. 104, 161 N. W. 269; *Renick v. Bank of Ohio*, 13 Ohio, 298, 42 Am. Dec. 208; *Ingraham v. Terry*, 100 Mich. 104, 161 N. W. 269; *Baldwin v. Johnson*, 95 Tex. 85, 65 S. W. 171; *Rider v. F. F.*, 7 Leigh, 154, 30 Am. Dec. 495; *Greeley v. Smith*, 100 Fed. Cas. No. 5748; *Pendleton v. Russell*, 144 U. S. 1, 12 Supp. 743, 36 L. ed. 574; and where the right of the plaintiff to maintain the action has terminated, it is said the legislature may provide for its revival for the purpose of authorizing the plaintiff to sue: *Bank of Mississippi v. Duncan*, 56 Miss. 166. On the other hand, under the statutes of Arkansas, it was decided that where a corporation had assigned choses in action to trustees, they could maintain thereon in the corporate name after dissolution: *Bank of Washington*, 18 Ark. 554.

Pending Suits—Abatement.—If, at the dissolution of a corporation, an action or other proceeding is pending in its name, it cannot be prosecuted any further. In other words, the action abates: *Chair Co. v. Kelsey*, 23 Kan. 632; *Buck S. & R. Co. v. R. Co.*, 29, 101 Pac. 668; *Bank of Gallipolis v. Trimble*, 100 Fed. Cas. No. 5748; *State Bank v. Wrenn*, 3 Smedes & M. 791; *Grand*

Gulf Bank v. Wood, 12 Smedes & M. 482; Ingraham v. Terry, Humph. 572; May v. State Bank, 2 Rob. 56, 40 Am. Dec. 726; Gley v. Smith, 3 Story, 657, Fed. Cas. No. 5748; Bank of United States v. McLaughlin, 2 Cranch C. C. 20, Fed. Cas. No. 928. Of course this result can be avoided by appropriate legislation, as by a statute expressly authorizing the continuance of the action in the name of the corporation or of some trustee or other successor of the corporate plaintiff: New York M. I. Works v. Smith, 4 Duer, 3. Though a statute permits the revival of an action upon the death of the plaintiff, this does not authorize such revival on the death of the plaintiff corporation: Torry v. Robertson, 2 Cush. 192. If, however, a judgment is taken in an action after its abatement by the dissolution of the corporation plaintiff, such judgment, according to the weight of authority, is not void. It is the duty of the defendant to plead in abatement or otherwise call the attention of the court to the dissolution of the plaintiff. Failing to do so, a judgment for the plaintiff probably establishes its continued capacity to maintain the action, and at all events protects the judgment from collateral attack because of the matter of abatement: Commercial L. & T. v. Mallers, 242 Ill. 50, ante, p. 306, 89 N. E. 661; Louisville v. Bank of United States, 3 B. Mon. 138; Kansas City Hotel Co. v. Sauer, Mo. 279; Butchers' & Drovers' Bank v. Pulitzer, 11 Mo. App. 594.

f. Proceedings Under Execution.—In the absence of any statutory modification of the common law, execution cannot issue in the name of a dissolved corporation: Fox v. Horah, 36 N. C. 358, 36 Am. Dec. 48; May v. State Bank, 3 Rob. 56, 40 Am. Dec. 726. This rule is applicable, if, before the dissolution, the judgment was assigned (Leach v. Thomas, 27 Ill. 457), or the statute apparently authorizes those whom it practically makes trustees of the late corporation of its stockholders and creditors, to wind up its affairs or collect its assets: De Vendell v. Hamilton, 27 Ala. 156; Commercial L. & T. v. Mallers, 242 Ill. 50, ante, p. 306, 89 N. E. 661; Preston v. Lough, 58 Hun, 210, 12 N. Y. Supp. 313; or continues the corporation in existence for that purpose: Boyd v. Hankinson, 92 Fed. 49, 34 C. C. 197.

If, before the dissolution of the corporate judgment creditor, execution has issued and a levy has been made thereunder, the levying officer probably acquires the right to proceed with the writ if the dissolution had not occurred: Kimball v. Grafton Bank, 20 H. 347; Boyd v. Hankinson, 92 Fed. 49, 34 C. C. A. 197.

g. Transferring Stock.—Strictly speaking, there can be no transfer of the stock of a corporation after its dissolution. The effect of an attempted transfer is merely to invest the transferee with the right to share in any balance which may be found to be due and satisfying all the liabilities of the defunct corporation: James v. Woodruff, 10 Paige, 541, 2 Denio, 574. But if shares of stock have been sold before the dissolution and the transfer noted on the books, the treasurer may afterward perform the ministerial duty of signing the certificate for such shares, and thus complete the evidence of the transferee's title: Sewall v. Chamberlain, 16 Gray, 581.

III. Statutory Extension of Right and Power.

a. General Nature of.—From the decisions heretofore cited maintaining that, notwithstanding the dissolution of a corporation,

the Corporate Powers for Some Designated Time Authorizing the Further Use of the Name.—A very securing the rights and enforcing the equities of creditors and others interested in a dissolved correspond the effect of such dissolution for some time *Kaloosa S. & A. Assn. v. Green*, 48 Ala. 346; *Singer* 83 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; 17 Ind. 595; *Cunningham v. Clark*, 24 Ind. 7; *v. Sewell*, 50 Me. 220; *Folger v. Chase*, 18 Pick. beock, 23 Pick. 334, 34 Am. Dec. 61; *Thornton v. 123 Mass. 32*; *Blake v. Portsmouth etc. R. R. Co.*, *Arguson v. Miners' & Manufacturers' Bank*, 3 Sneed, rize the use of its name, though it has, by dissolu- xist. Thus, in Alabama, a special statute relating banking corporation and declaring its charter for- its trustees to use the corporate name in the col- and to "use all the modes and powers given to said

bank by the original charter, or any subsequent act of the legislature for the collection of its debts in the same manner as if the charter of the bank had never been forfeited," but the corporation was held, nevertheless, to have no power to discount or purchase bill of exchange: *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 668; and a notice given in its name to one of the debtors was ineffective in the absence of a showing that the proceeding was instituted by direction of the trustees: *Jemison v. Planters' & Merchants' Bank*, 17 Ala. 754. By a later general statute of the state "all corporations whose powers expire by limitation, all which are dissolved by forfeiture or any other cause, exist as bodies corporate for the term of five years after such dissolution for the purpose of prosecuting or defending suits, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their business, but this continuance of the corporate business does not apply to proceedings instituted by stockholders to dissolve corporations by the voluntary action of the owners of three-fourths of the corporate stock": *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 11 L. R. A. 375. A statute of Connecticut also continues dissolved corporations so far as to enable them to prosecute or defend suits by and against them: *Metropolitan Co. v. Place*, 147 Fed. 90, 77 C. C. A. 262. In Illinois, the corporate capacity continues for two years after its dissolution "for the purpose of collecting the debts due the corporation, selling and conveying the property and estate thereof," and the rule is applicable to corporations created after the enactment of the statute adopting such rule: *St. Louis & S. C. & M. Co. v. Sandoval C. & M. Co.*, 1 Ill. 32; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 1 N. E. 338; *Central Stock & Grain Exchange v. Pine Tree L. Co.*, 1 Ill. App. 471; *Commercial L. & T. Co. v. Maller*, 242 Ill. 50, and p. 306, 89 N. E. 661. The statute of Indiana is similar to the statute of Arkansas hereinbefore referred to, except that the time is limited to three years: *Bank of Salem v. Caldwell*, 16 Ind. 40; *Herron v. Vance*, 17 Ind. 595; *Cunningham v. Clark*, 24 Ind. 7; *Lincoln City B. L. & S. Assn. v. Black*, 136 Ind. 444, 35 N. E. 829. Under the code of Iowa, "corporations whose charters expire by limitation or the voluntary act of the stockholders may, nevertheless, continue to act for the purpose of winding up their affairs": *Muscatine T. Verein v. Funck*, 18 Iowa, 469; *Muscatine W. R. R. Co. v. Horton*, 38 Iowa, 33. A dissolved corporation, therefore, remains entitled to hold its property until all its affairs are disposed of: *State v. McGarty*, 105 Iowa, 32, 74 N. W. 754. The statutory mode of action authorized in Kentucky also permits the corporation to do the necessary for closing up its business: *Bank of United States Leathers*, 8 B. Mon. 126; *Economy B. & L. Assn. v. Paris Ice Mfg. Co.*, 113 Ky. 246, 68 S. W. 21. This rule was adopted in Maine by a special statute relating to a designated corporation: *Franklin Bank v. Cooper*, 36 Me. 179; *Mariners' Bank v. Sewall*, 50 Me. 220. The three year period after dissolution is the one adopted in Massachusetts, Michigan and Minnesota by statute: *Folger v. Chase*, 1 Pick. 63; *Bewick v. Alpena Harbor I. Co.*, 39 Mich. 700; *Hanan Sage*, 58 Fed. 651; and judgments recovered after that period, proceedings having been taken under the statute, are void: *Thompson v. Marginal Freight R. Co.*, 123 Mass. 32. In Nebraska, suits

not abated by the dissolution of a corporation which they were begun. On the contrary, after the corporation, it may in its name prosecute any suit or use of the party entitled to receive the proceeds, all causes of action accrued, or which, but for such and have accrued in favor of such corporation, in the and with like effect as if such corporation were not idt & Bro. Co. v. Mahoney, 60 Neb. 20, 82 N. W. o. v. Edwards-Bradford L. Co., 76 Neb. 477, 107 N. code of North Carolina, corporations whose char or been annulled continue as bodies corporate for the purpose of winding up their affairs: Heggie v. Assn., 107 N. C. 581, 12 S. E. 275. Ohio has, also, y of permitting actions to be commenced, or if com- tinned by or against corporations after their dis- v. City Bank, 2 Ohio St. 167, 12 Ohio St. 577. essee declares that "all corporations whose charters wn limitation, or are annulled by forfeiture, or for exist as such bodies corporate for the term of five dissolution for the purpose of prosecuting suits by settling their business, disposing of their property, r capital stock, but not for the purpose of continu- siness": State v. Bank of Tennessee, 5 Bart. 101. ereinbefore referred to make obvious inroads upon rules stated: Ante, I and II. Probably all of them ement of pending actions by or against dissolved permit the prosecution of such actions to final judg- warrant the commencement of such actions when is incidental to the purposes for which the corpora- in existence. For the same reasons such corpora- ized to do any other act within their original cor- e doing of which is in furtherance of the purposes corporation, notwithstanding its dissolution, is still tence, or is otherwise authorized to pursue. tory method of winding up the business, satisfying nd disposing of the remaining assets of dissolved y making its directors or others trustees, and, for heir trust, investing them with the corporate prop-. The proceedings of such trustees are, however, eedings of the corporation, and hence do not fall of this note.

**PITTSBURG. CINCINNATI. CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. CHICAGO.**

[242 Ill. 178, 89 N. E. 1022.]

PLEADING.—Defects in Form in a Declaration are Cured by Verdict. (p. 318.)

CONSTITUTIONAL QUESTION — Waiver.—By Prosecuting Appeal to the appellate court the appellant waives the right to question the constitutionality of the law under which the action is brought. (p. 319.)

CARRIER.—Interest in and Protection of Property.—A carrier is a bailee of property for hire, and has such an interest therein that he may resort to any means for its protection to which the absolute owner could have recourse, and may recover the full value of property from the wrongdoer who destroys it. This is true although the real owner may also have an action against the same wrongdoer for the value of the property destroyed. (p. 320.)

CARRIER.—The "Public Enemy" for Whose Acts in Destruction of Property a carrier is not liable means the enemy of the country, not the enemy of the carrier, and does not embrace mobs and rioters. (p. 321.)

CARRIER.—Liability for Loss of Cars of Other Companies.—The liability of a carrier, in possession of cars of other companies as bailee, for their destruction by mobs or in riots, is absolute, and the measure of liability is the full value of the cars destroyed. (p. 322.)

MUNICIPAL CORPORATION.—Liability for Cars Destroyed by Mob.—The Illinois statute permitting a carrier to recover from a city in which its cars have been destroyed by a mob may be invoked by a carrier in possession as bailee or lessee of cars of other companies. The use of the word "owner" in the statute does not limit its application to absolute owners. (pp. 319, 322.)

MUNICIPAL CORPORATION.—Destruction of Cars by Mob.—A Notice to a city, signed by the vice-president of a railway company, in charge of its legal department, and having attached to it a schedule containing an itemized statement of the property destroyed, the date when and the place where destroyed, and the amount of damages claimed to have been sustained by the destruction of the item of the property, is sufficient notice under the statute making a city liable for the destruction of the property by mob. (p. 323.)

MUNICIPAL CORPORATION.—Whether Cars were in Transit at the Time of Their Destruction by a Mob is a question of fact for the jury, in an action by the railway company against a city to recover the loss, and if the evidence tends to sustain the appellee's contention that they were not in transit, the supreme court will reverse the judgment on the ground that it is contrary to the weight of evidence. (p. 324.)

EVIDENCE.—In Determining What is the Best Evidence the Nature of the case will admit of, and what is secondary evidence regard must be had, to some extent, to the nature and character of the business to which the evidence relates and the method of its conduct. (p. 325.)

EVIDENCE.—Car Report Record or "Borner Record."—In order to identify cars destroyed by a mob, in an action against a city to recover therefor, a car report known as the "Borner Record," which shows the arrival and movement of cars, is admissible, although the original reports from which the record was made have been destroyed. (p. 325.)

"Record of Car Equipment."—In Determining the destroyed by mobs, historical records, known as the "Record of Car Equipment," showing the time when and the place where the character of their construction, and to what extent repaired or rebuilt, are admissible. (p. 326.)

ndage and Robert N. Holt, for the appellant.

l & Loesch and L. C. Cooper, for the appellee.

C. J. This action was brought by appellee of Chicago, appellant, under the act of 1887, fourths of the damages alleged to have been suffered by the destruction of property by mobs in Chicago during a strike of the employes of the company and a sympathetic strike in their aid Railway Union, in July, 1894.

It avers that plaintiff is a common carrier of passengers over its line of railroad, which is partly within the limits of the city of Chicago, and was on July, 1894, "possessed, as of its own property described in the declaration, situate within the limits of the city of Chicago, on and near its line of railroad; that on said day, within the limits of the city of Chicago, a mob or mobs, riot or riotous assembly composed of twelve or more persons, and there composed of twelve or more persons, within the limits of the city of Chicago, a large quantity of the before described property was injured or destroyed, setting out a large property and its value. The declaration avers that the property was not in transit at the time of its destruction; that said injury and destruction were in any way aided, sanctioned or permitted by the plaintiff, or through the negligence of plaintiff to use reasonable diligence to prevent the destruction; that within thirty days of the destruction of the property plaintiff gave notice to the defendant of the destruction and demanded payment of the loss and damage sustained, but the defendant refused to pay the same, etc.

The defendant demurred to the declaration but defendant's demurrer was overruled. A change of venue was taken from Du Page county, where a trial by a jury was had, to substantially four months. A verdict was rendered for the appellee for one hundred thousand dollars, which the court, after overruling motions for a new trial, rendered judgment. From that judgment an appeal was prosecuted to the appellate court for error. One of the judges of the circuit court who tried the case was also one of the justices of the appellate court for the second district, and as appellee had,

before entering upon the trial in Du Page county, applied for a change of venue from all of the judges of the sixth circuit, of which Du Page county is a part, said justice of the appellate court deemed it his duty to refrain from taking part in the consideration of the appeal to that court. The appeal, therefore, was considered by two justices of the appellate court, and the opinion states they agreed that under the pleadings and the evidence no other verdict than one in favor of appellee could have been returned. On the question of law involved in the case, except as to the sufficiency of the declaration, we have not the benefit of the judgment of the appellate court, for the opinion states that they were unable to agree upon the right of appellee to recover for the destruction of property belonging to others than appellee and upon the competency of certain evidence offered and admitted to the objection of appellant. The opinion states that one of the justices of the appellate court was of opinion that the verdict was warranted and should be sustained even if the ruling of the court complained of in the admission of evidence was held to be erroneous; that the errors complained of, if they were errors, did not require a reversal of the judgment; while the other justice of said court was of opinion that the ruling complained of were erroneous, and that the errors were of such a nature as to require reversal. The two justices of the appellate court being unable to agree as to whether the judgment of the circuit court should be reversed or affirmed, it was affirmed by operation of law, and the city has prosecuted an appeal from this court.

Appellant contends that the court erred in overruling the motion in arrest of judgment on account of the alleged insufficiency of the declaration. The objections made to the declaration are: First, that there is no sufficient allegation of ownership; second, that it does not locate the mob within the city of Chicago; third, that it does not sufficiently negative the proposition that the injury or destruction of the property was not sanctioned or permitted by the carelessness, neglect or wrongful act of the plaintiff or through neglect on its part to use reasonable diligence to prevent injury and destruction; fourth, the declaration does not state notice of plaintiff's claim for damages was presented to defendant within thirty days after the destruction of the property, as required by statute; fifth, that the declaration fails to state a cause of action, because the statute upon which the action is based is unconstitutional.

We do not regard the objections made to the declaration as of so substantial a character as to require their discussion in detail. If there were any defects, they were defects of form only, and were cured by verdict. As to the constitutional

law under which the action is brought, appellate question by prosecuting its appeal to the Barnes v. Drainage Commrs., 221 Ill. 627, Case v. City of Sullivan, 222 Ill. 56, 78 N. E.

Important question involved in the case, and the counsel on both sides direct the greater portion of arguments, is the right of appellee to recover on cars in its possession as bailee or lessee, but, belonged to other railroad companies. The large number of the cars destroyed or injured by other corporations, but at the time of their injury were in possession of appellee in the ordinary business as a common carrier. Appellant's proof of damage on account of the destruction of the property, the objection was overruled and the proof contentions is that the statute was intended to apply only by the absolute owners of the property, appellee not being such absolute owner, it was no recovery.

Act of 1887, under which this suit is brought, to indemnify the owners of property lost or destroyed by mobs and riots." The first section provides that in case of the destruction or injury of real or personal property, except property in transit, in consequence of a riot composed of twelve or more persons, the destruction or injury occurs within a city, "shall be an action by or in behalf of the party whose property has been destroyed or injured, for three-fourths of the value thereof." The second section provides that the action may be brought in case. The third section provides that no recovery can be had in such case if the destruction of property was occasioned, or permitted by the carelessness, neglect or fault of the person or corporation, nor unless the person or corporation shall have used all reasonable diligence to prevent damages. The fourth section provides that the act shall be construed to prevent "any person or corporation whose property has been injured or destroyed in such riot or mob or riot" from maintaining an action on or persons participating in such mob or riot. The fifth section gives the city against which judgment is rendered a right of action against any person or corporation who was in the mob or riot. The sixth section provides that the municipality, "by any person or corporation whose property shall have been destroyed or injured in such riot or mob or riot within thirty days after the loss or damage

occurs, and requires suit to be brought within twelve months after the destruction of or injury to the property.

It will be seen that the title of the act is an act to indemnify "the owners of property." By the first section the municipality is made liable to an action "by or in behalf of any party whose property" was destroyed or injured. By the fourth section the right of action of "any person or corporation whose property" has been injured, against any person or persons participating in the mob or riot, for damages thereby sustained, is preserved. The sixth section requires ¹⁸⁷ the notice to be given "by any person or corporation whose property shall have been destroyed or injured." Appellant contends that these words and phrases, both in the preamble and in the body of the act, clearly indicate that it was the intention of the legislature that the action can only be maintained by the absolute owner of the property as distinguished from a person having a special property, such as a common carrier as bailee.

A common carrier is a bailee of property for hire, and has such an interest in the property that he may resort to any means for its protection to which the absolute owner could have recourse, and may recover the full value of the property from a wrongdoer who destroys it. "He is, in short, for all practical purposes, the owner of the property for the redress of all wrongs or injuries to it whilst in his possession" Hutchinson on Carriers, sec. 779. And this is true although the real owner might also have an action against the same wrongdoer for the value of the property destroyed: 2 Hutchinson on Carriers, sec. 780.

It is not denied by appellant that this is the rule at common law, but it is contended that this rule has no application to actions brought under the statute, for the reason, as stated, that the statute gives the right of action to the absolute owner only, and not to a bailee or one who has a special ownership of the property. We do not construe the act of 1887 to do anything more than create a liability where none had previously existed. It did not take away from a person or corporation having a right of action against a wrongdoer for the value of the property injured or destroyed, that right, nor in any way affect the remedy in such action. It provided that the liability of a party not liable at common law nor under any statute theretofore existing. The principle upon which such statutes rest is, that it is the duty of the municipality to preserve peace and good order and protect private property; that having the power to perform this duty, a failure or neglect to do so, ¹⁸⁸ resulting in the destruction of property by mobs or riots within its borders, makes the municipality a wrongdoer: City of Chicago v. Manhattan Cem

69 Am. St. Rep. 321, 53 N. E. 68, 45 L. R. A.

ank the word "owner," as used in the title of
 arase "party or corporation whose property"
 ed, was intended to be used in the restricted
 for by appellant. The purpose of the act,
 title, is to "indemnify" owners of property,
 ion makes the city liable to an action "by or
 e party" whose property is destroyed or
 ee is a common carrier for hire, and as such
 requested, to receive for transportation over
 other common carriers, and as to such cars
 e relation as to ordinary freight received by
 tion, and is held to the same measure and
 ility to the owner of the cars as would attach
 any other property received by it for car-
 e. Ry. Co. v. Chicago etc. Ry. Co., 109 Ill.
 . 605; East St. Louis Connecting Ry. Co. v.
 Co., 123 Ill. 594, 15 N. E. 45; Peoria etc.
 d States Rolling Stock Co., 136 Ill. 643, 29
 8, 27 N. E. 59; Schumacher v. Chicago etc.
 199, 69 N. E. 825. The liability in such
 n insurer of the safety of the goods against
 such as arise from the act of God or the
 t. Louis etc. R. R. Co. v. Montgomery, 39 Ill.
 R. R. Co. v. Shea, 66 Ill. 471; Chicago etc.
 wyer, 69 Ill. 285, 18 Am. Rep. 613; Adams
 Wilson, 81 Ill. 339; Merchants' Despatch
 ahn, 76 Ill. 520; 1 Hutchinson on Carriers,
 on Railroads, sec. 1454. The "public enemy"
 the country and not the carrier, and does not
 d riots: 1 Hutchinson on Carriers, secs. 315,
 Railroads, sec. 1458.

e under consideration expressly preserves the
 to the property owner against the persons
 mob or riot, and as against such persons we
 e action could be maintained by a common
 ion as bailee. It is well known, and the legis-
 had in mind, that mobs and riots are usually
 sons of no financial responsibility, so that an
 em would be unavailing to recover the value
 destroyed. With this in view, and in view
 the law confers upon municipal authorities
 ss mobs and riots and to protect property,
 ade the municipality liable to the same person
 n whom the right of action existed against
 ng the mob or riot, for three-fourths of the

value of the property destroyed by mobs or riots within borders which it failed to suppress and control. Any construction of the act would in most, if not all, instances cases like the one under consideration result in affording adequate remedy to the person who suffers the loss. The liability of a common carrier in possession of cars as bailee absolute in such cases as the one at bar, and the measure of the liability is the full value of the cars destroyed. In such case ordinary prudence and business judgment would lead the owner of the property to pursue its remedy against the bailee for full value rather than to resort to two actions—one against the city for three-fourths of the value and another against the bailee for one-fourth. It would follow, therefore, the bailee must in any event suffer a loss to the extent of one-fourth of the value of the property destroyed, and in the event of the bailor refusing to pursue its remedy against the city, the bailee must suffer the entire loss if it cannot maintain an action. Such construction does not enlarge the liability of the municipality, for, whether the damages are recovered by the city or paid to the bailee or the bailor, the liability is the same, and a judgment in favor of the bailee would ¹⁹⁰ be a bar to a suit by the bailor. This construction gives effect to the purpose and intention of the act, which was indemnity to the person injured, whether that injury resulted to such person by reason of his being the absolute or special owner of the property destroyed. The statute authorizes the action “by or in behalf of the party whose property” was destroyed. While this action is in the name of the bailee, it is none the less brought “in behalf of the owner.” “But even when the real owner might sue, the action may still be brought in the name of the carrier, though the object of the suit may be recovery for the full value of the goods, and a recovery by him will be a bar to any subsequent action by such general owner. But in case the carrier should recover the full value he will be entitled to the recovery only to the extent of his qualified interest in the goods, and as to the balance he will be held to be a trustee for the general owner, unless he has satisfied such owner for his loss”: 2 Hutchinson on Carriers, sec. 780.

The precise question here involved was before the circuit court of appeals for the seventh circuit in *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509. The action in that case was brought against the city by the Pennsylvania company under the act of 1887 and a recovery was had for cars destroyed which were in the possession of the plaintiff as bailee but were owned by other carriers. Upon this question that court said: “The company was the owner in a sense though not having the general title, and it is clear that

limited to the property to which the complaint title. Possession with a special interest as It was not necessary that all persons having property should be made plaintiffs. It could be contemplated that under the statute all persons injured in the property should be required to come in by bringing separate actions or join in one action for recovery of damages. The statute did not change the rule at common law that a common carrier may sue and recover for the value of the property injured or destroyed by another while in his hands. That bailees of property may sue in their own right for wrongful injury to property in their

there was no error in allowing a recovery for damages which were in the possession of appellee as carriers.

Appellant contends that the notice given it by appellee after the injury complained of, and the amount of the damages sustained, are insufficient, and have been admitted in evidence. The notice given by appellee by its second vice-president, who shows, had charge of the legal department. A schedule attached to the notice contains a statement of the property destroyed, the date and place where destroyed, and the amount of damages to have been sustained by the destruction of the property. One of the objections to the sufficiency of the notice is that appellee was not the owner of a portion of the property and it is claimed the notice could only be given by half of the real owner. What we have said in response to this objection. Other objections of a similar character are urged, but we think the notice given under the statute.

Appellant contends that the court erred in permitting the jury to go to the destruction of the property in possession of appellee as bailee or common carrier while in transit. All that need be said on this point is that the evidence tends to show that the cars were in transit. The destruction occurred in the yards known as Brighton Park yards and these yards were used for the storage of cars and dead freight. The same question was presented by the city of Chicago in the Pennsylvania case (9 Fed. 497, 57 C. C. A. 509), and upon that point the court of appeals said: "Then it is objected that the cars were in transit and for which no recovery could be had under the statute. But the evidence shows

that the cars were not in transit but were stored in plaintiff's yards until wanted for actual use." Whether the cars destroyed were in transit was a question of fact for the jury, and the evidence tending to sustain appellee's contention that they were not in transit, we cannot reverse the judgment on the ground that it is contrary to the weight of the evidence.

The testimony of about fifty freight conductors, and reports made by them showing the arrival of cars in the city of Chicago during a period of a few weeks preceding the destruction of the cars sued for, were admitted. This was followed by the introduction of books called the "Borner Record." These books purported to show what cars came into Chicago, into what yards they were placed and any further movements made of the cars. In order that appellee might keep a record of the movement of cars on its line, conductors were required to, and testified they did, make reports on arrival of trains in Chicago, upon blank forms furnished them for that purpose, known as "P. L. 508." These reports were forwarded to appellee's office at Pittsburg, where they were entered in records kept for that purpose by a force of clerks. The original reports, "P. L. 508," were identified by the conductors who made them and admitted in evidence. Another report was made by conductors on their arrival in Chicago. This report was on a form called "P. L. 66," and was transmitted to appellee's office in the city of Chicago. It was a duplicate of the report on form "P. L. 508," with the exception that it contained memoranda showing where the cars were placed or stored after arriving in the city. The information contained in these reports was transcribed into the Borner record by a clerk whose duty it was to make up and maintain the said record, and thereafter yard reports made to the same office showed any further movement of the cars, and whether they had been taken out of the yards, and the information contained in these yard reports was also entered in the Borner record. The Borner record derived its name from the fact that a man by the name of Borner invented that form and system of keeping the record of cars. The clerk who kept the record testified the system had been in use for thirty years. After the reports from which the Borner record is made are transcribed in the record said reports are sent to appellee's offices at Pittsburg and after a lapse of time are destroyed. The original reports from which the Borner record was made could not be produced at the trial, and the record was objected to as not being a book of original entries and as being secondary evidence; also because it was made from the conclusions of the clerk who kept the record, drawn from the reports from which it was made. With the exception of the record of two cars, the witness testified that the rec-

d in evidence were in his handwriting; that correctly made in the record by him from the inductors testified that they made out their "P. L. 508" upon arrival of their trains in Chicago and that said reports were correct; that duplicate of said report on form "P. L. 66," as above noted. If "P. L. 508" was correct, and "P. L. 66" was a duplicate of it, then "P. L. 508" has been correct also.

What is the best evidence the nature of the primary, and what is secondary evidence, regard to the extent, of the nature and character of the evidence relates and the method of making a case like the one under consideration it is practicable that the record of the movement of the cars appellee was required to deal with a book of original entries. ¹⁸⁴ It is easily the correctness of such a record is of the utmost importance to the common carrier for which it is kept. It is the course of business and according to methods that had been tested for many years, and there is no reason from the preliminary proof that it was as reliable as had been a book of original entries or the method it was made had been produced. In *Louisville v. Daniel*, 122 Ky. 256, 91 S. W. 691, 31 Ky. 190, what is known as a "train sheet" was introduced for the purpose of showing the arrival of every train on the company's road at telegraph stations on a certain day. The train sheet was made by the train-dispatcher, whose office was at the end of the road, from information received by telegraph from different stations on the line as to the movement of the trains. It was held that the record so made in the business was as reliable as information given by conductors, porters or wharfingers to a bookkeeper who enters thereof in books. In *Meyer v. Brown*, 101 N. W. 285, the books of a railroad company were introduced to show the weight of wood shipped, the material question involved in the case. The entries were entered on cards and from these cards they were entered in the books, and after comparing the cards with the books, to ascertain the correctness of the entries, the books were destroyed. The books were held competent evidence in *Beaman Machine Co.*, 160 Ill. 101, 43 N. W. 399, and in *Chicago etc. Ry. Co. v. Ingersoll*, 65 Ill. 399, tend to show the competency of the books in this case.

As to the view the court did not err in admitting the record in evidence. Its value and weight

as testimony were questions for determination by the jury. Other evidence, which was clearly competent, showed that about seven hundred cars were destroyed in ¹⁹⁰⁵ appeal. Fifty-ninth street and Brighton Park yards, so the appeal could not, in any event, have been seriously prejudiced by the admission of the record.

The same objections made to the Borner record were made to the introduction in evidence, on behalf of appellee, of a record or book known as the "Historical Record." This was the book in which the railroad company kept a record of its car equipment. It showed the time when, the place where, and by whom the cars belonging to the company were built, the character of their construction, and to what extent the cars had been repaired or rebuilt. It was testified to by the clerk who kept this record that it was a record of everything in regard to the history of the equipment, both freight and passenger. The witness testified that when a car is built, inspected and turned out, the inspector sends a statement to the clerk or bookkeeper showing the initials and number of the cars. The car-works also sends a similar statement. These statements are compared, and if they agree they are entered in the record of equipment, which is the historical record. The memoranda or statements are kept for several years and then destroyed. The technical name of the record is kept in the business of the company as the "Record of Car Equipment." The witness testified that he had been engaged in the employment of keeping this record since 1900 and it was in his handwriting since that time; that the record had been kept since 1876, and the entries in it were continuous, regular and uninterrupted; that W. W. Bowman had kept the record before him; that L. S. Van Dyke, who was then dead, was Bowman's predecessor, and the witness identified Van Dyke's handwriting, and that Richard Bratton kept the book before Van Dyke. Bowman was called as a witness and testified to the correctness of the book while he kept it. Historical records of other railroad companies, similar to that of appellee above described, were also identified and admitted in evidence over the objection of appellant, ¹⁹⁰⁸ for the purpose of showing the history and condition of the cars of these companies which were in the possession of appellee at the time of their destruction by the fire in appellee's yards. In the nature of things it would be well-nigh impossible to preserve and produce the original reports from which these records are made up, and it would be impracticable, if they were preserved, to use them as evidence on a trial, as it is apparent that a large number must be legion, for a record is made not only of the construction, but of the condition and all repairs made on each car. Moreover, the original evidence of construction

is not within the personal knowledge of any one who worked on one car may be done by a number of men, and under different foremen, so that an entry having personal knowledge would seem impracticable. Books were offered as aids to arriving at the value of the cars at the time of their destruction. They purport to show the age of the car, its character and the nature of repairs made thereto. They were supplemented by the testimony of competent witnesses as to the depreciation of cars from age and use. None of this is conclusive, but it was competent to be considered together with the other evidence.

It is here remarked that the proof shows about seven cars destroyed by fire set to them by mobs. It is difficult to show with exactness just what usage was made of the cars since its construction or its precise condition at the time of destruction, but the proof does show that they were being moved on their trucks, and the minimum value upon them by appellee's witnesses would have been considerably larger sum than the verdict of the jury. The value of other property destroyed, not including cars, such as track, ties, tower buildings, machines, watch-houses, tool-houses and tools.

Other questions have been raised by appellant as to the competency of testimony admitted. It would extend unnecessarily to discuss them in detail. We have considered the questions raised and are satisfied no reversible error has been committed respecting them.

We have examined the criticisms made by appellant of the trial court in giving and refusing instructions, and find that no error was committed in that regard of legal character to appellant as would justify a reversal of judgment.

The judgment of the appellate court is therefore affirmed.

See also a City for Property Destroyed by Mobs and Rioters
Chicago v. Manhattan Cement Co., 178 Ill. 372, 69 Am. St. Rep. 341.
Chicago v. Chicago League Ball Club, 196 Ill. 54, 89 Am. St. Rep. 341.
Board of Commrs. v. Church, 62 Ohio St. 318, 78 Am. St. Rep. 341.
Adamson v. City of New York, 188 N. Y. 255, 117 N. E. 255.

Books in Evidence Against Third Persons of Books, Re-
ceipts, other than books of account, is the subject of a note
in *Co. v. Bullion etc. Min. Co.*, 125 Am. St. Rep. 841.

RIGDON v. MORE.

[242 Ill. 256, 89 N. E. 992.]

JURY—Waiver of Applies Only to First Trial.—A waiver of jury binds the parties as to the first trial only. When the case is remanded by the appellate court, both parties are restored to their original right of trial by jury. (p. 329.)

TRIAL—Stipulation of Facts Applies Only to First Trial.—A stipulation of facts on a former trial is not admissible in the second trial over objection of either party. (p. 329.)

APPEAL—Appellate and Supreme Courts.—In Common-law jurisdictions the Judgment of the Trial Court, affirmed by that of the appellate court, is binding upon the supreme court as to the facts. (p. 329.)

APPEAL—Reversal and Trial De Novo—Right to Jury.—In an ordinary civil action at law, in which the parties are entitled to a matter of right to a jury trial, the supreme court can reverse the judgment and remand the cause with directions to the trial court to enter the proper judgment only where the error occurred after the verdict was entered. Where errors have intervened prior to the entry of judgment, and the cause is reversed therefor, it must be remanded for a trial de novo. (p. 330.)

Fyffe & Adcock, for the appellant.

Bulkley, Gray & More, for the appellee.

257 CARTER, J. This was a suit to collect commissions for the sale of real estate, and is in this court for the second time. The decision on the first hearing is found under the same title in 226 Ill. 382, 80 N. E. 901, where the facts existing up to that time are fully set forth. The claim for commissions was filed in the probate court of Cook county against the estate of William W. Strong and disallowed by that court. On appeal to the circuit court a jury was waived and the cause tried by the court and judgment entered against the appellant. This judgment was affirmed by the appellate court on appeal. We held in the decision above referred to that whether there was any evidence tending to support appellant's cause of action was a question of law, which might be reviewed here, and that "the evidence makes a prima facie case of the employment by Strong of plaintiff in error, as broker, to sell the real estate mentioned." The remand order in that case reads: "The judgments of the appellate and circuit courts are reversed and the cause remanded to the circuit court." On the second trial in the circuit court a mandate of this court was offered in evidence and with a certified copy of the record filed in the original cause in the circuit court, and it was thereupon insisted by counsel for appellant that the only thing the trial court could do was to enter judgment on that record, while counsel for appellee contended that the order reversing and remanding was general and

led to a jury trial on the second hearing. The court, against appellant's contention, and both parties pronounced themselves ready for trial, it was ordered that a jury be called. The attorney for appellant then moved that he elected to stand by the record he made and would offer no evidence. The court ordered that "appellant's claim be affirmed and it hereby is affirmed that that order and judgment was affirmed by the court on appeal, and this appeal followed.

The question at issue is whether the remanding order of this court in 226 Ill. 382, 80 N. E. 901, was the judgment to be entered by the trial court. The case was sent back for a trial de novo. A remand for the purpose of trial is exhausted by that fact. The case is remanded to the trial court both as to the facts and as to the right of trial by jury. An order to waive a jury trial binds the parties only in that trial: *Osgood v. Skinner*, 186 Ill. 491, 57 N. E. 1079. A stipulation of facts on a former trial is not admissible on a second trial over the objection of either party: *Foster*, 207 Ill. 150, 69 N. E. 783. The effect of a remanding order must depend, to some extent, upon the circumstances of the particular case.

Appellant cite as supporting their contention, *People v. People*, 219 Ill. 171, and *Wenham v. International Packing Co.*, 219 Ill. 171, 57 N. E. 1079. In those cases the parties were ordered to a matter of right, to a jury trial on the matter decided by this court. *Prentice v. Crane*, 240 Ill. 654, and *In re Maher*, 210 Ill. 160, 71 N. E. 1079, are cited as supporting appellant's contention as to remanding orders. These last cases were heard by a jury, in which the court was charged with the duty of weighing and deciding upon the facts. A remand governs as to the effect of remanding orders in cases obtained in common-law actions, where the parties are entitled to a trial by jury. Our attention has not been called to any common-law action in which it has been held to apply the rule contended for by appellant without a jury trial on the rehearing. In such actions the order of the trial court, affirmed by that of the appellate court, is binding upon this court as to the facts, because the court has heard the evidence, but only determine whether the evidence in the record which tends to support the cause of action: *Libby, McNeill & Libby v. Standard Scale Co.*, 206 Ill. 66, 78 N. E. 599; *Reiter v. Standard Scale Co.*, 206 Ill. 66, 78 N. E. 745.

It is insisted by appellant that *Griesbach v. People*, 226 Ill. 65, 80 N. E. 734, and *Roemheld v. City of Chicago*, 231 Ill. 467, 83 N. E. 291, support his contention. We cannot so hold. *Griesbach v. People*, 226 Ill. 65, 80 N. E. 734, was a quo warranto proceeding and not an ordinary common-law action. Quo warranto was originally criminal in its nature, and while now the pleadings in such cases should conform, as far as possible, to the general principles and rules governing pleadings in civil actions, it yet retains in some instances its criminal form: *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230. The *Roemheld* case (231 Ill. 467, 83 N. E. 291) does not in any way involve the question here under discussion. In that case this court in its final decision simply held the finding of fact made by the appellate court sufficient. In an ordinary civil action at common law, where the parties are entitled, as a matter of right, to a jury trial, this court can only reverse the judgment and remand the cause with directions to the trial court to enter the proper judgment there where the error occurred after the verdict was entered: *Vill of Shumway v. Leturno*, 225 Ill. 601, 80 N. E. 403; *Ogden v. Copeland*, 145 Ill. 98, 33 N. E. 1085. But where the error has intervened prior to the entry of the judgment and the cause is reversed therefor, it must be remanded for a trial de novo.

Counsel for appellant admit that this case was reversed and remanded generally by this court in 226 Ill. 382, 80 N. E. 9, and we think it is clear from the opinion and remanding order that it was sent back for a trial de novo; that the error pointed out by this court was of such character that it might have been obviated by additional evidence on the second trial: *Clark v. Supreme Lodge Knights of Pythias*, 189 Ill. 639, 60 N. E. 100. *Prentice v. Crane*, 240 Ill. 250, 88 N. E. 654. Both parties on the second trial were entitled to a jury.

The judgment of the appellate court must therefore be affirmed.

Where a Jury is Waived by Stipulation and the cause tried to a court, this does not amount to a waiver of a jury on a second trial after the judgment has been reversed and the cause remanded: *Braham v. North Chicago St. Ry. Co.*, 32 C. C. A. 64, 88 Fed. 627. The plaintiff in waiving a jury before the first trial of an action by ejectment does not waive a jury on the second trial, obtained under the Minnesota statute, by paying the costs after entry of the judgment: *Cochran v. Stewart*, 66 Minn. 152, 68 N. W. 972. If record shows that a jury was waived at a preceding term, such waiver will be presumed to have been general and not confined to the term which it was made: *Boslow v. Shenberger*, 52 Neb. 164, 66 Am. Rep. 487.

HAN v. DELLWOOD PARK COMPANY.

[242 Ill. 336, 89 N. E. 1005.]

RAILWAY—Duty and Liability to Passengers.—A scenic railway at an amusement resort is held to be responsible to passengers as a common carrier. It is required to exercise the highest degree of care and caution for the safety of passengers, to do all that human foresight and vigilance can do, in the mode of conveyance and the practical operation of the railway, to prevent accidents. (pp. 333, 334.)

RAILWAY—Presumption of Negligence from Accident.—A passenger operated by a scenic railway company suddenly injured while a passenger from his seat therein, a presumption of negligence. (p. 335.)

RAILWAY—Presumption of Negligence from Accident.—To show that a passenger on a scenic railway, who exercised due care, was injured by apparatus wholly in the possession of the carrier and furnished and managed by it, and that the injury was of such a character that it would not ordinarily be expected to result from the management of the railway, is prima facie evidence of negligence. (p. 335.)

Improbability of Testimony.—The Supreme Court will not reject testimony simply because it may seem improbable, but only if it is contrary to natural law. (p. 336.)

for the appellant.

Arcy, for the appellee.

MR. JUSTICE. This is an action on the case to recover damages for injuries which the appellee sustained September 1904 at Dellwood Park, Will county, Illinois, by being injured while riding on a "scenic railway" operated by the appellant. A jury in the circuit court of Will county returned a verdict for sixteen hundred dollars against the appellant. Judgment was then entered for the appellee was required by the trial court to remit the judgment to five hundred dollars, and judgment was then entered for the appellant for five hundred dollars. This judgment, on appeal to the Supreme Court, was affirmed. Appellant thereupon prayed

that the park is an amusement resort managed by appellee. On the evening of the day in question, the appellant, William Kirby, went to the park, and about 9 o'clock, having paid the regular fare of five cents, took a front seat in a car. The scenic railway is approximately one thousand feet in length, and the cars upon the track are somewhat like a cutter or sleigh, having two rows of seats, capable of holding two adults or three children. The front seat was high enough to furnish a view of the lake and those in the back seat, while for the protection of persons riding on the front seat there was an awning on a swivel, which was elevated to permit the sun to be seen and was then drawn down over

their laps. This was about waist high when a person seated and could be held on to by the passenger to steady him during the ride. Under each car were four wheels flat and without flanges, running upon a maple rail about six inches wide, which was laid upon a plank or timber about two inches thick, resting on cross-ties. On each side of the track were guide-boards sixteen or eighteen inches high, also a two-inch plank and a maple strip to guide the side wheels. On each side of the car were two guide wheels which played against these maple strips. The cars ran by gravity the greater part of the distance. A part of the track of the railway was upon trestlework elevated considerably above the ground. Passengers entered the car at a platform which was located on the upper edge of a valley, and was some forty-two feet above the lowest point in the tracks. After they were seated the car was started by hand and then propelled by an endless chain up an incline, when it was released from the endless chain and dropped fifteen feet down a sharp incline, thereby gaining the principal momentum for the trip. At several places the track ran up over short artificial hill and then dropped again. The road was circuitous and contained numerous curves. The cars reached the foot of the incline almost directly below the starting point and were then drawn by an endless chain up an incline to the starting platform. Nearly at the end of this portion of the road traveled by the force of gravity were several appliances called "brakes," located some ³³⁹ distance apart, each operated by a man and intended to reduce the speed of the car, the second brake so checking it that the car could be caught by the endless chain and carried again to the starting point. On the night of the accident seven cars were in operation, running at equal distances apart, taking a little less than two minutes to make the circuit. None of the cars were accompanied by persons in charge. After appellee Kirby had been seated in the front end of the car, as he had before stated, and it had gone down the first declivity, the car came to a sharp curve some five hundred feet from the starting point and six feet above the ground. They both testified that the motion of the car was suddenly checked. Kirby stating that the car was just barely moving and afterward testifying that it stopped; appellee testifying that it stopped, but afterward that he did not know whether it had stopped or not. Both of them stated that there was a grinding noise underneath. Kirby stated that it sounded as if they were passing over stone and gravel, while the appellee likened it to something hanging to the side or bottom of the car. The latter sat on the left-hand side, which was outside of the curve, and had hold of the handle-bar with his left hand. When the car was thus suddenly checked

appellee was thrown out of the car and fell on the ground, while Kirby was pitched forward over the car but remained in the car, which immediately stopped. When it reached the second brake at the incline Kirby got out and hurried across the track. Appellee had fallen and found him lying on the ground, very hurt about the face and mouth. Kirby testified that appellee was conscious, while appellee and an employee who was there at the time testified that he was unconscious. Portions of the park were lighted by gas lamps at the place where this accident happened and there was no eye-witness to it except Kirby.

Employees of appellant testified that all of the cars had been inspected on the morning of that day and were in good order, and were again inspected a short time after the accident and nothing found wrong; that the track was inspected at the place of the accident and there was nothing there to indicate what had

happened. Appellant contends that the trial court erred in giving instructions at the request of appellee, holding, in effect, that it was the duty of the appellant, in operating the scenic railway, to exercise the highest degree of care and caution for the safety of its passengers and to do all that human vigilance could reasonably do, consistent with the nature of the conveyance and the practical operation of the railway, to prevent accidents to passengers while riding on the cars. This is the rule laid down in this state as to common carriers. *Parmelee Co. v. Wheelock*, 224 Ill. 194, 79 N. E. 1087; *Chicago St. R. R. Co. v. Polkey*, 203 Ill. 179, 79 N. E. 1087; *Chicago St. R. R. Co. v. Tuerk*, 193 Ill. 108, 79 N. E. 1087; *Chicago etc. R. R. Co. v. Pillsbury*, 187 Ill. 483, 74 N. E. 22. We have also cases operating passenger elevators in buildings with the same high degree of care: *Hartford v. Sollitt*, 172 Ill. 222, 64 Am. St. Rep. 35, 50 N. E. 369; *Chicago Exchange Building Co. v. Nelson*, 197 Ill. 108, 79 N. E. 369; *Steiskal v. Field & Co.*, 238 Ill. 92, 87 N. E. 574, 13 Am. St. Rep. 266, 52 L. R. A. 498, the court, in discussing the degree of care required of persons operating elevators for the carrying of passengers, stated that the same care and diligence must be used by persons engaged in such employments to avoid injury to those they carry as is required of persons carrying passengers on the cars. In proportion to the danger to those carried must be the care and diligence to avoid injury. Where the danger is great, the utmost care must be employed. In such cases the law re-

quires extraordinary care and diligence." This doctrine was quoted ³⁴⁴ with approval by this court in *Springer v. Fox*, 189 Ill. 430, 82 Am. St. Rep. 464, 59 N. E. 953, 52 L. R. A. 930. Why is not this rule applicable to those operating cars upon a scenic railway, such as the one here in question? The passengers carried therein are subject to great risk of injury to life and limb. The steep inclines, sharp curves and great spaces necessarily are sources of peril.

The argument of appellant that the character of the scenic railway was of itself notice of the danger to its passengers; that its presence and operation involved no danger to those who kept away from it; that in this regard it differed from steam or electric railways or passenger elevators in buildings, and that therefore such a railway should be held a common carrier, does not appeal to us. Should the motive which causes a person to take passage make a difference as to the degree of responsibility with which the carrier is charged? Passenger elevators are frequently operated in buildings in order to convey persons to some vantage point where they can overlook a great city or some other object of interest, and trips on electric cars are often made solely for pleasure.

The precise question now under discussion has not been decided by this court, and our attention has not been called to any case where the degree of care and responsibility resting upon those managing a railway of this kind has been considered. The nearest in point, perhaps, is *Knottner v. North Park Street R. R. Co.*, 93 Mich. 348, 53 N. W. 517, 17 L. R. A. 726. That was as to the operation of a roller coaster, and the street railway company, while it owned the amusement park where the coaster was being operated, did not own or operate the device itself. Many of the authorities cited by appellant discuss only the responsibility and degree of care required of the managers and operators in ordinary places of amusement, and not the care required in the operation of scenic railways or other amusement contrivances in the nature of common carriers: See *Williams v. Mineral City Park Assn.*, 128 Iowa, 32, 111 Am. St. Rep. 184, 102 N. W. 783, 1 L. R. A., N. S., 427, 5 Ann. Cas. 93, ³⁴⁵ and note; *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395, and note; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, 58 Am. St. Rep. 767, 67 N. W. 479, 33 L. R. A. 598; *Hallyburton v. Burke County Fair Assn.*, 119 N. C. 526, 26 S. E. 114, 38 L. R. A. 156. We think, not only by fair analogy but on reason and sound public policy, appellant should be held to the same degree of responsibility in the management of the railway in question as a common carrier.

of plaintiff's evidence, and also at the close of the case, the appellant moved to instruct the jury that the defendant on the ground that there was no support for the charge of negligence as made in the case. Appellant insists that the recent case of *Thompson Scenic Ry. Co.*, 130 App. Div. 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

of a passenger is caused by apparatus under the control of a carrier and furnished and managed by the carrier, and the action is of such a character that it does not ordinarily occur if due care is used, the law presumes negligence. The presumption arises from the fact of the accident and the attending circumstances, and not from the mere fact of the accident itself: *Chicago & North Western Ry. Co.*, 235 Ill. 566, 126 Am. St. Rep. 921; *Chicago Union Traction Co. v. Giese*, 12 N. E. 232; *Chicago City Ry. Co. v. Rood*, 14 Am. St. Rep. 478, 45 N. E. 238. We think the evidence offered on behalf of the appellee brings this case within the rule laid down in these decisions. The appellee is charged with the responsibility of a common carrier, and the appellee had paid his fare and was riding in a car owned and managed by the appellant. The testimony of the appellee tends to show that he was using due care, and that the injury was caused by apparatus wholly under the control of the appellant and furnished and managed by the appellant. The accident was of such character that it does not ordinarily occur if due care had been used by the management of its railway. This is sufficient proof of negligence to impose upon the appellant the burden of rebutting it. On this proof the law presumes negligence.

The appellant earnestly insists that these authorities apply in this case, and bases his contention, as to his argument, on the fact that the evidence against his companion, Kirby, is so unreasonable

that it should be rejected. Counsel insists that the p shows that the seven cars on the scenic railway at the of the accident were running about ten seconds apart, that if the car carrying the appellee and Kirby had stopped or checked, as testified to by them, the car following would have bumped into it. The argument is also that if the car in which appellee was riding had been slow up or stopped, as they testified, the car, being on a curve the time of the accident, would not have been able, on the grade, to gain enough motion to reach the end of the line. Appellant insists in this connection that appellee could not have been thrown out of the car, as claimed by him and Kirby; that they must have been standing up in the car and scuffling, because Kirby, when the car reached the end of the line, had appellee's hat in his hand. No direct testimony supports such a conclusion and we do not think it can be fairly inferred from any evidence in the record.³⁴⁷ Conceding, for the sake of the argument, that the testimony of appellee and his associate might for any reason be improbable, we cannot on that account disregard it. In the recent case of *Zetsche v. Chicago etc. Ry. Co.*, 238 Ill. 240, 87 N. E. 412, we considered this identical question and we there said (page 244): "The appellate court and the trial judge are required by the law, upon the question being properly raised, to take into consideration the elements of improbability, and if either regards the verdict as clearly against the preponderance of the evidence, a new trial should be awarded. We cannot, upon consideration of this motion, reject testimony unless it is contrary to some natural probability, as, for example, evidence that on a certain occasion the sun at noontime in this latitude cast a shadow to the south. It appears from the evidence that the rails upon which the cars ran were greasy from the oil and grease that fall from the cars and that the bearings of the cars were frequently oiled. We cannot say from the record before us that it would be contrary to the laws of nature, even if the car came to a full stop, for it to move again on account of the grade and without being bumped by the car coming up behind it. The proof most favorable to the appellee, on consideration of the motion to find for the appellant, stands alone. We can consider nothing else: *Libby, McNeil & Co. v. Chicago etc. Ry. Co.*, 222 Ill. 206, 78 N. E. 599; *Pronskevitch v. Chicago etc. Ry. Co.*, 232 Ill. 136, 83 N. E. 545; *Reiter v. Standard Scale Co.*, 237 Ill. 374, 86 N. E. 745.

The motion for a peremptory instruction was properly denied.

The judgment of the appellate court will be affirmed.

Cartwright and Dunn, JJ., dissenting.

of Proprietors of Places of Amusement to persons in-
is discussed in the notes to *Horney v. Nixon*, 110
Woodward v. Miller, 100 Am. St. Rep. 196; *Mastad*
ren, 85 Am. St. Rep. 449. Recent decisions on this
iams v. Mineral City Park Assn., 128 Iowa, 32, 111
; *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 116 Am.
tt v. University of Michigan Ath. Assn., 152 Mich.
Rep. 423; *Meisner v. Detroit etc. Ferry Co.*, 154
m. St. Rep. 493; *Blakeley v. White Star Line*, 154
n. St. Rep. 496.

Common Carriers who own an island in a navigable
ere places of resort and amusement, and operate a
l carry various excursions: *Meisner v. Detroit etc.*
ch. 545, 129 Am. St. Rep. 493.

Negligence from the Happening of Accidents causing
are discussed in the note to *Cincinnati Traction Co.*
13 Am. St. Rep. 986. The presumption of the exer-
is the subject of a note to *Chicago etc. Ry. Co. v.*
St. Rep. 108.

FIDELITY LIFE INSURANCE COM- PANY.

[242 Ill. 488, 90 N. E. 213.]

Amendment Changing Form of Action.—Under
practice act the plaintiff in an action on an insur-
be permitted by amendment to change his form of
nant to assumpsit after the expiration of the time
licy for bringing suit. (p. 338.)

URANCE—When Becomes Operative—Incontestable
policy of life insurance provides that it shall be in-
it has been in force two years "from the date here-
from the date of the policy, and not from the date
delivery. (pp. 338, 339.)

URANCE—Interpretation Favorable to Insured.—If
e insurance policy is uncertain or ambiguous it is to
avor of the insured and more strongly against the in-
(p. 339.)

URANCE—Incontestable Clause—Default in Pre-
life insurance company accepts an overdue premium,
not thereby made between the parties, but the old
force without any interruption in the running of
make it incontestable. (pp. 339, 341.)

per & Isaacs, for the appellant.

King and Jule F. Brower, for the appellee.

J. This was an action of assumpsit com-
appellee against the appellant in the superior
county upon an insurance policy for three
rs issued by the appellant upon the life of
y, who died on October 19, 1905. The jury
dict in favor of the plaintiff for three thou-

sand two hundred and seventy-five dollars, upon which verdict the court rendered judgment, and the defendant prosecuted an appeal to the appellate court for the first district where the judgment of the trial court was affirmed, and a further appeal has been prosecuted to this court.

The suit was originally commenced in covenant, and as the insured had been dead more than one year (the period fixed by the policy within which suit should be brought being one year), the form of the action, by leave of court, was changed from covenant to assumpsit, and the pleadings were accordingly amended. The appellant urges that the present suit was not commenced within one year from the date of the death of the insured and that it cannot be maintained. The amendment changing the cause ⁴⁹² of action from covenant to assumpsit and amending the pleadings to make them conform to the latter action was properly allowed under section 39 of the practice act: Hurd's Stats. 1908, 1624; *Thomas v. Fame Ins. Co.*, 108 Ill. 91. The court cannot err in permitting the amendment to be made, as changing of the form of action was not the commencement of a new suit.

The defense sought to be made to a recovery on the policy was that the insured, in the application for the insurance, had made certain false statements, which amounted to warranties, relative to his health and medical treatment which he had received prior to the date of the application. The policy contained the following incontestable clause: "If this policy shall have been in continuous force after two years from the date hereof, it shall, in the event of the death of the insured, be incontestable for the sum payable hereunder except for nonpayment of premium." The policy bore date September 30, 1903, and the insured died on October 19, 1905. The policy was therefore incontestable, unless the fact that the policy was not delivered until October 30, 1903, under the clause found in the policy which provided that the policy "shall not be operative or binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the insured," and the further fact that the second premium which fell due September 30, 1904, was not paid until October 1, 1904, showed the policy had not been "in continuous force" for two years from its date. The insured paid the appellant for carrying the said insurance from September 30, 1903, and the policy provided if the policy should remain in continuous force "two years from the date hereof," that is, from September 30, 1903—it should be incontestable except for nonpayment of premium. We do not see, therefore, why the date from which the two years should commence to run should not be held to be September 30, 1903.

the two clauses found in the ⁴⁹³ policy—that which provided if the policy should remain in force for two years from the date hereof,” and the clause that the policy should not become binding on the insured until the first payment should have been made and received—are in conflict with each other and render uncertain from which the two years in which the policy should commence to run, we are to take the clause—that is, that the policy should be in force and remain in continuous force after two years from the date hereof—should be held to control, as that construction would be favorable to the insured, as the rule is in favor of an insurance policy, when uncertain or doubtful, always to be construed in favor of the insured and against the insurance company: *Union Accident Assn. v. Frohard*, 134 Ill. 228, 23 Am. St. Rep. 642, 10 L. R. A. 383; *Terwilliger v. National Accident Assn.*, 197 Ill. 9, 63 N. E. 1034; *Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224, 133 L. R. A. 452; *Switchmen’s Union of North America v. Merchants’ Warehouse*, 227 Ill. 561, 81 N. E. 696. Our conclusion is that the policy became incontestable two years after September 30, 1903, if it continually remained in force from that date for two years.

The plaintiff urged that the policy did not remain continuous for two years, as it is said the policy was forfeited on September 30, 1904, by reason of the failure of the insured to pay the premium due on that day, and that the policy was reinstated by the payment of the premium the next day, to wit, October 1, 1904, a new contract was made between the insurance company and the insured, and that the two years in which the policy should commence to run from that day—that is, from October 1, 1904—instead of from September 30, 1903. The defendant made no objection to this proposition. While the payment of the premium on September 30, 1904, the company could waive the forfeiture of the premium on that day and accept the premium on October 1, 1904, if it saw fit, and if it did waive the forfeiture on the thirtieth day of September ⁴⁹⁴ and accepted it on October 1, 1904, there was no forfeiture, and there was no new contract made between the parties, but the old policy remained in force, and whatever provisions were found in the policy, including the incontestable clause, would control the legal effect of the policy. “If payment of the premium is made, even though not according to the terms of the policy, the company could certainly not thereafter insist on forfeiture for a failure to pay promptly”: *Illinois Central R. Co. v. Wells*, 200 Ill. 445, 65 N. E. 1072.

In *Lindsey v. Western Mutual Aid Society*, 84 Iowa, 50 N. W. 29, there was a change in the law between the time of the issuance of the policy and the time of the loss under the policy, which forbade the naming as beneficiaries of certain persons named as beneficiaries in the policy who were named theretofore and when the policy was written have been named as such. After the enactment of this law the policy was forfeited for nonpayment of an assessment and reinstated upon payment of the assessment in arrears. Upon the occurrence of the loss the company defended upon the ground that the contract must be regarded as having been made by the company as of the date of the reinstatement, and hence void because in violation of the recently passed law against naming as beneficiaries the persons therein named as such. This contention was overruled by the court, and in so doing the court on page 741, said: "The defendant contends that this forfeiture and restoration created a new contract, and that it was after chapter 65 took effect, the certificate was issued under this statute, the beneficiary named not being husband, wife, relative, legal representative or legatee of the insured member. The reinstatement was not the making of a new contract, for no new or different terms were agreed upon. It was simply a cancellation of the forfeiture, whereby the insured's membership was restored to membership under the contract already existing. No new or different certificate was issued, but defendant continued ⁴⁹⁵ to recognize the certificate as valid upon as the valid and existing contract with the insured."

In *Goodwin v. Provident Savings Life Assn.*, Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157, 32 L. R. A. 473, the company, as in the case at bar, contested an "incontestable policy" upon the ground that the assured committed suicide, which act, by the terms of the policy, rendered the policy void. The policy provided, however, that it should be incontestable after two years from its date. The assured failed to pay a premium when it fell due, but did pay it, and the company accepted it, later. This fact was claimed by the company to create a new contract as of the date of the receipt by the company of the past due premium and that the incontestable clause would begin to run from the latter date. The court, on page 238, said: "The reinstatement was not the making of a new contract, for no new or different terms were agreed upon. It was simply the cancellation of a forfeiture, whereupon the contract was restored and recognized as binding by the company." To the same effect is the decision in *Massachusetts Life Assn. v. Robinson*, 104 Ga. 256, 30 E. 918, 42 L. R. A. 261.

The cases of *Pacific Mutual Life Ins. Co. v. Galbraith*, Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204, and *Tenn. v. United Life Ins. Assn.*, 159 N. Y. 411, 54 N. E. 72,

ent rule from the cases cited. We are of the
er, that the true rule, and the one most in
a the decisions of this court, is announced in
tern Mutual Aid Society, Goodwin v. Prov-
ife Assur. Assn. and Massachusetts Life Assn.
retofore cited. We think, therefore, that the
orce continuously for two years from its date.
renders the policy incontestable, and makes
to consider other questions argued in the

Reversible error in this record, the judgment of
Court will be affirmed.

Causes in Life Insurance Policies are valid and given
ation in favor of the insured: Royal Circle v. Ach-
49, 98 Am. St. Rep. 224. However, a policy of life
s opposed to public policy is not rendered enforce-
estable clause: Bromley v. Washington Life Ins. Co.,
Am. St. Rep. 467. And although a policy of life
s to be incontestable after date of issue for any
ayment of premium, an action thereon is said to be
ense that the assured made material false and fraudu-
ons before the issuing of the policy, sufficient to avoid
gan v. Union Mutual Life Ins. Co., 189 Mass. 555,
559.

of an Insured Person After a Forfeiture of his policy
g of a new contract, where no different terms are
dwin v. Provident Sav. etc. Assn., 97 Iowa, 226, 59
note to Lake v. Minnesota etc. Assn., 52 Am. St.
is held in Pacific Mut. Life Ins. Co. v. Galbraith, 115
m. St. Rep. 862, that the failure of an insured to
conditions of his policy as to the payment of pre-
forfeits all his rights thereunder, so that if the
ntly reinstated with the consent of the insurer, it
ntract as if then for the first time issued.

PEOPLE v. TILDEN.

[242 Ill. 536, 90 N. E. 218.]

Indictment must Set Forth Exact Copy of Instru-
on law requires an indictment for forgery to set
oy of the instrument. To allege its substance only,
(pp. 342, 346.)

Foreman & Beckwith and William S. Forrest,
s in error.

attorney general, and John E. W. Wayman,
for the people.

The plaintiffs in error, William D. Tilden
L. Graham, were convicted in the criminal
county upon an indictment consisting of one

count, which charged that on June 18, 1906, they "unlawfully, feloniously, fraudulently and wickedly did, with intent to defraud a certain corporation, to wit, Milwaukee Avenue State Bank, make, pass, utter and publish a certain false and fictitious note, said note then and there being an instrument of writing for the payment of money and purporting to be the note of Gabriel Artz, which said note in words and figures in substance as follows, to wit:

"\$5000.

Chicago, June 18, 1906

"3 months after date I promise to pay to the order of myself five thousand dollars at the Milwaukee Avenue State Bank, value received, with interest at the rate of six per cent per annum after date.

"GABRIEL ARTZ

"No. — Due ——— U. S. Bond."

"On the back of which said note appears the following: 'Gabriel Artz,' when in fact and in truth, at the time said false and fictitious note was so as aforesaid made, passed, uttered and published, there was no such individual in existence, they, the said William D. Tilden and said Chauncey Graham, then and there well knowing the said note to be fictitious," etc. After verdict finding both the defendants guilty they entered a motion in arrest of judgment, and insisted that it was error to deny this motion because the indictment does not profess to set forth a literal copy of the instrument alleged to be forged and is for that reason bad.

That every indictment for forgery or other crime, the essence of which consists in the publication or fabrication of a written instrument, must, on its face, profess to set out the instrument according to its tenor, except where the instrument is in the possession of the accused, destroyed for some other reason not accessible to the grand jury, in which case the excuse for not setting it out must be distinctly averred, is a rule of criminal pleading sustained by text-books and decided cases almost without exception. The word "tenor" imports an exact copy—that the instrument set forth in the very words and figures: *Griffin v. State*, Ohio St. 55; *Commonwealth v. Wright*, 1 Cush. 46; *State v. Atkins*, 5 Blackf. 458; *Wright v. Clements*, 3 Barn. & C. 503; 27 Am. & Eng. Ency. of Law, 2d ed., 46. It is sufficient, however, if the indictment uses any form of expression indicating that the copy set forth is exact, as, "in the words and figures following," "as follows," "that is to say." The indictment here purports to give the words and figures of the instrument in substance only, and not exactly.

In *Chitty on Criminal Law* (volume 3, page 1040) it is said: "Every indictment for forgery must set forth the instrument charged as fictitious in words and figures, in such a way that the court may be able to judge from the record whether

ent in respect to which forgery can be com-
The recital of the instrument is usually pref-
ords 'to the tenor following,' which imports an
t the words 'as follows' are sufficient. They
e and profess the same exactness."

law written instruments, wherever they form
st of the offense charged, must be set out ver-
n the case of forgery the instrument forged
and 3 William IV, chapter 127, section 3
een set out in the indictment in words and
ould on Criminal Pleading, Practice and Evi-
74.

on Criminal Pleading and Practice the rule is
where the words of a document ⁵³⁹ are essen-
of the offense, the document should be set out
figures: Secs. 167-170. And the same author
riminal Law (volume 2, section 1468) says:
at should not only set forth the tenor of the
ged, but should profess to do so. The instru-
as fictitious must be set out in words and
the court may be able to judge from the rec-
be an instrument in respect of which forgery
ed." The same rule is announced in 2 Bishop
al Procedure, section 403.

ist no doubt that it is necessary to the suffi-
dictment for forgery at common law that it
h the instrument forged with strict verbal
rule has been announced and uniformly fol-
urts of England and the various states of this
e federal courts, for a great many years. In
ounced by the king's bench in the case of Rex
. Raym. 464. It was again decided in Rex v.
173; Mason's Case, 1 East, 180n; Loyd's Case,
Gilchrist's Case, 2 Leach C. C. 657; Rex v.
h C. C. 77. It continued to be the require-
ments for forgery until a statute (2 and 3
apter 123, section 3, afterward replaced by 24
a, chapter 98, section 42) made it unnecessary
copy of the forged instrument: Regina v.
& P. 427; Regina v. Sharpe, 8 Car. & P. 436;
rimes, 796. The same rule has been declared
ber of decisions of the courts of this country:
5 Fla. 118, 33 South. 854; State v. Callendine,
ate v. Atkins, 5 Blackf. 458; Hill v. Common-
33 S. W. 823; Commonwealth v. Houghton, 8
nmonwealth v. Wright, 1 Cush. 46; Common-
ox, 1 Cush. 66; State v. Bonney, 34 Me. 383;
n, 47 Me. 165; State v. Gustin. 5 N. J. L. 744;
9 N. J. L. 26, 17 Am. Dec. 449; State ⁵⁴⁰ v.

Twitty, 9 N. C. 248; State v. Dourdon, 13 N. C. 443; D. v. State, 2 Ohio St. 91; McMillen v. State, 5 Ohio, 268; Commonwealth v. Sweeney, 10 Serg. & R. 173; State v. Jones, McMull. 236, 36 Am. Dec. 257; State v. Brownlow, 7 Hur. 63; Croxdale v. State, 1 Head, 139; Thomas v. State, 18 App. 213; Smith v. State, 18 Tex. App. 399; Edgerton v. State (Tex.), 70 S. W. 90; State v. Parker, 1 D. C. 298, 11 Am. Dec. 735; State v. Morton, 27 Vt. 310, 65 Dec. 291; United States v. Fisler, 4 Biss. 59, Fed. Cas. 15,105; United States v. Britton, 2 Mason, 464, Fed. Cas. 14,650; United States v. Smith, 2 Cranch C. C. 111, Fed. Cas. No. 16,326. In those cases in which it has not been required that the indictment shall set forth a copy of the instrument forged according to its tenor the decision has been based upon a statute making it unnecessary: Bostick v. State, 34 Ala. 266; McGuire v. State, 37 Ala. 161; Jones v. State, 50 Ala. 161; State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158; State v. Pons, 28 La. Ann. 43; State v. Nelson, 28 La. Ann. 46; Commonwealth v. Hall, 97 Mass. 570; Commonwealth v. McKeen, 98 Mass. 9; State v. Clinton, 67 Mo. 29 Am. Rep. 506; State v. Fay, 65 Mo. 490; Chidester v. State, 25 Ohio St. 433; State v. Childers, 32 Or. 119, 49 Am. Dec. 801; Coleman v. Commonwealth, 25 Gratt. 865, 23 Am. Dec. 711; State v. Henderson, 29 W. Va. 147; State v. Wright, 37 Wash. 96, 37 Pac. 313; State v. Hill, 30 Wis. 416; Sant v. State, 6 Wyo. 110, 71 Am. St. Rep. 906, 42 Pac. 746.

It is insisted on behalf of the people that the instrument is set forth in the indictment in *haec verba* and that this is sufficient, and the cases of Langdale v. People, 100 Ill. 523, and Trask v. People, 151 Ill. 523, are cited. In the latter place, it may be said that the indictment does not profess to set out the instrument in *haec verba* but only in substance. Further, the cases cited do not decide any question whatever as to the indictment. The only question considered is the reference to the description of the instrument set out in the indictment in either case is one of variance. In the Langdale case the indictment professed to set out an exact copy of the fictitious instrument, and in introducing the discussion of the question of a variance in the ⁵⁴¹ instrument produced this language appears in the opinion: "While it was not at all necessary to set out the order in *haec verba* in the indictment, yet when the pleader undertook to do so and averred that it was in the words and figures as follows, he was bound to set out each and every part of the written instrument which constituted any part of the written contract." The first clause above quoted, "while it was not at all necessary to set out the order in *haec verba* in the indictment," has nothing whatever to do with the case. That question was not in the record. The instrument was set out. The state

remark made by the way, upon a question not
t, without argument and manifestly without
or it was directly contrary to the well-estab-
such case. The same language was used in pre-
way in the Trask case, and the Langdale case
thority. The point decided in both cases was,
ader undertook to set out the instrument, he
very part of the written instrument which con-
t of the written contract. It was not decided
necessary to set out the written instrument.
rule of law cannot be changed by remarks
ent in a case in which that rule is not a matter
n. No case from this or any other court has
which, in the absence of a statute, an indict-
sustained for the fabrication of a written in-
the indictment did not profess to set out an
ne instrument. We have found none ourselves
of State v. Curtis, 39 Minn. 357, 40 N. W.
of Commonwealth v. Parmenter, 5 Pick. 279,
, be considered as inferentially supporting
ent, though the question there arose not upon
but upon the question of variance. If it is
ded, however, its authority is completely de-
ceases of Commonwealth v. Wright, 1 Cush. 46,
ealth v. Tarbox, ⁵⁴² 1 Cush. 66, which ex-
at that case "ought not to control the uniform
English decisions, supported by respectable
priorities."

of State v. Curtis, 39 Minn. 357, 40 N. W.
l, the supreme court of Minnesota by the de-
judges, two dissenting, held good an indict-
y which did not set out the forged instrument.
nce or according to its tenor, but described it
ng its date, amount, the name of the drawer
not the name of the drawee. The opinion,
n authority or mentioning the rule of the com-
had been in force for more than two hundred
that law is administered, unless changed by
e indictment good because the instrument was
aying: "When it is designated as a check, and
it is stated to have a drawer and payee and
ific sum, it appears that it was drawn on some
as certainly as though the name of the bank
given, for without a drawee it could not be a
the court accepted the pleader's construction
ent and assumed that it was a check because
e indictment. This was precisely the thing
non-law rule was intended to prevent by re-
ader to set the instrument out, so that the de-

fendant could demand, from the face of the record, the judgment of the court as to whether the instrument was a check or other instrument as to which a forgery could be committed and not be bound by the judgment of the drawer of the instrument. So far as we are advised, no other court has made a similar decision, but all have agreed in holding that the common-law rule was well established and could be changed by statute only.

The rule under consideration is technical, but we cannot disregard it for that reason. It has been universally recognized, and, though strict, is not without reason to justify. The court cannot know that a forgery has been ⁵⁴³ committed without an examination and construction of the instrument alleged to be forged. No court would undertake to construe a written instrument from a statement of its substance without having before it the whole instrument in its exact language. A forgery cannot be committed unless the forged instrument, if genuine, might be prejudicial to some one. How can a court know whether an indictment charges a forgery unless it knows the language of the alleged forged instrument? If the pleader's allegation of the substance of the instrument is accepted, the defendant is bound by the pleader's construction instead of the court's. The legislature has not seen fit to change the rule. We have no power, if we had the desire to do so. Changes in the law do not originate in the courts but in the legislature. Whatever may be the character of the rule, it is well established, and it is clearly the duty of the courts to enforce it. They are bound to administer the law as they find it. If a change in the rule of law under consideration is necessary to the promptness and certainty of the course of justice, it is the province of the legislature, and not of the courts, to make the change. The law requires the indictment to set forth an exact copy of the alleged fictitious instrument and a substantial copy is not sufficient.

Other objections to the indictment and alleged errors in the trial are urged upon our attention, but as they will probably be avoided in a future prosecution, it is not necessary to consider them.

The judgment is reversed, and since no conviction could be had upon this indictment, the cause will not be remanded but the defendants will be discharged.

In a Statutory Indictment for Forgery it is sufficient to charge the crime in the words of the statute. If the indictment charges that on a certain day, at a certain place, the defendant, "with intent to defraud," did then and there feloniously "forge" a certain promissory note of the tenor following, and then sets it out in full, a "particular offense" is charged, "in plain and concise language," and the defendant is sufficiently informed "of the nature and cause of the accusation against him" as required by law: *State v. Greenwood*, 76 Minn. 77 Am. St. Rep. 632.

COLEMAN v. CONNOLLY.

[242 Ill. 574, 90 N. E. 278.]

TESTORS AND TRUSTEES—Delegation of Power to Sell.—Delegated by will in executors and trustees is a personal power which cannot be delegated to an agent, although they may employ a purchaser. (pp. 350, 351.)

TESTORS—Power of One of Several to Execute Power.—Where a number of executors to execute a power of sale, and one of them failed to qualify but refused to do so, the others not only failed to qualify but refused to do so.

TESTORS—Execution of Power of Sale.—A power to sell conferred upon a testator upon his two daughters as trustees and they were presumed to have been conferred by reason of the fact that in them by him, and can be executed only by both jointly. (pp. 351, 352.)

TESTORS—Authority of One to Execute Power of Sale.—A testator appoints two of his daughters as executrices and empowers them to sell land, and provides that in case of the death of either they may act alone until a third daughter becomes of age, after which she reaches her majority, "the power of either alone ceases when the third daughter becomes of age, and then becomes a cotrustee. (pp. 351, 352.)

TESTORS—Power to Authorize Agent to Sell Land.—If a testator empowers an agent to sell land, but the contract made until another person qualifies as coexecutrix, and she recognizes the agreement, the agent's authority terminates.

VALIDITY OF Agent's Sale.—Trustees and Executors are not bound to have ratified an agent's sale of land, by their failure to receive the proceeds without their knowledge. (p. 353.)

ACCOUNTING FOR RENTS.—Where a Bill in Partition is brought, and the defendants are in possession claiming ownership with a third person and refuse to deliver possession, the court, after ordering partition, may decree an accounting against the defendants of the property. (p. 353.)

Newhall, for the appellants.

for the appellees.

R. C. J. Appellees, John J. and Mary A. Coleman, filed a bill in the circuit court of Kane county for lot 3, block 10, Clark Seminary addition to Chicago, Ill., alleging that John J. Coleman was the owner of one-fourth and Mary A. Coleman the owner of three-fourths of the premises; that Mary A. Coleman derived title to the whole of the premises by purchase from Anastasia Cummings Healy and Margaret Cummings individually and as executrices and trustees of the last testament of Pierce Cummings, deceased, who was the owner of the property, and that there-

after Mary A. Coleman conveyed an undivided one-fourth interest to John J. Coleman, her husband. The bill further alleged that at the time the complainants therein purchased the property James Connolly and Mary Connolly were occupying it by virtue of a pretended receipt from one J. P. Callan that on the 15th of February, 1907, the complainant Mary A. Coleman demanded possession in writing from James and Mary Connolly, but they refused to deliver it to complainant and claimed to own or have an interest in the premises by virtue of the receipt from Callan, executed prior to the purchase by the complainant Mary A. Coleman; that Callan claimed to have executed the receipt referred to as agent for Anastasia Cummings Healy and that it was executed prior to the purchase by Mary A. Coleman. The bill further alleged that Callan had no authority to execute the paper or to make a contract of sale to the premises with the Connollys; that they acquired no rights by virtue of said paper and had no interest in or title to the premises. The prayer of the bill was for partition and that the Connollys be decreed to account to the complainants for the occupancy of the premises.

The Connollys (appellants here) answered the bill, denying that complainants were the owners of the property, and alleging that on the 29th of July, 1904, they (respondents) purchased the real estate in controversy from Anastasia Cummings Healy, who was then sole executrix and trustee under the will of her father, through J. P. Callan, her agent, for the sum of one thousand dollars; that they paid sixty dollars at the time and on March 1, 1905, entered into possession; that they have made valuable improvements on the premises and have always been ready and willing to pay the balance ⁵⁷⁷ upon receipt of a good and sufficient deed; that they requested the execution of the deed and offered to pay the balance due upon its receipt, but the deed has never been delivered. They further allege that they are now willing to offer, to pay whatever sum the court may find is the balance due, upon delivery to them of a deed. The answer further avers that appellees had notice of the rights of appellants at the time they acquired a conveyance of the premises, and that they ought, in equity, to be decreed to convey to appellants the premises on payment of the balance due. The appellants also filed a cross-bill, setting up substantially the same facts recited in their answer, and praying that appellees be decreed to specifically perform the contract for the sale of the premises made by appellants with Anastasia Cummings Healy, through her alleged agent, Callan.

The evidence was heard before the chancellor, and a decree was entered on the original bill for partition, and that appellants be required to account to appellees for the detention and

from the time appellee Mary A. Coleman conveyed therefor. The decree found the rental of the premises during that period to be twelve dollars and directed payment of that sum to be made to her. The decree further found that Callan had no authority to make a contract with appellants for the sale of the premises, and that they obtained no interest in the property. The bill was dismissed for want of equity.

At the time of his death was the owner of the premises described in the bill. He left surviving him three daughters, Anastasia Cummings (now Anastasia Beth Cummings) and Margaret Cummings (now Margaret Cummings). The latter was the youngest of the three daughters and died at the time of her father's death. By his will the Cummings devised his residuary estate (which included other real estate, ⁵⁷⁸ the lot in controversy) to his three daughters. The will provided that in case of the death of any of them then the property should go to the survivors. The trustees and executrices of the will were given power and authority to take charge of the estate, keep the same in repair and collect the rents and profits in their discretion, if deemed for the best interest of the estate, to sell the property, full power and authority to execute, make conveyances and do everything necessary in the purchase being expressly conferred. Anastasia and Elizabeth were appointed executrices. A clause appointing them reads as follows:

"I hereby nominate and appoint my two children, Anastasia and Elizabeth Cummings to be the executrices of my last will and testament and my trustees for the execution of the provisions of this will, and in case of the death or disqualification or the failure to act of any one of the said executrices and trustees, then I appoint as her successor my daughter Margaret, who shall qualify after she attains her majority, and pending which time such of my said children as has qualified hereunder may act as executrices in case of the death or other disqualification of any of my said children then the survivor shall act as such trustee under this will; and any discretionary powers before granted to my executrices or trustees shall remain in any one or more of my said children who may be appointed executrices or trustees under this will at such time as the death of such one or more may require the exercise of such powers. And I direct that none of my said children be required to give any bond or security as such trustees, as aforesaid."

Anastasia Cummings died October 21, 1893, and letters were granted to her daughters Anastasia and Elizabeth on October

31, 1893. Elizabeth died September 12, 1896. At that Margaret was a minor and did not become of ⁵⁷⁹ age the year 1899 or 1900. The proof is not definite as to exact time she attained her majority. After the death of daughter Elizabeth, and until the daughter Margaret attained her majority, Anastasia was sole executrix and trustee. Letters full power to carry out the provisions of the will. Letters testamentary were not issued to the daughter Margaret until July 28, 1904. The appellants claim title to the premises in controversy by virtue of authority they allege Anastasia Cummings Healy gave Callan, as her agent, to sell the property before letters testamentary were issued to the daughter Margaret. It is not claimed that authority to make the sale was given by Anastasia Cummings Healy before Margaret attained her majority. It is not denied that the alleged authority was given by Anastasia Cummings Healy to Callan to sell the property was long after Margaret had attained her majority, but it is claimed before she had qualified as executrix. The alleged authority to Callan to make the sale of the property is in a letter written to him by Anastasia Cummings Healy on June 23, 1904. The letter states that the writer appoints Callan her general agent and attorney to transact all her business in connection with the settlement of her father's estate, and authorizes him to rent the property and collect the rents, keep the property in repair, insure it and to sell certain real estate, including the lots in controversy. It will be seen this letter was written four or five years after Margaret had attained her majority and one month and five days before she qualified as executrix. The contract for the sale of the premises to appellants by Callan was made July 29, 1904, which was one day after Margaret had qualified as executrix. The only written evidence of the contract with appellants is the following:

"Aurora, Illinois, July 29th, 1904.

"Received of James Connolly \$60 to apply on purchase of the Cummings house and lot, No. 442 or 446 South Broad Street, Aurora, Illinois. Price of house and lot to be \$1000.

"STESSIA CUMMINGS HEALY,

"Executrix

"J. P. CALLAN,

"Agent

⁵⁸⁰ The first question to be determined is whether appellants obtained any rights by virtue of the alleged contract made by them with Callan for the purchase of the premises July 29, 1904. We think this question must be answered the negative. The power of sale was vested by the will in the trustees and executrices. It was a personal trust and confidence reposed in them and could not be delegated to an agent. It would have been competent for the trustees

employ an agent to find a purchaser, but the contract therefor could only have been made by the testator, it seems plain from the will of Pierce Cummins that the power of sale conferred upon the trustees and the one therein named was never intended by him to be, or to have been, executed unless by both trustees and the testator, except, as provided in the eleventh clause, that if the two older daughters named should die while the testator was still a minor. In that event the surviving trustee was authorized to exercise all powers conferred upon the trustees until the youngest daughter, Margaret, attained her majority, "who shall qualify after she reaches her majority." There is no intimation in the evidence that the testator at any time ever refused to qualify. The will executed by the trustees and executrices from any duty or liability and the only thing necessary for Margaret to qualify was to apply for and have letters issued to her, which she did, but not immediately upon attaining her majority. *Clinefelter v. Ayres*, 16 Ill. 329, will be found in the discussion of the right of one of a number of trustees to execute a power of sale conferred by the will when the named as coexecutors failed to qualify. The authorities in English and American, are reviewed in the opinion. It was held that in order to entitle the one executor to execute the power, it must be shown, not only that the named as coexecutors failed to qualify, but that the testator did so. In that case the record recited that the named as coexecutors declined acting, but it was held insufficient. *Pennsylvania Company for Insurance on Lives v. Ayres*, 149 Pa. 459, 33 N. E. 156, the court said on page 474: "It is essential that the named as coexecutors to a will cannot exercise a power of sale conferred upon them unless it is shown that the others refused to act, and that refusal must be shown positively and affirmatively by an unequivocal manifestation by the executors that they were given in order to divest themselves of the power, and powers conferred, not by the law, but by the will of the testator"; citing *Clinefelter v. Ayres*, and other cases. The two older daughters were named as executrices but as trustees also, and as such the power of sale was conferred upon them. As trustees, it was required of them to qualify. To authorize the testator to charge the duties of executrices it was necessary that a testamentary be issued. After the death of the testator and the attaining of her majority by the daughter, she became a cotrustee with her surviving sister, and it was necessary to a valid sale that she join in it. The power of sale conferred upon the trustees and executrices must be presumed to have been con-

ferred by reason of the trust and confidence reposed in by the testator, and could be executed only by all those whom it was conferred acting jointly: *Stose v. Heissler*, Ill. 433, 60 Am. Rep. 563, 11 N. E. 161.

There is an additional reason in this case why we think the agreement made by appellants with Callan for the purchase of the property was invalid. Said agreement was not made until after Margaret had qualified as executrix. She refused to recognize the agreement between appellants and Callan and declined to agree to a sale to appellants or to join in the conveyance to them. If it were conceded that Anastasia Cummings Healy had power to sell and convey at the time she claimed she authorized Callan to sell the property, she made no contract for its sale to appellants ⁵⁸² until after Margaret had become a qualified, acting coexecutrix, and this would necessarily terminate any authority Callan might have derived from Anastasia Cummings Healy prior to that time on the theory that she was sole executrix and trustee.

It is next contended that even if Callan had no authority to make the agreement with appellants for the sale of the property at the time he did make it, it was afterward approved and ratified by both trustees and executrices, and therefore became a valid and binding agreement upon them. It appears that Margaret Cummings Byrne objected to Callan acting as agent for the trustees and executrices in any capacity, and on the nineteenth day of January, 1905, they, together with their mother, who was entitled to a share in the proceeds of the property under the will, executed an instrument by which they agreed to appoint F. H. Hotz their attorney and agent. The fourth clause of said instrument is as follows:

"Fourth—It is further agreed that the said parties shall make and execute a more formal power of attorney to said agent to carry out the provisions of this contract, and it is agreed that said agent shall pay all just bills which may be due for repairs, improvements or taxes on any of the said property, estate, and that all moneys in the hands of J. P. Callan, C. A. Bennett for collections of rents or for sales of said property, estate subsequent to June 23, 1904, shall be immediately turned over to the said agent."

Callan testified that after the execution of the instrument he paid Hotz the sixty dollars received from appellants under the agreement made by him with them for the sale of the property. It is contended that the receipt of this money by the trustees and executrices through their agent, amounted to an approval and ratification of the contract for the sale to appellants, and that as this occurred before the property was sold to appellees, they were bound, in equity, to execute a deed to appellants upon their paying or tendering the balance

money due. It is also contended that appellants to take notice of the rights of appellants, were in possession of the property before and trustees purchased it. We do not think this possible for the reason that there is no evidence tending to show that the trustees and executrices had any knowledge of the property or ever received any money whatever from the purchase of the property or executed to them a receipt of the receipt of any money. There is no evidence when the agreement was made appointing and authorizing him to receive moneys from the sale of property the trustees and executrices received any money from the sale of the property. It was essential that knowledge on their part could have been proven before the acceptance of the bill by Hotz could be considered upon the question: *Cadwell v. Meek*, 17 Ill. 220; *Mathews v. Reynolds*, 470; *Reynolds v. Ferree*, 86 Ill. 570.

It is also claimed that there was no privity of contract between the appellants and appellees, and that it was therefore no error for the court to decree an accounting for the rent.

The bill prayed for an accounting as an equitable relief that was cognizable only in a court of equity having jurisdiction of the parties and the subject-matter for the purpose of administering equitable relief to adjudicate all the rights of the parties. Some of those rights may have been cognizable in a court of law: *Hadley v. Morrison*, 39 Ill. 392; *Dowell*, 114 Ill. 255, 2 N. E. 56; *Stickney v. Pomeroy*, 23 N. E. 1034; 1 *Pomeroy's Equity Jurisprudence*.

Under the decree of the circuit court is supported by the evidence, and it is affirmed.

One of Several Executors is the subject of a note to the effect that in *Weeks v. Hosch Lum*, 127 Am. St. Rep. 381. In *Weeks v. Hosch Lum*, ante, p. 213, it is held that a special trust as to land, conferred by will on three executors, and by one of them selling and making a deed; and that the deed cannot be upheld by parol evidence tending to show that the executors took no active part in administering the estate, where the executor making the conveyance was the managing executor.

CARLIN v. GRAND TRUNK RAILWAY COMPANY

[243 Ill. 64, 90 N. E. 201.]

RAILROAD CROSSING—Duty of Person About to Cross

A railroad crossing is a dangerous place, and it is the duty of a person about to cross a railroad track to approach it cautiously and use reasonable care to avoid accident. (p. 355.)

RAILROAD CROSSING—Instruction on Contributory Negligence.—Where there is evidence, in an action against a railroad company for an injury at a crossing, tending to show that the injured person went under the safety gates and upon the track where he was struck by a train, the defendant is entitled to an instruction applying the law to these facts, notwithstanding a general instruction has been given on the question of contributory negligence. (pp. 355, 356.)

RAILROAD CROSSING—Safety Gates—Duty of Traveler.—A person about to cross a railroad track is bound to know that danger exists, and to approach the track with care proportionate to the danger, notwithstanding safety gates have been installed by the railroad company. Although he may rely upon the giving of customary signals, he must exercise due care himself. (p. 356.)

Kretzinger, Rooney & Kretzinger, for the appellant.

⁶⁵ **DUNN, J.** Hans P. Schmidt was killed by a passenger train of the appellant at the Loomis street crossing of a railroad company's railroad, in the city of Chicago. Appellee, his administratrix, brought suit for the benefit of his widow and children of kin against the appellant and recovered a judgment, which was affirmed by the appellate court for the first time. This appeal is from the judgment of affirmance.

Loomis street runs north and south and at the place where the deceased was killed is crossed by four railroad tracks. The accident happened a few minutes before 9 o'clock in the evening, and the train which struck deceased was running east on the most southerly of these tracks. There were crossing gates north and south of the railroad tracks, operated from a tower between the two middle tracks. The deceased came from the north along Loomis street. The evidence was conflicting as to whether the crossing gate was down before the deceased passed it, the testimony on behalf of the plaintiff tending to show that it did not come down until he was between the two middle tracks, while that for the defendant tended to show that the gate was down when the deceased came to it and that he stooped down and passed under the gate. There was evidence tending to show that the witness was blown at Western avenue, a mile west of Loomis street, and at Ashland avenue, four blocks west; that the bell was ringing and that there was a bright headlight on the engine which could be plainly seen for five blocks before the train reached Loomis street. The evidence as to the speed of the train was conflicting, the plaintiff's evidence tending to show that it was running at a very high rate of speed, great in excess of the rate permitted by the ordinance of the city.

defendant's evidence tended to show that the speed was less than that permitted by the ordinance.

The question presented for our consideration is as to whether the court in refusing to give to the jury the instruction which was asked by the appellant: "We instruct the jury that every person is bound to exercise due care when crossing a railroad crossing is a dangerous place, and he is negligent unless he approaches it as if it were so, and if the jury believe, from the evidence, that the gates at the crossing in question were down and the deceased went upon the tracks underneath the gates, and failed to exercise due care for his personal safety, the consequence thereof was struck by an engine and the deceased's administratrix cannot recover in this action, the jury should find the defendant not guilty."

No argument or citation of authority to show that a railroad crossing is a dangerous place, and that it is the duty of a person about to cross a railroad track to approach it cautiously and to use reasonable care to avoid it, was given. The instruction stated this rule correctly to the jury, and left to their determination the questions of whether the gate was down and the deceased went under it in so doing he failed to exercise due care for his personal safety, and whether it was in consequence of such negligence he was struck by the engine and killed. Appellant's evidence that the deceased stooped down and went under the crossing after the gate was down, and that his negligence in so doing was negligent and resulted in his being struck by the train. There was evidence tending to sustain the instruction and the appellant therefore had a right to have it given as to the law applicable to it. Other instructions were given informing the jury that there could be no recovery if the deceased was guilty of negligence in going under the crossing at the time of the accident. Such instructions, however, were abstract in character. The refusal to give the instruction directed the attention of the jury to a controlling issue in the case and to the evidence on that issue. Notwithstanding the giving of such an instruction of a general character, this instruction, applying to the facts which there was evidence tending to prove, was not given: *Fowler v. Chicago etc. R. R. Co.*, 15 N. E. 298; *Chicago City Ry. Co. v. O'Donnell*, 70 N. E. 294, 477; *Mallen v. Waldowski*, 203 N. E. 409; *Chicago etc. R. R. Co. v. Camper*, 199 N. E. 448.

It is insisted by the appellee that the first sentence of the refused instruction is not the law in this case, because the deceased had a right to rely upon the performance by the appellant of its duty to lower the gates on the approach of a train, and therefore was not bound to approach the crossing as though it was dangerous. *Chicago etc. Ry. Co. v. Clo*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184, and *Chicago etc. Ry. Co. v. Blaul*, 175 Ill. 183, 51 N. E. 895, are cited in support of this contention. These cases hold that one about to cross a railroad track where a flagman is employed has a right to rely upon his reasonable performance of his duty to give warning of the approach of trains. They do not hold that railroad crossings where flagmen are employed or where gates have been installed are not dangerous or that persons approaching such crossings are under no obligation to exercise due care for their safety. All reasonable persons know that a railroad crossing is a place of danger. The use of gates or other means of warning to the public reduces the danger, but a person about to cross the tracks is bound to know that danger exists and to approach the tracks with care proportionate to the danger. He may rely upon the giving of customary signals but he must exercise due care himself. Whether the acts of the deceased amounted to due care or showed a lack of ^{or} due care, and whether the accident was occasioned by his negligence, were questions of fact which were properly submitted to the jury.

For the error in refusing this instruction the judgment of the appellate court and the circuit court are reversed and the cause is remanded to the circuit court.

A Person About to Cross a Railroad Track has a right to assume that notice of the approach of trains will be given, and he cannot be held guilty, as a matter of law, of contributory negligence in going across the track without stopping, looking, or listening for approaching trains. Some authorities, however, seem to adopt a stricter rule. *Louisville etc. R. R. Co. v. McNary*, 128 Ky. 408, 129 Am. St. Rep. 308, and cases cited in the cross-reference note thereto. As to the presence of safety gates at a railroad crossing modifying the duty of a traveler in the highway to be on the lookout for approaching trains, see *Slattery v. New York N. H. & H. R. R. Co.*, 133 Mass. 453, 133 Am. St. Rep. 311; *Weaver v. Southern Ry. Co.*, 76 Ga. 49, 121 Am. St. Rep. 934; *Messinger v. Pennsylvania R. R. Co.*, 148 Pa. 497, 114 Am. St. Rep. 970; *Koch v. Southern California Ry. Co.*, 148 Cal. 67, 113 Am. St. Rep. 332.

PEOPLE v. WEIL.

[243 Ill. 208, 90 N. E. 731.]

AL LAW.—A Verdict of Guilty on the Second Count is equivalent to a verdict of not guilty on the first counts under that count from the case so that error cannot be assigned in any ruling in reference to it. (p. 359.)

AL LAW.—Right of Defendant to Bill of Particulars. The state's attorney should be required to furnish a bill of particulars under a count charging a confidence game rests in the discretion of the trial court. (p. 360.)

AL LAW.—Election Between Offenses.—The right to elect an offense for which the state's attorney to elect for which offense he will ask the jury, when more than one offense is charged in different counts, is confined to offenses actually distinct from each other and not arising out of the same transaction. (p. 360.)

AL LAW.—Witnesses not Indorsed on the Indictment. The discretion of the court in a criminal trial to allow a witness whose name is not indorsed on the back of the indictment to exercise this discretion will not be reviewed on appeal if the defendant has been taken by surprise, and the burden is on him to show surprise. (p. 360.)

AL LAW.—Witness not Indorsed on the Indictment.—The state's attorney notifies the attorney for the accused in the indictment that witnesses whose names are not indorsed on the back of the indictment will be called at the trial, the court does not have to call such witnesses to testify. (p. 360.)

AL LAW.—Evidence of Other Offenses.—In a prosecution for a confidence game it is proper to prove that the accused had been employed by other persons by the same confidence scheme by evidence of money of the prosecuting witness, in order to show a pattern. (p. 360.)

—Instructions not Incorporated in Abstract.—The court will not review an assignment of error upon rulings of the trial court upon instructions which are not incorporated in the abstract. (p. 361.)

—Improper Remarks of Counsel, Exception to.—The court will assign as error improper remarks of the state's attorney to the jury, unless he objects to them when made and reserves an exception to the ruling of the court or to its refusal to grant an exception. (p. 361.)

—Improper Remarks of Counsel, Exception to.—The court will assign as error improper remarks of the state's attorney for the accused "I except to the statements of the witness," or words to that effect, without any ruling of the court as to the exception to the failure of the court to rule upon the exception, will not preserve for review in the supreme court an exception to the ruling of the court. (p. 361.)

CONFIDENCE GAME.—Dealings in Form of Business Transactions.—The fact that the dealings between the parties assume the form of a business transaction and its breach involves a breach of contract does not relieve of criminality the party who entered into it in connection with a false and fraudulent scheme to obtain money from the other party; it is a confidence game, notwithstanding its contractual form. (p. 362.)

CONFIDENCE GAME.—What Constitutes.—One Who Represents himself as a friend of an acquaintance of the latter, and who is in the employ of a local company and has just been discharged, and upon these representations, which are false,

obtains money, and leaves an I O U and a worthless watch as security and promises to return the money the next day, is guilty of a confidence game. (pp. 362, 363.)

Stedman, Soelke & Shutan, for the plaintiff in error.

W. H. Stead, attorney general, John E. W. Wray, state's attorney, Joel C. Fitch, Robert E. Crowe and Frederick Burnham, for the people.

209 HAND, J. At the March term, 1909, the grand jury of Cook county returned into the criminal court of Cook county against the plaintiff in error an indictment containing two counts. The first count charged the plaintiff in error with having obtained from Thomas E. Brabenec the sum of thirty dollars by false pretenses, in violation of section 98 of the Criminal **210** Code; and the second count charged plaintiff in error with obtaining a like amount from said Thomas E. Brabenec by means of the confidence game, in violation of section 98 of the Criminal Code. After a motion to quash the indictment, and each count thereof, had been overruled, a plea of not guilty was entered, and upon a trial a verdict was returned finding the plaintiff in error guilty under the second count of the indictment, and upon which verdict, after overruling a motion for a trial, the court sentenced the plaintiff in error to the penitentiary, and he has sued out the writ of error to review said judgment of conviction.

The undisputed evidence shows that Thomas E. Brabenec was in the employ of the Clinton Wire Cloth Company as cashier, whose place of business was at No. 30 River street in the city of Chicago; that at about 6 o'clock on the evening of December 5, 1907, the plaintiff in error went to the business place of said Clinton Wire Cloth Company in company with a man whose name he said was Moore; that the business place of the Clinton Wire Cloth Company was closed for the day and Thomas E. Brabenec was in the office alone; that the plaintiff in error knocked on the office door; that Brabenec went to the door, where he found the plaintiff in error, who was a well-dressed man and presented a favorable appearance, and admitted the plaintiff in error and Moore to the office, whereupon the plaintiff in error said to Brabenec whose name was Watson, and he inquired for Mr. E. F. Schmidt, the former cashier of the Clinton Wire Cloth Company, who he said, was his friend; that on being informed by Brabenec that Mr. Schmidt had severed his connection with the Clinton Wire Cloth Company and was not in its employ, plaintiff in error said he was in the employ of the American Wire Fence Company, of the city of Chicago, and that while he was crossing the Rush street bridge he had just lost his pocket-book; that after some conversation between **211** the parties the plaintiff in error asked Brabenec if he could

some money—a few dollars. Brabenec asked what he wanted, and he said about \$10. Brabenec went to the safe, where he had \$35 which he had drawn as cash from the package containing the money and took a \$10 bill from the package and laid it on the counter. The plaintiff in error thereupon picked up a card and wrote an order for \$10 and signed it "J. R. W., 184 La Salle" and said he would send the money over by the next morning. As Brabenec laid out the \$10 bill, the plaintiff in error said, "Can you let me have \$20?" and Brabenec changed the I O U to \$20, and when Brabenec laid out \$20 he changed it to \$30," and changed the I O U to \$30, and gave the plaintiff in error a pocket watch which he removed from his fob, saying, "I will leave this watch with you for security," and the plaintiff in error paid up the \$30. Brabenec placed the watch and the balance of his money in the safe and the plaintiff in error left the office. The plaintiff in error did not get the money, as he had agreed to, on the next morning. It turned out on investigation that his name was not J. R. W., that he did not know Mr. Schmidt, that he was not in the employ of the American Wire Fence Company, that the watch which he gave Brabenec was worth at most \$10, and that the scheme he worked on Brabenec was not the first time before he obtained Brabenec's money, but that he had obtained it from Frank T. Dicey, of whom he obtained \$10.

The main contention of the plaintiff in error is that the court erred in overruling his motion to quash the indictment on the second count thereof. The verdict of guilty on the second count is equivalent to a verdict of not guilty on the first count. See *People v. Whitson*, 74 Ill. 20; *Keedy v. People*, 84 Ill. 477; *People v. People*, 113 Ill. 531. By the verdict the first count was eliminated from the case, and error cannot be assigned on any of the rulings of the court with reference to the second count as it was in the language of the indictment a good count: *Graham v. People*, 181 Ill. 477, 47 L. R. A. 731. The court did not err, therefore, in overruling the motion to quash.

The plaintiff in error urges that the court erred in overruling the motion to quash the indictment on the second count of the indictment. Whether or not the court should have been ruled to furnish the plaintiff in error a bill of particulars under the second count of the indictment was a matter which rested in the sound legal judgment of the trial court. The second count of the indictment was sufficiently specific to notify plaintiff in error of the offense with which he was charged, and the court did not err in overruling his motion for a bill of particulars: *People v. People*, 47 Ill. 468; *Du Bois v. People*, 200 Ill.

157, 93 Am. St. Rep. 183, 65 N. E. 658; Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

It is also contended that the court erred in declining to require the state's attorney, at the close of the people's case, to elect upon what count of the indictment he would ask for a conviction, and in permitting the state's attorney to call witnesses whose names were not upon the back of the indictment. If two or more offenses are properly joined in a single indictment under separate counts and grow out of the same transaction, the state's attorney will not be required to make an election for which offense charged in the indictment he will ask a conviction. The right to require ²¹³ the state's attorney to elect for which offense he will ask the jury to convict, when more than one offense is charged in different counts of an indictment, is confined to cases where the offenses charged in the different counts of the indictment are actually distinct from each other and do not arise out of the same transaction: Goodhue v. People, 94 Ill. 37; And v. People, 117 Ill. 195, 7 N. E. 265; Herman v. People, 117 Ill. 594, 22 N. E. 471, 9 L. R. A. 182. And it is within the sound legal discretion of the court to allow a witness to be called whose name is not indorsed on the back of the indictment (Logg v. People, 92 Ill. 598), and the exercise of this discretion will not be reviewed by this court unless it appears that the defendant has been taken by surprise (Gifford v. People, 148 Ill. 173, 35 N. E. 754), and the burden is upon the defendant to show that he was surprised. Here it appears that the counsel for the plaintiff in error was not surprised orally before the trial was commenced, in the presence of the plaintiff in error, by the state's attorney, that the witnesses whose testimony was objected to and whose names were not upon the back of the indictment would be called and examined as witnesses upon the trial. While the practice, generally, is to give such notice in writing, we think it clear that surprise was worked upon the plaintiff in error, and that the court did not err in permitting certain witnesses to be called by the state's attorney and to testify upon the trial although their names did not appear upon the back of the indictment.

It is further contended that the court erred in ruling upon the admission and rejection of the evidence. The most of the objections urged to the rulings of the court in this case are hypercritical and need not be considered, and the specific objection that the court permitted proof of other offenses cannot be sustained, as it was proper to prove that the plaintiff in error had obtained the money of other persons by the same confidence scheme by which he obtained the money of Brabenec, for the purpose of showing ²¹⁴ guilty knowledge. Du Bois v. People, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658; Juretic v. People, 223 Ill. 484, 79 N. E. 181; Lipscomb v. People, 223 Ill. 484, 79 N. E. 181; Lipscomb v. People, 223 Ill. 484, 79 N. E. 181.

contended that the evidence does not support and that the verdict is contrary to law. It is that the plaintiff in error went to the place Brabenec and represented to him that his name and that he was a friend of Mr. Schmidt, who was a friend of Brabenec, which statement was false; that he represented to Brabenec that he was in the American Wire Fence Company, which was also false; that after having gained his money by making those statements, he obtained from Brabenec upon the representation that he had lost his watch and would return the same to him the following morning, and that he would return the same to him the following morning with Brabenec a worthless watch and his I O U for \$30, which he never intended to pay. This transaction, by the plaintiff in error, was a business transaction for the obtaining of the \$30 amounted, in law, to a conspiracy to defraud Brabenec from Brabenec to the plaintiff in error and to the plaintiff in error, and that, conceding all the facts found in this case to be true, it does not show that the plaintiff in error committed the criminal offense of obtaining money by the use of false pretenses from Brabenec. The jury evidently did not believe the plaintiff in error's view of the effect of the trans-

action between the plaintiff in error and Brabenec. Neither do we. It was held in *Chilson v. People*, 224 Ill. 535, 79 N. E. 934, that the fact that the dealings between the parties assumed the form of a business transaction and its breach involved the breach of a contract did not relieve a defendant of criminality, where it appeared the contract was entered into by a defendant with the intention of taking no steps to carry it out, but with the wrongful intent of causing the other party to part with his money without receiving any adequate consideration therefor, and that where it appeared, as it was held in that case it did appear, that the contract was but a mere incident to the false and fraudulent scheme of the defendant, the defendant was liable for a violation of the statute defining the offense of obtaining money or property by the confidence game. In that case, on page 539, the court represented its view of the law upon the question now under consideration by an illustration founded upon the facts in an early case in this court. It was there said: "The ordinary case of agreeing to sell the gullible one a gold brick notwithstanding the possession of the aged Indian presents a breach of a contract, and yet counsel would scarcely pretend that it is a confidence game. The reason any the less a confidence game. The fact that the affair was made to assume the guise of an ordinary business transaction, whereby, as a preliminary, Spooner was required to pay his money for the lots, is without significance. It is the substance, and not the form, that is material. The transaction in question was 'a swindling operation, in which advantage was taken of the confidence reposed by the procuring witness in the plaintiff in error'—a confidence transaction had been obtained by deceit and false promises. The case came within the confidence game statute." In *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995, it was said (page 255): "It is difficult to give a definition of what is commonly called the confidence game"; and in *Morton v. People*, 47 Ill. 236 (page 474): "These devices are as various as the mind of a man is suggestive." In the *Maxwell* case Webster's definition of the offense was adopted, and it was there held (page 256) that the "confidence game is any swindling operation in which advantage is taken of the confidence reposed by a victim in the swindler." And this court, in *Hughes v. People*, 223 Ill. 417, 79 N. E. 137, on page 421, said: "We think it clear, where a party has by a course of conduct led his victim to repose confidence in him with a view to take advantage of such confidence and to obtain the money or property of the victim by a betrayal of such confidence, and advantage is taken of the confidence reposed by the victim in the swindler, and the swindler obtains, by reason of the betrayal of such confidence, the money or property of his victim, the statute has been violated." In this case the evidence shows, w

that Brabenec was swindled by the plaintiff in his money by the betrayal of the confidence of the plaintiff in error's fine clothes and appearance, maintenance and friendship with his friend and had inspired in Brabenec. We are of the opinion that the case falls clearly within the terms of the constitutional statute, as construed by this court in *Maxwell*, 111 Ill. 248, 41 N. E. 995, *Du Bois v. People*, 133 Am. St. Rep. 183, 65 N. E. 658, *Hughes v. People*, 111 Ill. 417, 79 N. E. 137, *Juretic v. People*, 223 Ill. 181, *Chilson v. People*, 224 Ill. 535, 79 N. E. 1090, *People v. Depew*, 237 Ill. 574, 86 N. E. 1090. The judgment of the criminal court will be affirmed.

THE CONFIDENCE GAME.

Definition of the Offense, 363.

Definition of Confidence Game is, 364.

Elements, 364.

Particulars, 366.

Penalty, 366.

Constitutional Force of the Statute, 368.

I. Antiquity of the Offense.

We give even a condensed historical account of the confidence game, which would mean an epitome of the world's frauds—a search through the records of to-day, of yesterday, of time immemorial, from the period of Haroun Al Raschid and the Arabian Nights to the present era of Hindustan, and of the trick played by Jacob and Esau, the personation of Esau. So long as human nature has existed, there have been those who place confidence in others, the weaker relying on the stronger, mentally or physically, and so long have there been cases of the abuse of that confidence. The stronger, who are invariably the weaker morally, have been the victims. Relatively meager reports of convictions for playing this game are not unfair to assume that for every one case of conviction there are fifty which are not exposed for reasons which are obvious. It must suffice that the reader shall be satisfied that the confidence game is as old as mankind, that effort has been made to punish it, that measure after measure has been taken upon it, that the ingenuity of the defendant and his counsel have succeeded in setting at defiance the old statutes against confidence games, and that in this present day of accommodation we have had to insert in our penal enactments one directly aimed at its suppression—the calling the spade a spade—and that in the majority of the criminal codes a clause to the effect that any person who with intent to cheat and defraud shall attempt to obtain, from any other person or persons any money, or valuable thing whatever, by means or by use of deception or false and fraudulent representation or statement or by any other means or instrument or device connected with the confidence game, shall be deemed guilty of a felony.

Such a provision is properly directed against the obtaining of money or property from a person whose confidence has first been secured and through means of false and fraudulent representations in connection with acts done with the intent to cheat and defraud. It is intended to reach the class of offenders, now well, though sometimes colloquially, known as confidence men, who obtain the money of their victims by means of, or by the use of, some trick or representation designed to deceive. The very essence of the crime is that the injured party must have relied upon some false or deceitful pretense, device and parted with his property: *State v. Pickett*, 174 Mo. 68, 122 S. W. 844; *State v. Wilson*, 223 Mo. 156, 122 S. W. 701.

II. What the Confidence Game is.

The dictionary definitions tell us it is a swindler's operation consisting of obtaining or cheating a person whose confidence he has gained, and the confidence man is one who practices or assists in a confidence game. *Bunco-steerer*: Standard Dictionary.

The confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler: *Swindler*: *Webster's International Dictionary*.

The Century Dictionary and Cyclopedia defines it as a kind of swindle practiced usually in large cities upon unwary strangers: *Deceit*: *People*, 200 Ill. 157, 93 Am. St. Rep. 183, 65 N. E. 658.

In Illinois, it is defined to be the obtaining, or attempting to obtain, from another person money or property by means of the use of a false or bogus check or by any other means, instrument or device commonly called the confidence game: *Morton v. People*, 47 Ill. 468. It was followed in *Maxwell v. People*, 158 Ill. 248, 41 N. E. 995. In *People v. People*, 223 Ill. 417, 79 N. E. 437, the court held that inducing men to bet on top and bottom of dice, and procuring money from a man for the purpose and getting possession of his pocket-book for the purpose of betting, even though fear is aroused in him for the loss of his money, is enough of a confidence game to sustain a conviction: *Van Eyck v. People*, 178 Ill. 199, 52 N. E. 852.

A confidence game is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler: *People v. Talmadge*, 233 Ill. 560, 84 N. E. 655.

Any scheme whereby a swindler wins the confidence of his victim and swindles him out of his money by taking advantage of such confidence, is a confidence game: *People v. Poindexter*, 243 Ill. 68, 100 N. E. 261. And the majority of these definitions were adapted in *People v. People*, 223 Ill. 417, 79 N. E. 437.

In Missouri the statute expressly names the game called "three-card monte" as a confidence game: *State v. Edgen*, 181 Mo. 582, 80 S. W. 942.

III. The Indictment.

Notwithstanding the efforts of the legislature to meet the difficulty of successful prosecution of confidence men, objection has been made to the form of the indictment, that it does not embrace in its elements every criminal fact that is material to the punishment sought to be inflicted, and this, too, in the face of the fact that the indictment runs in the words of the statute. In *State v. Cameron*, 117 Mo. 304, 122 S. W. 1024, which was an appeal from a judgment quashing the indictment against a conviction on an indictment for false pretenses by means of the

for obtaining money and the fact was it was a check: *Lory v. People*, 229 Ill. 268, 82 N. E. 261.

Reading the conflicting opinions carefully and setting the need for preservation of the rights of the defendant against those for protection of the victims of these games, regarding that apparent surviving desire for mathematical accuracy and completion of definition in indictments with the eyes of progress in the conduct of legal causes, we cannot see that the defendant suffers any prejudice being arraigned on a charge, where the form of the indictment against him, if guilty, a comprehensive outline of the case to be presented against him, and, if innocent, more than sufficient to enable him to meet the charge. We think that the time has passed for going into ecstasies over the rhythm of criminal pleading, and that, always, if understood with the best of intentions, some of our judges put their zeal for the rights of defendants on the shoulders of a reverence for those exotic forms and technicalities of the law which only too often let loose to prey on society those who had been kept temporarily away from it. The indictment must be regarded as sufficient if it corresponds with the description of that upheld in *Anton v. People*, 47 Ill. 468: "We are of opinion that the offense set forth in the indictment that the accused can be at no loss to what it is with which he is charged, and can so prepare his defense that he cannot be charged with one offense and arraigned for another and different offense, and that he cannot be tried again for the same offense; it being so distinctly specified in this indictment as to enable him, if again charged with the same offense, to plead this judgment a bar."

IV. Bill of Particulars.

A common objection in prosecutions for these offenses is the desirability of a bill of particulars of the crime charged in the indictment. It is now settled that the ordering of such a bill is in the discretion of the trial court, which is of course guided by the indictment itself. If the court thinks the indictment sufficiently specific, it will not order the particulars asked, and its discretion will not be interfered with on appeal: *Morton v. People*, 47 Ill. 468; *Du Bois v. People*, 211 Ill. 157, 93 Am. Rep. 183, 65 N. E. 658; *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842; *People v. Depew*, 237 Ill. 574, 86 N. E. 1099; *People v. Poindexter*, 243 Ill. 68, 90 N. E. 261, the indictment charged for conspiracy to obtain money by the confidence game, and the court there held that defendants were not entitled to a bill of particulars in the absence of evidence that they were hampered in their defense for want of it.

V. The Offense.

As has been gathered from the preceding remarks, it would be impossible, and would serve no useful end if it were possible, to fix the details of the offense, the infinite variety of which age does not appear to "wither nor custom stale." One or more swindlers do not appear to have the idea that by first winning the confidence of the intended victim in one of the thousand and one ways known to the guild, they can obtain money or property of some kind from him, and in most cases they succeed. It is rare for the courts to have to go into the facts of a case. The defendant invariably attacks the indictment

to attack an adverse verdict on the usual ground of rejection of evidence.

Important of these grounds is, whether on the trial for any means of the confidence game, evidence is admissible of the state tending to show that the defendant had undertaken to perpetrate frauds upon other persons, taking money or property from them under the same circumstances, at or near the time it is charged the acts were done in the case under trial. It has been several times under the reason of the cogency of its bearing on this point. In *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389, it is held, while, as a general proposition, a distinct crime, for which might be properly proceeded against, could not be proved against a person on trial for a single offense, this has its exception, equally well settled, and it was in that case, adopting the views of Judge Story in *United States v. Anderson*, 16 Pet. 342, 10 L. ed. 987, that where "the question of fraudulent intent or not, and upon questions of the intent of the party is matter in issue, it has allowed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character to illustrate or establish his intent or motive in the act, directly in judgment."

In *People v. Carley*, 142 Mo. 403, 44 S. W. 267, Judge Burgess said: "The other efforts upon the part of defendant, made about to obtain goods from other merchants, upon the same statements and representations, was admissible for the showing the intent of the defendant, and to this purpose evidence was properly restricted by the state's fifth instruction that defendant had no right to complain on that score." The rule followed in *State v. Cooper*, 85 Mo. 256; *State v. Anderson*, 16 Pet. 342, 10 L. ed. 987; *State v. Sarony*, 95 Mo. 349, 8 S. W. 407; *State v. Wilson*, 103, 37 S. W. 808; *State v. Wilson*, 143 Mo. 334, 44 S. W. 267; *State v. Wilson*, 72 Minn. 522, 75 N. W. 715, it is held that where the crime for which the defendant is being tried is one of a system of successive frauds or swindles of the kind which he had been engaged in, it is competent for the state to introduce evidence as tending to prove a criminal intent. While the fact that evidence of the accused having committed other crimes is inadmissible, this forms one of the exceptions. It is competent to show that the defendant had been engaging in like or similar cheats to support the intent. The evidence would justify a conviction for larceny does not justify the less a swindle: *People v. Frigerio*, 107 Cal. 151,

People v. Shattuck, 194 N. Y. 424, 87 N. E. 775, a curious set of facts is presented. The defendant, having received a hundred dollars, asked the drawer to give him in lieu of one for one hundred and eighty dollars and the other two, and pretended to destroy the original one for two hundred but kept and cashed it. He was indicted for larceny of a hundred dollar check and convicted, and on the appeal was reversed, but as the trial court had not been asked to

advise an acquittal and no exception was taken at the trial, the reference to it being that it formed one of the grounds of a motion for a new trial, the court of appeals could not review the cause, the appeal was dismissed. It is essential to prove that the victim a fraud did repose confidence in the swindler and that in consequence thereof he parted with his property to him. If the victim voluntarily parts with his money to another to effectuate a purpose to which the alleged swindler was to all intents and purposes a stranger the victim cannot be maintained: *People v. Talmadge*, 233 Ill. 560, 101 N. E. 655.

The distinction must be noted between the direct operation of a confidence game by false representation and mere puffing statements to further a sale. The sale of stock in an undeveloped mine accompanied by a guaranty of what it would pay in a given time does not convert the operation into a confidence game merely because expectations were not realized: *Lory v. People*, 229 Ill. 268, 82 N. E. 1090. And there is the intermediate class of cases in which the swindling operation takes the form of a bona fide business transaction; and more using an ancient simile, "the voice is Jacob's voice, but the hands are the hands of Esau," and in this class the difficulty of obtaining a conviction is increased proportionately to the quantum of deception and the balance of the truth introduced into it. It was just such a case as was dealt with in *People v. Weil*, 243 Ill. 208, ante, p. 90 N. E. 731, the deposit of a worthless watch as security for a loan. The accused attempted to disguise in the garb of a loan. It was just such a case as was dealt with in *Chilson v. People*, 224 Ill. 535; *People v. Depew*, 237 Ill. 555, 101 N. E. 1090, and *State v. Zumbunson*, 86 Mo. 111, and *State v. Bryant*, 74 N. C. 124, and in a large number of the gold brick class of cases such as pretending that a package placed in the hands of the victim contained money; *Stinson v. State*, 43 Ill. 397; playing the card monte game: *Blemer v. State*, 76 Ill. 265; playing the sleight of hand trick known as the "strap" game: *State v. Quinn*, 47 Iowa, 188, 11 N. E. 124; taking the victim into a sale stable and persuading him that he had made a trade for certain horses of which the swindlers obtained the proceeds: *State v. Zumbunson*, 86 Mo. 111; showing a bogus check for five hundred dollars and taking the victim into a saloon to cash it and then luring him into a dice game: *Loomis v. People*, 67 N. Y. 23, 23 Am. Rep. 123; borrowing money on a trick: *State v. Bryant*, 74 N. C. 124; the five cent trick: *Defrese v. State*, 3 Heisk. 53, 8 Am. Rep. 124; betting a horse on the ability to open a trick knife: *Gray v. State*, 32 Tex. Cr. 598, 25 S. W. 627.

VI. Extraterritorial Force of the Statute.

The statutes dealing with the prosecution of the offense are limited in operation to such offenses as are committed in the state in which the accused is tried. Where it is expressly disclosed on the record that the representations were made in Indiana, on the faith of which the victim went into Illinois and there parted with his money, the meaning of the words "any place" as used in the statutes defining "bunco-steering" cannot be so enlarged or extended as to make it apply to some place in another state: *Cruthers v. State*, 161 Ind. 67, 67 N. E. 930, following *Johns v. State*, 19 Ind. 421, 81 Am. Dec. 67, and *Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739.

DICK v. ALBERS.

[243 Ill. 231, 90 N. E. 683.]

FIDUCIARY RELATIONS—What are, and Their Effect.—A person cannot stand in a fiduciary relation to another when he has no interest in the property which he is bound to exercise for the benefit of that person. In such case he is not allowed to derive any profit or advantage from the relations between them, except upon proof of full consent of such other. (p. 372.)

FIDUCIARY RELATIONS—Technical and Informal Relations.—Fiduciary relation exists in all cases where there is a special confidence reposed in one who in equity and good conscience is bound to exercise the power with faith and with due regard to the interests of the one reposing confidence. The rule embraces both technical and fiduciary relations, and those informal relations exist wherever one man reposes confidence on another. The origin of the confidence is immaterial. (p. 372.)

FIDUCIARY RELATION—Adult Son Purchasing Notes.—The relation between a father and his adult son who purchases for himself is not necessarily fiduciary, although a trust might be established in that case by less evidence than would be required as between entire strangers. Hence the son may purchase notes or mortgages against the father, and the father may impress a trust upon the transaction in the absence of any other evidence except their mere blood relationship. (p. 373.)

TRUST—Relation of Parent and Adult Son.—If an adult son in business for himself purchases outstanding mortgages against his father, a resulting trust will not be presumed because of the relation of parent and child. (p. 374.)

Sentel and Eckhart & Moore, for the appellants.

Minnings and F. M. Harbaugh, for the appellee.

OPINION OF THE COURT.—**ALBERS, J.** This is an appeal from the circuit court of Cook county from a decree setting aside a deed made by Arthur H. Gross to Susan H. Albers, and declaring a certain deed made by said Arthur H. Gross to Henry Albers to be void, and requiring Henry Albers to account for the profits of certain real estate to the complainant, Dick, who filed the bill as conservator of John Albers, a sane person, against Henry Albers, Susan Albers and Arthur H. Gross. The defendants below have appealed from the decree and ask a reversal upon the ground that the same is not supported by the evidence.

The controversy grows out of the following state of facts: In the year 1893, John Albers was the owner of one hundred and twenty acres of valuable farm lands in Moultrie township, which he resided with his wife, Anna L. Albers and their children. On the first day of April, 1893, John Albers received three thousand two hundred dollars, for which he executed his note and a mortgage, in which his wife

joined, upon the farm. The note fell due five years from date. After the execution of the note and mortgage domestic troubles arose between Albers and his wife, which finally terminated in the wife and children leaving the home and divorce being granted to her for the fault of the husband. The evidence tends to show that there was a total estrangement between the husband and wife, and ²³³ that the children resided with and sympathized with their mother in the differences between her and their father. Henry Albers, oldest son, seems to have especially shared his father's illness. John Albers continued to live on the farm and kept the interest paid on his note regularly until April 1, 1905, when he ceased paying and thereafter gave no further attention to the note and mortgage. At the October term, 1905, of the court of Moultrie county, upon complaint of A. C. Robertson, an attempt was made to have John Albers adjudged a spendthrift and a distracted person and to have a conservator appointed for him. A trial by a jury resulted in a verdict finding John Albers was not a spendthrift or a distracted person. After this trial John Albers returned to his farm, where he continued to live alone, as he had done for several years prior thereto.

In June, 1906, Henry Albers received a letter from the Trevett-Mattis Banking Company of Champaign, Illinois, informing him that they held a note and mortgage against his father which was long past due, and that the interest thereon due April 1, 1906, was unpaid, and asking Henry Albers to call and see them, as they desired to confer with him as to what course ought to be pursued in regard to the note and mortgage. At the time this letter was received by Henry Albers he was farming on his own account and had not had any communication with his father in regard to business matters for a number of years. In response to the letter Henry Albers went to Champaign, Illinois, and had a conference with the bankers who held the note in reference to what was best to do in order to save the farm from foreclosure and the like. He learned on this visit to Champaign that his father had neglected to answer any notices or letters that had been sent him in regard to the note. Henry Albers returned to his home, and after consulting with friends of the family it was decided to make an effort to raise the money to take up the note. Henry ²³⁴ Albers did not have the money of his own, nor did he have the individual ability to raise it. John Gross, Samuel Cox, Joe Dorjohn and Arthur H. Gross agreed to aid in raising the money. Accordingly two notes were executed, one to the First National Bank of Atwood and the other to the Bank of Pierson, on which Arthur H. Gross name appears as principal and the other persons above named

With the proceeds from these two notes Henry up the note and mortgage from Trevett & Mattis. tion between Albers and Trevett & Mattis took an assignment. Arthur H. Gross was treated as of the note and mortgage. After having gotten mortgage out of the hands of Trevett & Mattis, s went to see his father in the hope of getting some effort to save the farm, but his father re-nything whatever. At the August term, 1906, of ourt of Moultrie county another effort was made, nt of A. C. Roberts, to have John Albers declared ne jury failed to agree and were discharged with-

tember term, 1906, of the Moultrie county circuit H. Gross, as assignee of the note, filed a bill to mortgage. John Albers and his wife were made On the first day of the term of court John Albers courthouse in Sullivan and told Mr. Whitfield, for the complainant in the foreclosure suit, that not been paid and that he did not desire to make to the suit. This conversation was reported to Mr. Whitfield and the court appointed a guardian John Albers, who filed an answer for him and ore the master at the taking of the evidence. A eclosure was entered and the property was sold sale to Arthur H. Gross for the full amount of rest and costs. The sale was duly approved, and 08, the time of redemption having expired and aption having been made, the master in chancery eed for the premises to Arthur H. Gross. The es made to the banks to procure the money to Trevett & Mattis note and mortgage matured in m their dates. To obtain money to meet these ir maturity Arthur H. Gross executed a note, trust deed on the premises, to Almond G. Dan-fterward conveyed the equity of redemption to bers, a sister of Henry and a daughter of John the April term, 1908, of the Moultrie county Albers was adjudged insane and committed to a Samuel Dick, the complainant below, was ap-nservator.

framed on the theory that the taking up of the rtgage, the filing of the bill to foreclose the same, title to be vested in Arthur H. Gross and subse-im conveyed to Susan H. Albers, was a fraud-devised for the purpose of divesting John Albers o real estate worth approximately twenty thou-and also on the theory that there was a fiduciary

relation existing between Henry Albers and his father, in consequence of which a court of equity will declare a constructive trust and compel the execution of the same by requiring the holder of the equity of redemption to convey it to John Albers. These contentions were sustained by the court below, and action in so doing is assigned as error.

So far as the charge of fraud is concerned, there is no evidence whatever tending to support it and appellee virtually abandoned that contention in his brief. The burden of proving the allegations of fraud rests upon appellee, and there being no evidence offered to support such averments, that phase of the case may be passed without discussion.

Appellee's main contention is that there was a fiduciary relation existing between Henry Albers and his father. The terms "fiduciary relation" and "confidential relation" have frequently been used interchangeably by courts and ²³⁶ legal writers. In general, the relationship is one in which if wrong arise the same remedy exists on behalf of the injured party as would exist against a trustee on behalf of the cestui que trust: *Central Nat. Bank v. Connecticut Mutual Life Co.*, 104 U. S. 54, 26 L. ed. 693. A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of the other person. In such case he is not allowed to derive profit or advantage from the relation between them, except upon proof of full knowledge and consent of the other person. The relations of attorney and client, principal and agent, guardian and ward, are familiar illustrations of fiduciary relations. The relation exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The term embraces both technical and fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another. The origin of the confidence reposed is immaterial: *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 80.

The whole theory of appellee on this branch of the case is that because Henry Albers was a son of John Albers he stood in a fiduciary relation to his father. There is no evidence showing that the father reposed any special confidence in him or that the latter undertook or assumed to act for and in behalf of his father in respect to the purchase of the note and mortgage. The evidence shows that after the note had been assigned to Gross, Henry went to see his father and advised him fully of what had been done, and gave him an opportunity, if he desired, to take some steps to protect his equity, and that John Albers wholly refused to have anything whatever to do with the transaction. It cannot be said, a

v, that because Henry Albers was a son of John thereby assumed a fiduciary relation to the latter transaction. The relationship ²³⁷ existing between son where the son is an adult and doing business is not necessarily a fiduciary relation to which the doctrine of constructive trusts is applicable. In son would have the same right to purchase out- es or mortgages against his father that any other l, and while a fiduciary relation might be estab- h case by less evidence than would be required parties were entire strangers, still there must be e, outside of the mere blood relation between the stify a court of equity in impressing a trust upon on.

f Hamilton v. Buchanan, 112 N. C. 463, 17 S. E. much in point here. In that case William E. ased land belonging to his brother at an execution evidence tended to prove that after the purchase ere was an agreement between William E. Horne r that he would reconvey the land to his brother, the repayment to him of the amount he had paid ion sale. The court rejected the evidence of this ment on the ground that it was void under the auds, and held that the mere fact of the blood ing between the parties did not establish a con- st. That case is like the one at bar, also, in that t in execution, whose land had been sold, was sub- judged insane.

of Evans v. McKee, 152 Pa. 89, 25 Atl. 148, the rt of that state held that where a son purchased dred dollars real estate worth thirteen hundred n execution sale against his father and su'se- a deed to the premises sold, in the absence of any dence of undue influence the title thus obtained held by the son as a trustee for his father.

of Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403, ld that there was no fiduciary relation existing a mother and her married daughter, and that to h relation evidence other than mere relationship y.

e at bar the contention is pressed upon our atten- n Albers was of unsound mind, and it is thought cumstance should have some bearing upon the olved. There is no pretense here that Henry Al- other person, exercised any undue influence upon or that his course of conduct was influenced in y anything that was done or said by the son or g in concert with him. If the question of undue

influence were in the case, then the mental capacity of J. Albers would be pertinent, but in the absence of any claim, we fail to see how that question has anything to do with the matters in issue.

Appellee relies on the cases of *Trotter v. Smith*, 59 Ill. 158, *Moore v. Pickett*, 62 Ill. 158, *Davis v. Hamlin*, 108 Ill. 399, 13 N. E. 541, *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 309, and *Pope v. Dap*, 176 Ill. 478, 52 N. E. 58, to support the contention that there should be a resulting trust declared in the case at bar. Examination of these cases will show that in none of them was a resulting trust declared to grow out of the mere relation of parent and child. In each of them there was present some relation growing out of contract or some special confidence reposed and violated or circumstances establishing fraud. None of these cases lend support to appellee's contention.

In our opinion the evidence in this record wholly fails to support appellee's bill.

The decree of the circuit court of Moultrie county was reversed and the cause remanded to that court, with directions to dismiss the bill for want of equity.

A Fiduciary Relation Exists in Every Case in Which There is Confidence reposed on one side and resulting superiority and influence on the other. The relation and the duties involved in it need no legal aid. They may be moral, social, domestic or merely personal: *Hensan v. Cooksey*, 237 Ill. 620, 127 Am. St. Rep. 345.

The Validity of Transfers or Conveyances Between Parent and Child is considered in the recent cases of *Hensan v. Cooksey*, 237 Ill. 620, 127 Am. St. Rep. 345; *Post v. Hagan*, 71 N. J. Eq. 234, 124 Am. St. Rep. 997; *Barnes v. Banks*, 223 Ill. 352, 114 Am. St. Rep. 331; *J. v. Aller*, 68 N. J. Eq. 666, 111 Am. St. Rep. 654; *Albert v. Haeb*, 68 N. J. Eq. 664, 111 Am. St. Rep. 652.

Constructive Trusts as Between Parent and Child are discussed in note to *Insurance Co. of Tennessee v. Waller*, 115 Am. St. Rep. 115.

BROOKE v. GLOS.

[243 Ill. 392, 90 N. E. 751.]

REGISTRATION OF TITLES—*Constitutional Law*.—Section 18 of the Illinois act concerning land titles, providing that "the examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs," is constitutional. (pp. 375, 376.)

REGISTRATION OF TITLES—*Mandatory Statutes*.—The provisions in sections 11 and 18 of the Illinois act concerning the

titles, in regard to the allegations and proofs regarding land, are mandatory. (p. 376.)

REGISTRATION OF TITLES—Proof of Vacancy of Premises. For registration of title must prove her allegation that the premises are vacant and unoccupied. It is not enough to introduce her abstract showing title, with proof that it has been made in the ordinary course of business by makers of abstracts.

Connor, for the appellants.

Brooke, for the appellee.

D. J. This was an application filed by Jennie L. Brooke for the act concerning land titles, in the circuit court of Cook county, to register title to the west half of lot 13, in Johnson's subdivision of the northwest quarter of the northwest quarter of section 19, township 30 north, range 12 east of the third principal meridian, Cook county, Illinois. It was alleged in the application that Jennie L. Brooke was the owner of said premises in fee; that the land was vacant and unoccupied; that there were no liens or encumbrances upon, and that the only persons claiming any interest in the premises adverse to the applicant were Jacob Glos, who had a tax deed thereon, and Emma J. Glos, who was the co-owner of part of the interest in said premises acquired by her and Jacob Glos by said tax deed. Jacob Glos and Emma J. Glos appeared and averred that they claimed title to said premises. The case was referred to an examiner of titles and the examination of the applicant was taken. No proofs were offered by Jacob Glos and Emma J. Glos except as to payment of taxes. The report was filed by the examiner finding the title to be in fee; that the premises were vacant and unoccupied; that the tax deed of Jacob Glos was void and recommending that a decree be entered. Thereupon a decree was entered in accordance with the prayer of the application, from which Jacob Glos and Emma J. Glos have prosecuted

an appeal. The only proof offered by the applicant before the examiner was an abstract of title, consisting of three parts, showing the title of the applicant by chain of title from the general land office with proof that the several parts of said abstract had been made in the ordinary course of business by makers of

abstracts. The grounds of reversal are urged in this court: First, that "An act concerning land titles," in so far as it requires that the title to be established by the applicant for registration of title which has been made in the ordinary course of business by a regular abstracter, is unconstitutional; secondly, that while the examiner reported, and

the decree found, the premises were vacant and unoccupied there was no evidence presented to the examiner and served in the record to establish those facts.

Section 18 of the act concerning land titles (Hurd's Statutes, 1908, p. 500) provides: "The examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts, and the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs." Judge Cooley, in his work on Constitutional Limitations, second edition, page 368, says: "What shall be evidence and which party shall assume the burden of proof in civil cases, its [the legislature's] authority is practically unrestricted so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, so far as altogether to preclude a party from exhibiting his rights." This text is fully sustained by the authorities. We see no constitutional objection to the provision of the statute in so far as it permits a party who seeks to register his title to establish in himself a prima facie title by an abstract of title which was made by a regular abstract maker, upon which abstract, perhaps, he relied at the time he purchased the property, reserving, however, to persons opposing the registration of his title, the right to establish by proof, if they can, that the abstract is not correct, or, as a matter of fact, the applicant is not the holder of the title to the premises which he seeks to register.

As to the second proposition, the statute (paragraph 1 of section 11) provides the application shall state "whether the land is occupied or unoccupied, and, if occupied by any person other than the applicant, the name and postoffice address of each occupant, and what estate or interest he has or claims in the land"; and section 18 provides, among other things, that the examiner to whom the case shall be referred shall "proceed to examine into the title and into the truth of the matter set forth in the application, and particularly whether the land is occupied, the nature of the occupation, if occupied, and what right, and make report in writing to the court, the substance of the proof and his conclusions therefrom." These provisions of the statute we think clearly mandatory. The court has repeatedly held that the applicant must show in himself a title against the whole world (*Glos v. Kingman & Co.*, 207 Ill. 26, 69 N. E. 632; *Glos v. Cessna*, 207 Ill. 69, 69 N. E. 634; *Holberg*, 220 Ill. 167, 77 N. E. 80) and without proof to who is in possession of the premises if occupied, or if they are vacant and unoccupied, it would be impossible for

ermine whether the title in fee rested in the appli-
 cation on the part of the applicant to establish by
 accordance with the averments of her application,
 premises were vacant and unoccupied, the decree will
 and the cause remanded.

Constitutionality of Statutes providing for suits against unknown
 to quiet title to land is discussed in the recent case of
 toration Co. v. Kerrigan, 150 Cal. 289, 119 Am. St. Rep.
 the note to McClymond v. Noble, 87 Am. St. Rep. 358.
 tionality of the Torrens land act is recognized in Robin-
 an, 151 Cal. 40, 121 Am. St. Rep. 90; State v. Westfall,
 89 Am. St. Rep. 571; People v. Simon, 176 Ill. 165, 68
 175; but denied in State v. Guilbert, 56 Ohio St. 575, 60
 756.

COBURN v. MOLINE AND WATERTOWN RAILWAY COMPANY.

[243 Ill. 448, 90 N. E. 741.]

VERDICT—Evidence That Person is Passenger.—Evidence that
 on an electric car took the fare of a person on the front
 vestibule without objection to his riding there fairly
 made him a passenger, although there is a rule, of which he
 was ignorant, posted in the front vestibule where there
 forbidding passengers to ride there. (p. 379.)

VERDICT—Companion of Passenger Giving Motorman Liquor.
 A companion of a passenger on an electric car gives the
 drink of whisky, which to some extent causes him to run
 reckless fashion, does not affect the passenger's right to
 injuries sustained from the car leaving the track. (pp.

INSTRUCTIONS—Instruction as to Weight and Credibility.—It
 is proper to give an instruction that the jury should give the same
 weight to the testimony in depositions as they would to the
 testimony given by witnesses in open court. But the failure to
 give such an instruction is harmless, if the evidence in the depositions
 substantially change the facts brought out by oral testimony.

VERDICT—Liability to Intoxicated Passenger.—The fact that
 a passenger on an electric car is intoxicated at the time he is injured
 while leaving the track does not bar his right to recover there-
 for unless it is shown that he has a cause of action. (p. 380.)

VERDICT—Negligence of Passenger Riding on Front Platform.
 A passenger is not entitled to recover for injuries
 sustained while on the car leaving the track if the jury believe from the
 evidence that he was guilty of contributory negligence in going upon
 the platform, and is properly refused if it ignores his contention
 that the failure to give such an instruction is harmless, if the evidence in the depositions
 substantially change the facts brought out by oral testimony.

VERDICT—Negligence of Passenger in Ignoring Rules.—Al-
 though a passenger may be guilty of contributory negligence in dis-

regarding a rule of the company of which he has knowledge, and is under no duty to use diligence to find out what the rules of the carrier are. (p. 381.)

EVIDENCE.—The Opinion of a Physician is not Compelling evidence in a personal injury case where it is based upon self-serving statements by the patient, not made in the course of treatment with the view of enabling the physician to testify in reference to the physical condition of the patient. (p. 381.)

Searle & Marshall and Cyrus E. Dietz, for the appellants.

W. R. Moore, for the appellee.

450 VICKERS, J. This is an action on the case brought by Matthew B. Coburn in the circuit court of Rock Island county against the Moline, East Moline and Watertown Railway Company and the Mississippi Valley Traction Company to recover damages on account of a personal injury sustained by him on the evening of December 4, 1903, while riding ⁴⁵¹ on one of the electric cars of the traction company going from Moline through the town of East Moline, to the village of Watertown. The negligence charged in the declaration was that while appellee was a passenger on one of the cars of the appellant said car was so negligently run and operated that it left the track at a point in the town of East Moline known as Tenth avenue and Seventh street and overturned, breaking appellee's right arm in two places. A verdict for seven thousand dollars was returned in favor of the appellee, from which one thousand dollars was remitted and judgment entered for six thousand dollars. The judgment has been affirmed by the appellate court for the second district, and the defendants below prosecuted a further appeal to this court.

Appellants contend that their motion for a directed verdict should have been sustained, for the reason that the evidence does not show that appellee was a passenger, as stated in the declaration. This case has been twice before the appellate court for the second district. The opinion on the first trial is reported in 132 Ill. App. 624. On the first consideration of the case by the appellate court the judgment was reversed and the cause remanded because, among other things, the evidence did not show that appellee had paid his fare. On the last trial of the case in the circuit court the conductor in charge of the car was a witness and testified that after appellee and his brother in law, Carraher, got upon the car they went forward to where the two men were standing in the front vestibule and demanded their fare, and that thereupon Carraher paid the conductor the fare for both of them. It is shown that appellee's purpose in getting upon the car was to ride from the point where he boarded the car to his home in Watertown. Appellants contend that appellee was riding on the front platform or vestibule of the car in violation of

company which provided that no person should ride on the front platform with the motorman or spatcher, without a written permit ⁴⁵³ from the conductor. That he therefore was not a passenger. The rule of the railroad was posted up in the front vestibule, above the motorman. The evidence shows that there was no sign in the front vestibule, and appellee testifies that he did not see notice of the rule and knew nothing about it. The evidence already pointed out, shows that the conductor collected appellee's fare while he was on the front platform and that there were no objections to his riding there. This evidence tends to prove that appellee was a passenger on appel-

lee. They further contend that appellee was guilty of contributory negligence, as a matter of law, which ought to defeat his recovery. Appellee and Carraher, his brother in law, went on the car a short time before getting on the car and Carraher bought a glass of beer and appellee a glass of wine, and in the saloon Carraher bought a pint bottle of whisky, put it into his pocket and had in his possession when they got on the car, and after appellee and Carraher were on the car, Carraher drew the bottle of whisky from his pocket and gave the motorman and conductor a drink and a bottle to appellee, but he testifies that he refused to take a drink. A witness for appellants testifies that appellee did not take a drink from the bottle. The evidence tends to show that the car was being run at a high and dangerous rate of speed. Appellants concede that the motorman was negligent in running the car at such a high rate of speed when approaching the curve where the accident happened. They contend that the negligence of the motorman was a result of his being intoxicated, or partly from the effect of drinking the whisky that was bought by Carraher. From this fact the conclusion is drawn that appellee is in some way responsible for the presence of the whisky on the car and the reckless and negligent conduct of the motorman in consequence of his having drunk of it. Without considering ⁴⁵³ whether the legal effect of the evidence which appellants seek to draw from the assumed fact of drinking, we think there is a total want of proof connected with the drinking of whisky by the motorman. The evidence shows that the whisky was bought by Carraher. Appellee testifies that he did not know that Carraher had whisky until he saw the bottle when it was produced to the motorman. Why appellee should be held responsible for any misconduct of Carraher in this regard is not apparent. If Carraher was the party suing, the appellee would then present the legal question which appel-

lants insist upon, but it does not arise in Coburn's. There was no error in refusing to direct a verdict for lants.

Appellants further contend that the court erred in refusing instruction No. 2, to the effect that the jury should give the same fair consideration to the testimony in depositions as they would give to said testimony if it had been given by witnesses in open court. Appellants introduced in evidence the deposition of Henri Beauprez, taken in Belgium, and of Leon Eslander, taken in Manitoba, and instruction No. 2 was intended to apply to these two depositions. This instruction stated the law and should have been given: *Olcese v. M. Fruit etc. Co.*, 211 Ill. 539, 71 N. E. 1084; *Rev. Stats.* c. 51, sec. 34. We think, however, that the error in regard was harmless. The failure of the court to submit instruction did not have the effect of withdrawing the depositions from the consideration of the jury. They were still embraced within the language of other instructions referring to the evidence. But depositions might not be regarded by the jury as having the weight of testimony given by witnesses in the presence of the jury, and there is therefore great propriety in submitting an instruction to the jury where a part of the evidence is by depositions, such as the one that was refused in this case. An examination of the depositions shows that the two witnesses were passengers on the ⁴⁵⁴ car at the time the accident occurred. They were sitting in the smoking compartment. Both of them testified that they saw two persons besides the motorman on the front platform. One of them (Beauprez) says that he saw the parties drinking from a bottle and he thinks that appellee took one drink, while Eslander testifies that he saw the parties drinking on the front platform but he could not tell whether appellee drank or not. These are the only facts testified to of importance in this case. It will therefore be seen that their evidence does not materially change the facts, except that one of them testifies that appellee drank one drink of whisky. This fact is of a vital one way or the other. It is not contended that appellee was intoxicated, and if he had been, that fact alone would not bar his right to recover if otherwise he had a cause of action. While the instruction under consideration ought to have been given, its refusal, under the circumstances of this case, is harmless.

Appellants also contend that the court erred in refusing instructions 6, 7, 8 and 9. There is evidence tending to show that when Carraher started to get upon the car he and appellee intended to get upon the car in the rear; that they there found the conductor, and that the conductor directed them to go to the front and get upon the front platform.

to show that the conductor learned, before the on the car, that Carraher had a bottle of whisky, fact caused him to suggest that they get upon tform. The evidence also tends to show that conductor joined the parties on the front platnk from the bottle of whisky. The instructions nsideration, except No. 8, presented the question want of proper care in getting upon the front he car, and told the jury that if they believed ng he was guilty of contributory negligence he over. These instructions entirely ignored the of appellee that they got upon the front plat-direction of the conductor. The observations o not apply to instruction No. 8. That instruc-e effect that even though appellee was upon the a by direction of the conductor, yet if he knew, cise of reasonable care might have known, that tion of the rules of the company for passengers the platform he could not recover. We do not is instruction embodies a sound rule of law. ut the appellee might be guilty of contributory disregarding a rule of the company of which dge, still he was under no duty to use due dili-out what the rules were. These instructions refused.

finally contend that the court erred in refusing on their motion, certain portions of the evidence anville and Sala with reference to certain tests purpose of determining the extent of appellee's the view of testifying in the case, because such based on subjective symptoms. The rule estab-decisions of this court is, that the opinion of is not competent evidence where it is based upon atements by the patient, not made in the course but with a view of enabling the physician to erence to the physical condition of the patient: cago City Ry. Co., 239 Ill. 548, 88 N. E. 221. ows that this evidence was not objected to when

The witnesses were competent to testify to all ey obtained knowledge of in a proper manner. ere asked with reference to matters based upon or conduct of appellee during the examination ould have interposed an objection.

ent of the appellate court for the second dis-
ed.

Passengers on a Street-car or railway train, see the
nin v. Boston etc. Ry. Co., 104 Am. St. Rep. 584; Illi-
E. Co. v. O'Keefe, 61 Am. St. Rep. 75. And as to the

liability of a carrier to a passenger who takes a position on the form, running-board, or other exposed place on the car, see *C. etc. R. R. Co. v. Field*, 7 Ind. App. 172, 52 Am. St. Rep. 444; *Man v. Pere Marquette R. R. Co.*, 131 Mich. 544, 100 Am. St. Re. *McGann v. Boston Elevated Ry. Co.*, 199 Mass. 446, 127 Am. S. 509; *Oliver v. Ft. Smith Light etc. Co.*, 89 Ark. 222, 131 Am. S. 86, and cases cited in the cross-reference note thereto.

The Duty of the Carrier Toward Intoxicated Passengers is com in the recent cases of *Benson v. Tacoma Ry. etc. Co.*, 51 Was. 130 Am. St. Rep. 1096; *Sullivan v. Seattle Electric Co.*, 51 Wa. 130 Am. St. Rep. 1082, and cases cited in the cross-reference thereto.

BARKER v. CHICAGO, PEORIA AND ST. LOUIS WAY COMPANY.

[243 Ill. 482, 90 N. E. 1057.]

GOVERNMENT OFFICER—Liability for Acts of Subord Public officers and agents of the government are liable for their personal negligence or defaults in the discharge of their duties, not for the acts or defaults of inferior officials in the public service, whether appointed by them or not. (pp. 383, 384.)

GOVERNMENT CONTRACTOR—Liability for Acts of Subordinates.—The rule exempting public officers from responsibility for the negligence or positive wrongs of their subordinates in the discharge of their duties does not extend to a corporation contracted to perform work or render service for the government for compensation and with a view to profit, whose subordinates are employed and by it and subject to be dismissed at its pleasure. (pp. 384, 385.)

MASTER AND SERVANT—The Maxim of Respondent Superior is founded on the principle that he who expects to derive advantage from an act which is done by another for him must assume for any injury which another may sustain from it. (p. 385.)

RAILROAD—Duty and Liability to Postal Clerk on Train.—A railroad carrying mail under contract with the United States Government owes the same measure of care to a postal clerk riding on a train in the performance of his duties as it does to an ordinary passenger for hire. (p. 386.)

Wilson, Warren & Child, for the appellant.

Albert Salzenstein and John L. King, for the appellee.

485 DUNN, J. The appellee recovered a judgment against the appellant for personal injuries, which the appellate court affirmed. Appellant has brought the record to this court for review.

The appellee was a postal clerk in the United States railway mail service, running between Peoria and Springfield on the appellant's railroad. His injuries were received while he was attending to his duties in the mail-car attached to the appellant's train, and were caused by a collision between that train and two coal-cars which had run out upon appellant's

switch connecting such track with an adjoining track. There was evidence to show negligence on the part of the appellant's servants in permitting the coal-cars to run on the main track.

The appellant claims that it is not liable because in carrying out its duty the route agent in charge of it, the appellant was acting as a postal agency performing a governmental function, and therefore not liable for the negligence of its employes. The appellant contends that plaintiff was not a passenger; that the duty it owed him was the exercise of ordinary care, and the court erred in instructing the jury that it was the duty to do all that human care, vigilance and foresight could reasonably do to guard against accidents.

The question arose upon appellant's motion, at the close of the evidence, to instruct the jury to return a verdict in favor of the defendant. The switch track from which the accident occurred was upon the main track was built and maintained by the railroad company at the mine company's cost, and was used by the appellant's switching crews in taking the loaded cars to the main track for transportation. There was ⁴⁹⁶ a derailing device on the switch track about one hundred and thirty-five feet from the main track which had no lock but could be closed by any person, and it was due to the fact that the device was closed instead of open, as it should have been, that the accident occurred. It was therefore a question for the jury, under all the circumstances, the appellant's negligence in guarding its main track against cars coming onto the switch track, and this question was properly left to the jury, unless the appellant's contention is sustained that it was engaged in the performance of a governmental function and therefore not liable for the negligence of its servants.

Waiving the question whether the construction of the switch and derailing device in the manner in which it was constructed was not negligence of the appellant, but negligence of its servants, the appellant is considered as if the negligence which the evidence shows was only negligence of the servants of the appellant, and not negligence of their duty.

The Government of the United States has the power to establish post-offices and post roads, and has assumed exclusive control of the carriage and delivery of the mail, prohibiting any person from engaging therein. In so doing the Government is engaged in the discharge of a governmental function. The principle is well recognized that public officers of the government are exempt, as such, from liability for the acts of their subordinates. They are liable for their own personal negligence or defaults in the discharge of their duties but not for the acts or defaults of in-

ferior officials in the public service, whether appointed by or not: *Robertson v. Sichel*, 127 U. S. 507, 8 Sup. Ct. 1286, 32 L. ed. 203. The appellant, however, is not a public officer or a public agent. It is a contractor with the government for the performance of a special service, viz., the carrying of the mail, and the same reason does not exist for holding it exempt from liability for the negligence ⁴⁸⁷ of its servants as for holding the postmaster general or a postmaster exempt from liability for the defaults of those who act under him in the public service, as agents of the government. The responsibility of a public officer for the acts and defaults of those employed by or under him depends upon the question whether such persons are acting in the public service as agents of the government, by direct appointment or by authorized subappointment, or whether they are his private agents and servants employed by virtue of his individual independent authority and paid by and responsible to him to whom he can employ, retain and dismiss at will, 'in other words, whether the situation of an inferior is a public or a private service': 1 Am. Lead. Cas. 785. If the subordinates are the agents and servants of the officer, not by official employment but to assist him, as an individual, in the discharge of his official service, the reason ceases for the application of the doctrine of respondeat superior and exemption from liability for their misconduct or negligence. *Central R. R. etc. Co. v. Lampley*, 76 Ala. 357, 52 Am. 334.

The case just cited was a suit brought by a bank against a railroad company for the loss from the mail of money contained in a registered letter through the negligence of the servants of the company, and it was held that the company would be liable in a proper form of action. In the case *Sawyer v. Corse*, 17 Gratt. 230, 94 Am. Dec. 445, the supreme court of Virginia, after a thorough consideration of the exemption of public officers and agents from responsibility for the acts and defaults of those employed by or under them in the discharge of their public duties, and an examination of the decided cases, held a mail contractor liable to the sender for the loss from the mail, through negligence of the contractor's servant, of a letter containing money.

The exemption of public officers from responsibility for the negligence or positive wrongs of their subordinates ⁴⁸⁸ in the discharge of their public duties arises from considerations of public policy. Competent persons would not be willing to accept positions which imposed upon them liability for torts and wrongs committed by subordinates whom they did not appoint and could not discharge. These considerations do not apply to a corporation undertaking, by con-

work or render service for the government for a to be paid to it and with a view to its own profit, subordinates are employed and paid by it and dismissed at its pleasure. It is said in Sawyer v. Pratt, 230, 94 Am. Dec. 445: "Such a contractor and proper sense an officer of the government, may be said to be in a certain sense an agent of the government because he is engaged in working for the benefit of the laborers and others whom he employs in the execution of his contract cannot be said to be the government, which does not know them, does not control them, does not pay them and does not do with them. He is not a public agent, but working for his own profit by fulfilling a contract which he has bound himself to perform and for which he receives compensation."

The doctrine of respondeat superior is founded on the principle that one who expects to derive advantage from an act done by another for him must answer for any injury which may result from it. We know of no reason why it should not apply here. The employés of the appellant were not employed for the special service of the mails, but were the private servants of appellant in the work of appellant in the general business of transportation for its benefit and profit, employed by appellant subject to be discharged at its pleasure. It is clear that the servants of the appellant by whose negligence the injury to ⁴⁸⁹ appellee is claimed to have occurred even incidentally engaged in any way in the business of the mails.

Cases have been cited which have held that a mail company is not liable for the loss of property transmitted by mail lost through the carelessness of the contractor's driver. They are Conwell v. Voorhees, 13 Ohio, 523, 42 Am. Dec. 523; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 53; Chicago & N. W. Ry. Co. v. Chicago etc. Ry. Co., 118 Iowa, 423, 92 Am. Dec. 423; L. R. A. 796, and Bankers' Mutual Casualty Co. v. Chicago etc. Ry. Co., 117 Fed. 434, 54 C. C. A. 608, 1902, 397. These cases proceed upon the theory that contractors are public agents and not responsible for the negligence or misfeasance of those employed by them. We think the cases which hold the contrary are supported by sounder reason. No case has been cited holding that a railroad company is not liable for an injury caused by the negligence of its employés while in the performance of their duties. There are no decisions that they are so liable to the same extent

as to a passenger for hire: *Malott v. Central Trust Co.* Ind. 428, 79 N. E. 369, 11 L. R. A., N. S., 879; *Seyl* New York etc. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; *v. Missouri Pac. R. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 A. 36; *Gulf etc. Co. v. Wilson*, 79 Tex. 371, 23 Am. St. 345, 15 S. W. 280, 11 L. R. A. 486; *Libby v. Maine Cent. Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; *Lindsey v. sylvania R. R. Co.*, 26 App. Cas. (D. C.) 125; *Collett v. don etc. R. R. Co.*, 16 Ad. & E., N. S., 984; 71 Eng. C. 984.

It is insisted that the appellant could not be compelled a common carrier, to transport the mail, but that its contract to do so was a mere private contract which did not impose upon it any liability as a common carrier to the appellee; it was under no common-law or statutory obligation to transport him in the manner he was carried at the time of the accident. The appellee was lawfully on the train, to be carried by the appellant for a consideration ⁴⁹⁰ received by it under its contract with the government as its compensation for carrying the mail and the person in charge of it. Under such circumstances the law imposes upon the railroad company the duty of carrying safely, and the degree of care required is commensurate with the dangerous consequences likely to result from negligence. Whether or not, in a strict sense, the relation of carrier and passenger exists between the railroad company and the postal clerk, courts hold with substantial unanimity that a postal clerk upon a railway train is entitled to the same measure of care as an ordinary passenger for hire. Just as good a right to be upon the train as the ordinary passenger, and his life is just as valuable. The moral duty to exercise care to avoid injuring him is the same, and no reason exists for a distinction in the legal duty. The duty that requires the exercise of the utmost care and vigilance to guard against accident extends to every case in which a person receives and agrees to transport another not in its employment, whether by contract with the person to be carried or with some other person by whom the person to be carried is employed for the purpose of transacting the employer's business upon the cars or other conveyances of the carrier. In case the person so to be carried is injured through the negligence of the carrier or its servants, without his fault, his right to recover damages rests upon the same basis as that of an ordinary passenger for hire. Recoveries have been had on this basis in many other cases besides those already cited. The principle has been applied to postal clerks, express messengers, persons riding on a drover's pass, and persons permitted to conduct business on a public conveyance by arrangement with the carrier; *Gleeson v. Virginia etc. Ry. Co.*, 140 U. S. 4

. 859, 35 L. ed. 458; *Nolton v. Western R. R. Co.*, 69 Am. Dec. 623; *Blair v. Erie Ry. Co.*, 66 N. Y. Rep. 55; *Brewer v. New York etc. R. R. Co.*, 124 Am. St. Rep. 647, 26 N. E. 324, 11 L. R. A. 483; *Co. v. Woodworth*, 26 Ohio St. 585; *Baltimore Co. v. State*, 72 Md. 36, 20 Am. St. Rep. 454, 18 L. R. A. 706; *Decker v. Chicago etc. Ry. Co.*, 102 N. W. 901; *Illinois Cent. R. R. Co. v. Crudup*, 63 Grant v. Raleigh etc. R. R. Co., 108 N. C. 462, 13 Hammond v. Northeastern R. R. Co., 6 S. C. 130, 467; *Louisville etc. R. R. Co. v. Kingman (Ky.)*, ; *Norfolk etc. R. R. Co. v. Shott*, 92 Va. 34, 22 Commonwealth v. Vermont etc. R. R. Co., 108 Mass. p. 301; *Yeomans v. Contra Costa Steam Nav. Co.*, New York etc. R. R. Co. v. Blumenthal, 160 Ill. 809; *Cavin v. Southern Pac. Co.*, 136 Fed. 592, 366; *New York C. R. R. Co. v. Lockwood*, 17 L. ed. 627; *Yarrington v. Delaware etc. Co.*, 143 Jennings v. Grand Trunk Ry. Co., 15 Ont. App. pson on Negligence, secs. 2649-2651; 2 Hutchin-ers, 3d ed., secs. 1017, 1018.

ylvania it has been held that the right of action clerk for injuries received while being carried in is only such as would exist if he was an employé and company, and does not stand on the same foot- of a passenger: *Pennsylvania R. R. Co. v. Price*, Foreman v. Pennsylvania R. R. Co., 195 Pa. 499,

But those decisions are based upon the construc- tute of Pennsylvania. They hold that "passen- sed in that statute, were intended to be distin- persons "lawfully engaged or employed on or ds, works, depots and premises of a railroad com- or about any train or car therein or thereon, of any such person is not an employé," and that are included within the latter class as distin- n passengers. Those cases are therefore not in the doctrine of the other cases cited.

held that a railroad company, in contracting with mpany for the transportation of express ⁴⁹² mat- mpany's messengers in charge thereof, may exemption from liability for the negligence of its d that a contract made by the messenger with the any in consideration of his employment, assum- of injury in the course of his employment, oc- the negligence of the railroad company, and railroad company from liability to him therefor, nst public policy but would be enforced: *Blank nt. R. R. Co.*, 182 Ill. 332, 55 N. E. 332, 48 L. R. e same rule has been applied to a like contract

made by a sleeping-car company: *Chicago etc. Ry. Co. v. Lee*, 117 Ill. 120, 106 Am. St. Rep. 187, 74 N. E. 705, 18 Am. N. S. 472, 11 Ann. Cas. 22. The principle on which cases were decided is that the railroad company is not bound to release and hold over its third express-cars or sleeping-cars in demand by the owners of such cars facilities for carrying their business in its railroad. It may undertake to do that if it likes, the undertaking is not the performance of any imposed by law, but is a special contract, giving rise to which is a private matter. It would not be compellable in equity. The principle is announced in numerous decisions of other courts but is not applicable here. There was no release of the appellant's liability, either by the appellee or by government. Even if it be conceded that the appellant was a private matter as to the appellee and that the appellee was not a passenger, yet appellant was liable to the appellee for the same price to the same extent as to a passenger, and that that was sufficient to release the appellant from liability would have been valid is not important unless he acted under a contract to release it. The trial court therefore was not in instructing the jury as to the measure of damages of the appellant.

The judgment of the appellate court is affirmed.

A *Third State Power Co.* as a *Public Power* is held to be subject, entitled to recover for an injury inflicted by the negligence of the railway company, in *Cleveland etc. Ry. Co. v. Ketchan*, 121 Ill. 446, 36 Am. St. Rep. 531. See also, *Baltimore etc. R. Co. v. State*, 72 Md. 36, 31 Am. St. Rep. 454. And an express messenger carried by a railroad company in a car for the transportation of a press matter under a contract with the express company, is a passenger for other: *Davis v. Chesapeake etc. Ry. Co.*, 122 Ky. 523, 12 Ky. Rep. 451.

METTLER v. WARNER.

[245 Ill. 601, 99 N. E. 1099.]

PERPETUITIES.—The Rule Against Perpetuities has reference to the time within which the title vests, and has nothing to do with the postponement of the enjoyment or the duration of the term. (p. 324.)

PERPETUITIES.—An Interest Which Begins Within Life Being and twenty-one years thereafter is not within the rule against perpetuities, although it may continue beyond the prescribed period. (p. 324.)

WILLS.—Letters Testamentary Relate Back to the Date of the testator's death, after the will is probated, and validate acts done by the executor in the line of his duty before he qualified. (p. 329.)

—**The Law Favors the Vesting of Estates**, and inclines to the view favorable to the devisee or grantee, rather than to the interest. (p. 395.)

—**Vested or Contingent Remainder**.—Where a remainder is postponed to the enjoyment is for the convenience of the estate rather than for reasons personal to the remainder should be held to be vested. (p. 395.)

—**A Devise of all the Rents and Profits or income from a devise of the real estate itself**. (p. 395.)

—**FUTUITIES**.—**A Devise to an Executor in Trust**, directing immediate possession of the property, manage it, and pay to the testator's children or their descendants in equal shares, and further directing him to divide the estate in equal shares at the expiration of fifteen years, with a provision for the case of the death of any of the children without issue, the manifest belief of the testator being that it was for the advantage of the estate to allow it to remain, as in, in farming lands for a limited time, rather than to sell or sold at once, vests the legal title in the trustee and the title in the children upon the death of the testator, and the rule against perpetuities. (pp. 395, 396.)

—**The Fact That a Devise to a Trustee Places Him in a position where his duty may conflict with his personal interest does not make the devise void as contrary to public policy**. (p. 396.)

—**Separate Suits for Assignment**.—A widow entitled to separate tracts of land may file a bill for assignment in a separate suit, and afterward have dower assigned in the residue of the land in the proceeding. She is not obliged to include all the lands in the bill. (p. 397.)

—**A Widow's Right to Dower Accrues Immediately upon the death of her husband**, and she is entitled to the same even if the husband requires a sale of real estate contrary to directions in his will. (p. 397.)

—**The Rights of Devisees must Give Way to the right of a widow to have her dower assigned**. (p. 397.)

—**The Postponement of the Period of Distribution to a later time does not have the effect of postponing the widow's right to dower**. (p. 398.)

Warner, Hugh Crea and John Fuller, for the plaintiffs in error.

Herrick & Herrick, Ingham & Ingham and Unwin & Unwin, for the defendants in error.

OPINION OF THE COURT.—**WILLIAMS, J.** This is a bill in equity filed by Minnie C. Mettler and Arabella Warner Bell against Vespasian C. Mettler and Flora Warner McDermott for partition between them of the lands owned by John Warner, and praying for judgment of dower to the widow, Isabella R. Warner, in the lands. The circuit court of DeWitt county granted the bill and rendered a decree as therein prayed for. The defendants below have sued out this writ of error to reverse the decree on the ground that the court erred in its decision of obtaining a review of said decree.

The question involved arises out of the construction of the last will and testament of John Warner.

The testator lived for many years in the city of Clinton, county, and died there on the twenty-first day of December, 1905. At the time of his death he was the ⁶⁰³ owner of the real estate of the value of eight hundred thousand dollars and his personal property about equal in value to his real estate. The testator was married twice. By the first marriage two children survive the deceased—the plaintiffs in error, Vesper Warner and Flora Warner McDermott. About eight years after the death of his first wife the testator married Isaac R. Robinson, and of this marriage two children survived the testator—Arabella Warner (now Mrs. Bell) and Minnie Warner (now Mrs. Mettler). Before his second marriage the testator and Isabella R. Robinson entered into an antenuptial contract. After the death of her husband his widow filed a bill for the purpose of having the antenuptial contract set aside and declared null and void. That case was finally adjudicated in this court, and the decree of the circuit court setting aside the antenuptial contract was affirmed, and the opinion of the court in that case is reported as Warner v. Warner, 235 Ill. 85 N. E. 630. It was adjudicated in that case that the widow was entitled to her dower in all of the real estate belonging to her husband at the time of his death. After the commencement of the suit to set aside the antenuptial contract and before it was finally terminated by the assignment of the dower to the widow, the defendants in error commenced the present suit for partition, claiming that the will of John Warner was void and that his entire estate passed as intestate property to his four children, who are parties to this suit. So much of the will of John Warner as is necessary to a proper understanding and decision of the questions here involved is as follows:

“Clause 3—If my wife survives me and after my death she ratifies, confirms and complies with and fully executes on my part the ante-nuptial contract mentioned in clause 2 of my will hereof, made and entered into by and between her and me on the 29th day of May, A. D. 1874, on the executor hereof paying to his successors, paying or tendering her the balance of money if any, then remaining unpaid her thereon, ⁶⁰⁴ I will, do and bequeath to her in fee simple out-block twenty-eight acres in the city of Clinton, DeWitt county, Illinois, now occupied by me as a homestead, the west half of the southeast quarter of section thirty-four (34), in township twenty (20), north of range two (2) east of the third P. M., in said county. I reserve all my right, title and interest in and to what was the farm of her father, containing two hundred and twenty-two (223) acres, more or less, in Fairfield township, Huron county in the State of Ohio; but the above bequests in this clause mentioned are made on the express condition that my wife

after my death ratifies, confirms and complies
ly executes on her part said ante-nuptial con-
xecutor hereof, or his successors, paying or ten-
he balance of money, if any, then remaining
ereon.

-I give, grant, devise and bequeath to the exec-
y son, Vespasian Warner, and to his successors,
conditional bequests mentioned in clause 3 above
subject to all just demands against me or my
subject to all just demands, interests, titles and
, my wife, in case she survives me, may be held
on or therein as my widow, all the property and
ersonal and mixed, moneys, bonds, notes, rights,
nds, choses in action, and of whatever kind or
by me or which I may be entitled to at the time
n fee simple, but in trust for the purposes herein
none other."

-I will and direct that said executor, immediately
h, take possession of the real estate above devised
that he, and his successors after him, for and
n commencing at my death and ending fifteen
fter the first day of the next month of March
when this my last will and testament is admitted
nagement, control, rent, cultivate, ^{and} keep in repair
the same as he or they may deem advisable, and
ds thereof and income therefrom pay all costs
of the same and all charges, taxes and assess-
n and the costs and expenses of administering
d each year during said term pay the net pro-
ome of and from said real estate, after paying
penses, charges, taxes and assessments, to my
or their descendants, in equal parts, per stirpes
apita.

-I will and direct that in case either or any of
ren shall not survive me and leave no descendant
s him, her or them surviving, that the share of
eds mentioned in clause 6 above that would be
er or them if living, be paid to his, her or their
ther and sisters or their descendant or descend-
rpes and not per capita, in equal parts, the
descendants of each child being paid the amount
ther or mother would have been paid if living.

-I will and direct that in case either or any of
ren shall die after my death and during said
eing at my death and ending fifteen (15) years
day of the next month of March after the date
last will and testament is admitted to probate,
clause 6 hereof, leaving no descendant or descend-

ants him, her or them surviving, any payments that have been made such last mentioned deceased child or children after the date or dates of the death or deaths of such mentioned deceased child or children under clause 6 hereof, if he, she or they were living, shall be paid by said executor or his successors to my then surviving children and descendant or descendants of such of my children, if any, who had prior to that time departed this life leaving no descendant or descendants then surviving, per stirpes and per capita.

⁶⁰⁶ "Clause 9—I will and direct that at the expiration of said term commencing at my death and ending fifteen years after the first day of the next month of March after the date when this my last will and testament is admitted to probate, mentioned in clause 6 hereof, all of said real estate shall be sold by said executor or his successors in such manner and on such terms as he or they may deem best, and the proceeds realized from such sale or sales paid said executor or his successors, in equal portions, to those of my said children then surviving, and to the descendant or descendants, if any, of any of the children who may then be dead, per stirpes and per capita, or said executor or his successors may, at their discretion, at the end of said term commencing at my death and ending fifteen (15) years after the first day of the next month of March after the date when this my last will and testament is admitted to probate, mentioned in clause 6 hereof, divide and partition said real estate among the my said children then surviving, and to the descendant or descendants, if any, of any of my children who may then be dead, by setting off or causing to be set off and conveyed in fee simple to each of my said children then living, and to the descendant or descendants, if any, of each of my said children who are then dead, per stirpes and not per capita, an amount in value of said real estate, to be owned and held by the grantees thereafter in fee."

The bill charges that the provisions of the will creating the trust in Vespasian Warner are void, in contravention of the rule against creating perpetuities. A joint and several demurrer was interposed to the bill on behalf of Vespasian Warner, as executor and trustee under the will, and Warner McDermott, and it was insisted in support thereof that by the terms of the will the legal title to the lands was in the executor at the time of the death of the testator, and that an equitable interest vested at the same time in the children of the deceased, and that therefore ⁶⁰⁷ no part could be had of said lands and that the bill should be dismissed for want of equity. The demurrer was overruled, and Warner McDermott stood by it and was defaulted. An a

ny Vespasian Warner, personally and as executor, denying that the provisions of the will creating were void for the reasons alleged in the bill or for reason. It was also insisted in the answer that no d be allotted to the widow out of certain lands described in her original bill for dower, and amendment, were afterward stricken out of that

stion presented for determination by the aver- the answer last above referred to is, whether a file more than one suit for the purpose of having assigned in the lands of her deceased husband, or e must include all of the lands in which she claims ight in one suit. Upon this question the circuit her former suit for the assignment of dower, which lude the lands involved in this bill, was no bar to o have her dower assigned in the lands which had icken out of her original bill for dower.

ommissioners appointed to partition the land and ower to Isabella Warner and to Mary J. Weldon, Lawrence Weldon, who in his lifetime was a ten- mon with the testator, John Warner, in the par- ds in which dower was assigned in this proceed- ed that the dower could not be assigned and set off ithout manifest injury to the parties interested. as approved, and a decree was entered vesting e lands owned by the testator at his death in his en, severally, as partitioned and divided by com- and directing a sale of the land in which dower be assigned or set off, as aforesaid, and that the ve their respective dowers in the proceeds of the es not appear from the ^{cos} record that either of ys filed a written assent to the sale of said lands. said widows has joined in this writ of error, but s urged by Vespasian Warner and Flora Warner t that it was error for the court to order a sale e written assent thereto of the widows aforesaid.

re numerous errors assigned on this record, but ons presented may be considered under the fol- positions: 1. Is the will of John Warner void be- ontravenes the rule against perpetuities? 2. Can ho is entitled to dower in several different tracts e a bill for the assignment of such dower in a part nds and afterward have dower assigned to her in e in a separate proceeding? 3. Should the decree t ordering a sale of certain tracts of land in which of John Warner and Lawrence Weldon had dower l because there is no written assent of said widows

to said sale filed in this cause? These questions will be considered in the order in which they are stated above.

1. The question of the validity of the will of John Verner is the one of controlling and paramount importance in this cause. As already indicated, the court below held that clauses 6, 7, 8 and 9 of the will violated the rule against perpetuities. These clauses of the will direct what disposition shall be made of the estate after fifteen years from the first day of the next month of March after the date when the will was admitted to probate. By the fourth clause of the will the testator devised all of his property, both real and personal, to his executor in fee simple, in trust for the purposes specified in the sixth, seventh, eighth and ninth clauses of the will. There is no limitation whatever as to when the legal title vests in the trustee under clause 4. If any doubt exists as to the time when the legal estate was intended to vest in the trustee under clause 4, such doubt would be dispelled by the express direction ⁶⁰⁰ in clause 6 that "my executor, immediately upon my death, take possession of the real estate above devised to him, and that he, and his successors after him, for and during a term commencing at my death," etc.

The rule against perpetuities has reference to the time within which the title vests and has nothing to do with the postponement of the enjoyment or the duration of the estate. An interest which begins within lives in being and two years or one year and one day thereafter is not within the rule although it continues beyond the prescribed period. If it were otherwise all fee simple estates would be bad: Gray on Perpetuities, sec. 232; Madison v. Larmon, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556; Flanner v. Fellows, 206 Ill. 136, 66 N. E. 1057; Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A., N. S., 564; Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246. There does not appear to be any ground whatever for the contention that the legal estate did not vest in the trustee under the will, immediately upon the death of the testator. After the will was probated the letters testamentary were issued, relate back to the date of the testator's death and validate the acts done by the executor in the line of his duty before he qualified. 3 Redfield on Wills, *23; Richards v. Pierce, 44 Mich. 371, 7 N. W. 54; Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246.

The case of Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A., N. S., 564, is relied on by defendants in error in support of their contention. The will in that case devised the real estate to a trustee, "to have and to hold for the term of twenty-five years from and after date of the probate of this will," and it was held that this language indicated that the title of the trustee was not to vest until the will was probated. There is no such language in the will before

to the vesting of the estate in the trustee, and that no support to defendants in error's contention that the estate did not vest in the trustee in the case at bar is shown by the probate of the will.

Contention of defendants in error that under the will there is a possibility that the equitable title might not vest in the beneficiaries within the time prescribed by the will presents a more serious question. Determination of this question depends upon whether the interest of the beneficiaries is a vested remainder or a contingent remainder upon their being alive when the time of distribution arrives. The controlling consideration in determining this question is to discover and give effect to the intention of the testator as expressed in the will, if it can be ascertained without contravening the established rules of law:

Wallace, 202 Ill. 239, 66 N. E. 1088; *Pearson v. Wallace*, 30 Ill. 610, 82 N. E. 813; *Wardner v. Memorial*, 12 Ill. 606, 122 Am. St. Rep. 138, 83 N. E. 1077; *Barber v. Barber*, 239 Ill. 389, 88 N. E. 246. The law is that in the vesting of estates, and in cases where the instrument is susceptible of two constructions the law inclines to the construction most favorable to the devisee or legatee rather than the construction that would be against him: *Kellett v. Shepard*, 139 Ill. 433, 28 N. E. 751, 154 Ill. 254. Remainders will only be held to be contingent if the intention to create such interest is clearly shown by the words of the instrument: *Grimmer v. Grimmer*, 164 Ill. 245, 45 N. E. 498. Where a remainder is created and the postponement of the enjoyment is for the benefit and not for the benefit of the estate and not for reasons other than the benefit of the devisee, the remainder should be held to be vested: *Pottgieser v. Pottgieser*, 176 Ill. 368, 52 N. E. 934; *Carter v. Carter*, 234 Ill. 507, 85 N. E. 292; *Armstrong v. Armstrong*, 9 Ill. 389, 88 N. E. 246.

It is noted that by clause 6 of the will the executor is directed to take immediate possession of the real estate and to "manage, control, rent, cultivate, keep in repair and improve the same as he or they may deem advisable," and that the expenses are paid the net proceeds and income from the said real estate are to be paid to the children of the testator, or their descendants, in equal parts, per stirpes and per capita. There is here an express devise to the children of all of the proceeds and income from the real estate. It is a well-established rule ⁶¹¹ that a devise of the rents and profits or income from real estate is a devise of the real estate itself: *Carter v. Carter*, 234 Ill. 507, 85 N. E. 292; 30 Am. & Eng. Ency. of Law, 2d ed., § 100, p. 100. Looking the entire testamentary scheme into consideration it is apparent that the testator intended the entire

beneficial interest in his estate to vest in his children the lineal descendants of such as might die before the of distribution was reached. There is an absence of purpose to give any other person any interest in or from the estate, and the purpose in postponing the distribution was to give his children the benefit of the increase the value of the real estate during the time the trust was running. There is no circumstance connected with the beneficiaries personally, such as minority or incompetency or other cause, suggested for the postponement of the distribution. Manifestly, the testator believed that it would be to the advantage of the estate to allow it to remain invested by him, in valuable farm lands, for a limited period rather than to have it divided or sold at the present time.

Under the authorities already cited we think it manifestly held that the equitable title vested in the testator's children at the time of his death. The provision in the will providing for the survivorship in case of the death of any of his children without leaving lineal descendants can only be regarded as a condition subsequent, upon the happening of which the vested interest would be divested. This construction is warranted by the language of the will and gives effect to and carries into execution the testator's intention. The will is not void either in the devise to the trustee of the simple title in trust, or in its provisions respecting the beneficial interests of his children.

Defendants in error contend that the devise to the trustee should be held void, as being contrary to public policy because it places the trustee in a position where his duties may conflict with his personal interest. We cannot assent to this view. The most that can be said in support of ⁶¹² this point is, that the trustee might attempt to make an unfair division or partition among the heirs when the period of distribution arrives. It is a sufficient answer to this contention that the trustees could not use his official powers to the detriment of the distributees without being guilty of such fraud and misconduct as would authorize a court of chancery to assume jurisdiction at the instance of the distributees and administer such remedies as to secure them from any possible injury in this regard. If any occasion shall arise making it necessary to do so, the courts will be appealed to to prevent any injury that may be apprehended from a violation by the trustee of either the letter or spirit of the powers conferred upon him. There is in all cases where property is intrusted to the hands of a trustee a possibility that the trustee may prove recreant to his duty; this possibility has never been supposed to be a sufficient reason for declaring the trust invalid.

in error's second contention is, that the court assigning the widow dower in certain lands which, originally included in her bill to set aside the ante-nuptial contract and for the assignment of dower, were by amendment, stricken out of said bill and are not in the present proceeding. This contention is based on the assumption that a widow having the right to dower assigned in several tracts or parcels of land should include in one bill all of the lands in which she is entitled. No authority for this contention is cited by the court in error and we are aware of no principle of equity on which such contention can rest. It is not a bill for partition that all of the lands held in common should be included in one bill. Such a bill may be brought for different parcels of real estate if the interests of the parties may require. That a widow is entitled to dower in different parcels of real estate does not forfeit the same unless she included all of the parcels in the first suit would seem to be a ⁶¹⁸ highly technical and legal rule. An additional reason why this contention is sustained is that it was not set up and relied on in the answer. If the first suit for assignment of dower was held to be a bar to the assignment of dower in the second proceeding, such former adjudication would have to be relied on in the answer. That was not done in the answer. There was no error committed by the court in sustaining the contention of the widow in error in the lands stricken out of the original bill.

The second contention of plaintiffs in error is, that the court in ordering a sale of certain real estate without the assent of the widows who were entitled to dower in the same lands. There are two satisfactory answers to this contention. In the first place, the parties for whose benefit the order was passed are not complaining of the order without their written assent; and in the second place, the widows were entitled to dower in all the lands whereof her husband was seised of an estate of inheritance at the time of the marriage, unless the same has been released in legal form. There is no provision in the will of the husband which the widow has accepted in lieu of her dower. Under this situation her right to dower accrued upon the death of her husband, and she is entitled to the same even though it may require a sale of the real estate contrary to the directions in the will. In other cases the rights of the devisees under the will must give way to the rights of the widow, under the statute, to have her dower satisfied. Where a will makes a provision for the satisfaction of her dower and she accepts such provision, her right to dower is gone (*Cowdrey v. Hitchcock*, 103 Ill. 262);

but in the absence of some such provision in the will the widow's right to dower, under the statute, is to be treated as though no will had been made. The postponement of the period of distribution to the devisees could not have the effect of ⁶¹⁴ postponing the widow's right to dower. There was no error in the decree in this regard.

For the error in decreeing partition among the heirs of John Warner before the period of distribution arrived, the decree of the circuit court is reversed and the cause remanded, with directions for other proceedings in accordance with the views herein expressed.

The Law Favors the Early Vesting of Estates, and in doubt the interest should be deemed vested in the first instance rather than contingent, unless the instrument under consideration does not admit of such construction: *Roberts v. Roberts*, 102 Md. 131, 111 Am. St. Rep. 344. As to when remainders are vested and when contingent, see *Golladay v. Knock*, 235 Ill. 412, 126 Am. St. Rep. 224.

The Rule Against Perpetuities is the subject of a note to In re Estate of, 49 Am. St. Rep. 117. A perpetuity is a "future limitation, whether executory or by way of remainder, either of real or personal property, which is not to vest until after the expiration of a period, not necessarily vest within, the period fixed and prescribed by the instrument, the creation of future interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation": *Starcher Bros. v. Duty*, 61 W. Va. 373, 123 Am. St. Rep. 990.

The Assignment of Dower is the subject of a note to *Sanders v. Millan*, 39 Am. St. Rep. 25. A widow's right of action for the assignment of her dower accrues immediately upon the death of her husband: *Joplin Brewing Co. v. Payne*, 197 Mo. 422, 114 Am. St. Rep. 770. That dower may be set off in an ordinary partition suit: *Wettlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449.

ELLIOTT v. WESTERN COAL COMPANY.

[243 Ill. 614, 90 N. E. 1104.]

ADVANCEMENTS, Parol Declarations to Evidence of Advancement.—Under the Illinois statute an advancement cannot be established by parol declarations or statements, nor can any material or essential part of the proof necessary to establish an advancement be sustained by parol testimony. (p. 400.)

ADVANCEMENTS.—An Advancement is a Question of Intent. Not every gift from a parent to a child is regarded as an advancement, but it must appear that the gift was so intended that the child's part will be charged with it. (p. 400.)

ADVANCEMENTS.—The Mere Fact That a Parent has Made a Gift of Property to one Child and not to another, or more to one than to another, is not sufficient to charge the favored child in the distribution of the parent's estate. (p. 400.)

ADVANCEMENTS—Whether Gift can be Changed into an Advancement.—A gift of land by a parent to his child becomes an advancement.

is delivered, and it is not in his power years afterward, legally executed will, to change the gift into an advancement, 400, 401.)

ADVANCEMENTS.—The Intention Which will Characterize a advancement is the intention of the donor at the time of gift, expressed in the manner required by the statute.

ADVANCEMENTS—Subsequent Declarations of Donor.—A gift to a child cannot be shown to be an advancement by the statement of the donor made years after the gift. (pp. 400,

Cook and W. F. Spiller, for the appellant. .

McIntrell and L. O. Whitnel, for the appellee.

OPINION. N. J. On March 12, 1889, Alfred S. Taylor and his wife, conveyed to appellant, Nancy P. Taylor, his daughter, twenty acres of land in Franklin county, Illinois, for an expressed consideration of two hundred dollars. Alfred S. Taylor died intestate in February, 1892, in fee of the one hundred acres of land in controversy in this case, and leaving Olef Taylor, his widow, John B. Taylor, John B. Taylor, Nancy P. Elliott, Hanson and Alice Klamp his children and only surviving issue. Among the deeds of the deceased was the following paper, dated October 12, 1892:

"I, A. S. TAYLOR, do hereby certify that I, A. S. Taylor, have made my daughter Nancy P. Elliott a warranty deed of the following described real estate, to wit: The north-west quarter of the north-west quarter of section thirty-one (31), township seven (7), south, range one of the third P. M., in Franklin county, Illinois, and I hereby certify that the said land is the said Nancy P. Elliott's full heirship of my real estate.

"A. S. TAYLOR,

her

"OLEF X TAYLOR."

mark

the widow and heirs, except appellant, conveyed the one hundred acres to William S. Foreman and he conveyed to appellee. On August 29, 1907, appellant filed a bill against appellee for partition of the premises, claiming a one-fifth thereof by descent from her father. Appellee answered, denying that appellant had any interest in the premises, averring that the conveyance of March 12, 1889, was made as an advancement to her and in lieu of her share in her father's real estate, and relying upon the evidence above mentioned as written evidence of such advancement. Upon the hearing the bill was dismissed for want of equity, and complainant appeals.

Mrs. Elliott paid nothing for the land. Her father, at the time of the conveyance to her, conveyed forty acres to another of his daughters and to one of his sons. Her daughter testified that her father said in her presence, not in the presence of her sister, that this land was intended Mrs. Elliott to have. No other statement or declaration, except the written instrument above set out, is testified to as made by him at any time, indicating the deed to Mrs. Elliott was an advancement or in fulfillment of her interest in his estate or his real estate. There was no intention expressed in the deed that it should be an advancement. It was not charged against her, in writing, as an advancement or so acknowledged by her.

⁶¹⁸ Section 7 of chapter 39 of the Revised Statutes provides that "no gift or grant shall be deemed to have been made in advancement unless so expressed in writing, or charged in writing, by the intestate, as an advancement or gift, and acknowledged in writing by the child or other descendant." Inasmuch as advancements, under this statute, cannot be evidenced by parol declarations or statements, no matter how essential a part of the proof necessary to establish an advancement can be supplied by parol testimony: *Young v. Young*, 204 Ill. 430, 66 N. E. 532. Prior to this statute, it was a question of intention whether a gift by a parent to a child was an advancement. The donor's oral declaration made at the time of the gift, as to his intentions, were admissible as part of the *res gestae* characterizing the act of gift. The presumption was that such gift was an advancement. *Grattan v. Grattan*, 18 Ill. 167; *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796. It is still a question of intention, but the statute has prescribed the manner of proof of the intention. Not every gift from a parent to a child is to be regarded as an advancement. It must appear that it was so intended before the child's part will be charged with it. The fact that a parent has given property to one child and not to another, or more to one than another, is not sufficient to charge the favored child in the distribution of the parent's estate.

The question presented here is, Can a gift by a parent to a child be shown to be an advancement by the written statement of the donor made years after the gift? Evidently a donor's declaration that he had several years before given property to a child would not be competent evidence of that fact but mere hearsay. It would be necessary to prove the gift, not by the declaration of the donor or of any other person, but by testimony given under the sanction of an oath and with an opportunity for cross-examination. It is as important to prove the intention of the donor as to prove the gift itself, and any subsequent ⁶¹⁹ declaration, whether oral or written, that he had several years before intended

y given to his daughter to be an advancement be competent evidence of that fact. Hearsay is incompetent to prove intent than any other fact. The of a grantor after he has made a conveyance not admissible to affect the grantee or the title Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; O'Bryan, 111 Ill. 53; Shea v. Murphy, 164 Ill. n. St. Rep. 215, 45 N. E. 1021. The intention characterize a gift as an advancement is the intention donor at the time of making the gift, expressed as required by the statute. The gift in this case complete at the time of the delivery of the deed. nce of the donor's intention at that time is im- r the statute requires the evidence to be in writ- manifest that the conveyance could not then, or than three years afterward, have been regarded advancement. It was an absolute gift, for which t could not be called upon to account. It was power of the donor later, except by a legally ll, to change the effect of his acts and by charg- h her own property change his gift into an ad- Sherwood v. Smith, 23 Conn. 516; Bradsher v. 6 N. C. 445; Lawson's Appeal, 23 Pa. 85. She roperty without liability to account for its value ement of the estate. The instrument signed by after the conveyance to her could not in any way om his grant, or annex to it the condition, not ing, that she should account for the value of the settlement of his estate or that it should be in full

ee will be reversed and the cause remanded to court, with directions to enter a decree in accord- the prayer of the bill.

ts are discussed in the note to Miller's Appeal, 80 Am. advancement is giving, by anticipation, whole or part of supposed a child will be entitled to on the death of the if intestate. The definition embraces the idea that the evocably parted with his title in the subject advanced: rd, 82 Va. 859, 3 Am. St. Rep. 123; Hattersley v. Bissett, 597, 40 Am. St. Rep. 532; Headrick v. McDowell, 102 Am. St. Rep. 843; Crain v. Mallone, 130 Ky. 125, 132 Am.

ement by a Parent to a Child is not Shown without satis- nce of an intention, coincident with the transaction, to "portion or settlement in life," as an anticipation of the if the donor dies intestate; and the party asserting an has the burden of proof: Booth v. Foster, 111 Ala. 312, ep. 52. See in this connection, Hattersley v. Bissett, 51 , 40 Am. St. Rep. 532; Cazassa v. Cazassa, 92 Tenn. 573, ep. 112; Allen v. De Groodt, 98 Mo. 159, 14 Am. St. Rep. Roberts, 48 Ark. 17, 3 Am. St. Rep. 211.

t. Rep., Vol. 134—26

CASES
IN THE
SUPREME COURT
OF
IOWA.

PUCKETT v. GUENTHER.

[142 Iowa, 35, 120 N. W. 123.]

JUDGMENT.—Power of Court to Amend a Correction.—section 243 of the Iowa code a court has express authority to a correction of the record, in order to make it speak the true the entry of the judgment, the first correction having been erroneous (pp. 403, 404.)

JUDGMENT.—The Entry of Judgment by the Clerk on does not render the judgment void. (p. 404.)

JUDGMENT.—The Entry of a Judgment by the Clerk is ministerial, and not a judicial, act. (pp. 404, 405.)

Courtright & Arbuckle, Reed & Tuthill and Milchman, for the appellant.

Mears & Lovejoy, for the appellee.

³⁵ **EVANS, C. J.** On April 5, 1905, plaintiff obtained a verdict against the defendant. On May 26, 1905, the judge entered on his calendar an order for judgment for the amount of the verdict. On July 10, 1905, the defendant perfected his appeal to this court on the assumption that judgment was entered on May 26, 1905. Upon that purported appeal to this court the plaintiff, as appellee, contended that the service of notice was premature, in that no judgment had been entered of record ³⁶ until after July 10, 1905. He filed a motion in the lower court asking that it be ascertained when the judgment in his favor was actually spread upon the records. Notice was given to the defendant, and testimony was heard upon the question. Upon such hearing no witness was able to fix the exact date upon which the record was actually made, but all agreed that it was not made prior to October 1st, and that it was made about that time. The court thereupon corrected the record so that it should show October 1st as the date of its making. From this order an appeal was taken to this court, and the order was affirmed and the appeal in the main case was dismissed: See Puckett v. Guenther.

wa, 647, 114 N. W. 34. After the affirmance of this court the defendant filed a motion in the calling attention to the fact that October 1, 1905, and that the entry of the judgment upon the for that reason void. The relief asked by the was that valid judgment now be entered upon the pro tunc, in order that defendant might perfect deal therefrom and pursue the litigation to a de-

This motion was resisted by the plaintiff. He filed a counterclaim asking for further correction of record so that it would show that the judgment was entered of record on Sunday, but upon a second entry. The two motions were heard together. Upon such hearing the trial court again corrected the record so as to show that it was entered on October 2d. It made a written order to the effect that the first correction fixing the date of entry was a mere inadvertence, that the fact that the judgment occurred on Sunday was overlooked by the court, and that there was no evidence on the former hearing as to show that the record was made on Sunday, nor was the Sunday question considered at all. As a result of this the court denied the motion of the defendant. From this denial the court making the second ³⁷ correction the defendant appealed, and the correctness of such order is now under consideration.

The contention of the appellant is twofold. His first contention is that the first finding of the court, fixing October 1 as the date of the record, was an adjudication, and that the question cannot be again litigated. He so pleaded in his petition below. His second proposition is that the entry of judgment upon the record was of logical necessity at that time, in that there could be no judgment until the judgment was entered upon the records, and that, being such, it was of no effect "because forbidden by our Statutes." Turning our attention to the first proposition it should be noted that both proceedings to correct the record were had before the judge had signed the record. Under the provisions of section 243 of the code, power is conferred upon the trial court to amend the record at any time before the same is signed by the judge. The very requirement of the statute is that the record be signed by the judge presupposing a right and duty to make such corrections as shall conform to the very truth. If a judge should make a correction in the first instance, and afterward discover that there was an error in the correction itself, we see no reason on principle why he has not the same power to amend the correction as he had to make it in the first instance; and this is especially true where the amendment is made to correct an evident error. Such a correction may be made even after the

record is signed by the judge: Code, sec. 244; *Shelle Smith*, 50 Iowa, 543; *Fuller v. Stebbins*, 49 Iowa, 376.

The proceedings adopted for such correction are strictly adversary in their character. They are intended as a mere aid to the memory of the trial judge to make the record conform to the truth, and they are not necessarily controlled by the doctrine of prior adjudication. The ³² *adjudicata* is in the main case, and the purpose of a correction of the record is, not to modify such adjudication nor to add to nor take from either party any right determined therein, but to declare the very truth as to what such adjudication was. We need not enter into a discussion of the inherent power there is in the court for such purpose. The point that we hold now is that, by the express permission of section 243 of the code, the trial court was warranted in making the second correction complained of.

Our conclusion on this point makes it unnecessary for us to enter into a discussion of the other. We have, however, given the question consideration. We are of opinion that if the clerk had entered the judgment on the records on that day, such fact would not render the judgment void. Even if it is true that it has been held by this court that there is no judgment in legal contemplation for the purpose of an appeal until it is spread upon the records of the court, it does not necessarily follow that the spreading of such judgment upon the records by the clerk is a judicial act. On the contrary, it has heretofore been held by this court that it is a ministerial act. We know of no authority to the contrary. *Coffey v. Gamble*, 117 Iowa, 545, 91 N. W. 813; *Stutsman v. Sharpless*, 125 Iowa, 335, 101 N. W. 105; *Burke v. Burke*, 142 Iowa, 206, 119 N. W. 129. It has also been held that a ministerial act is not rendered void because performed on a Sunday: *Nixon v. City of Burlington*, 141 Iowa, 316, 111 N. W. 239; *State v. Ryan*, 113 Iowa, 536, 85 N. W. 812.

It is urged by appellant that the cases cited by appellee from other states are not applicable here. It is said that the doctrine that there can be no judgment until it is entered on the record does not obtain in such states, and that in such states it can be logically held that the act of the clerk is ministerial only. On the other hand, it is said that the Iowa doctrine leads us in the other ³³ direction, and that, if there is no judgment until it be entered on the record, it logically follows that the entering of the judgment by the clerk is a part of the judicial act. It is argued conversely that, if the act of judgment on the record is to be deemed only a ministerial act, then it must be because the judicial act is complete before such entry is made, and that the judgment already exists in some form. The writer hereof is ready to concede the force to this argument, but its effect is rather to show

doctrine referred to is unsound in so far as it is the spreading upon the records by the clerk is essential to the existence of the judgment as such. It is the opinion of the writer hereof that this doctrine is not sound in this respect, and that it would have been a better position to hold that, as between the parties to a judgment, no judgment exists in some form whenever the judgment is complete, and that all clerical entries thereof made by the clerk upon the records should always be nunc pro tunc; but the doctrine as it is was laid down more than twenty-five years ago: *Case v. Plato*, 54 N. W. 128; *Balm v. Nunn*, 63 Iowa, 641, 19 N. W. 128. The rule as so laid down operates uniformly upon

The diligent can always adapt themselves to it. It is that we ought not lightly to change a rule of law, even though we should prefer another rule, if better. An appeal for such a change, if desired, is directed to the legislative department. The change accomplished there without injury to any litigant.

could concede, therefore, that the proposition now before us is not in strict line, logically speaking, with the doctrine above referred to, the fact remains that the proposition itself is unassailable and is supported by the reason and authority. If we must establish a course in order to maintain ground so safe and well settled it were better to do so ⁴⁰ than to be driven by logic from the unsound to the absurd. Regarding, therefore, of the soundness or unsoundness of our old doctrine that the spreading upon the record is essential to the judgment as such, we hold to the elementary proposition that the act of the clerk in making such entry is ministerial.

Conclusions and order of the trial court are in accord with the views as herein expressed, and the order appealed from is affirmed.

Acts may be Performed on Sunday: *Hanover Fire Ins. Co. v. State*, 9 Tex. 35, 59 Am. St. Rep. 25; *Whipple v. Hill*, 36 Neb. 100, 21 St. Rep. 742. And the entry of a judgment by the clerk is a ministerial act. But the judgment is the judicial act of the court. *See v. Henderson*, 164 Mo. 347, 86 Am. St. Rep. 618, and note in the cross-reference note thereto. See, also, *Childress v. State*, 100 Miss. 571, 131 Am. St. Rep. 546.

Verdict Rendered on Sunday is said to be void, but a verdict rendered on that day is valid: *Styles v. Harrison*, 99 Tenn. 1, 10 St. Rep. 824; *City of Parsons v. Lindsay*, 41 Kan. 336, 10 St. Rep. 290; *Tuttle v. Tuttle*, 146 N. C. 484, 125 Am. St. Rep. 100.

COMMERCIAL NATIONAL BANK v. GILINSKY

[142 Iowa, 178, 120 N. W. 476.]

CORPORATION—Notice of Exemption of Stockholders' Liability.—The use of the word "suits" instead of "debts," in a publication of a notice of incorporation that "the private property of stockholders is exempt from corporate debts," is not fatal to the validity of the notice. (p. 407.)

CORPORATION—Affidavit of Publication of Stockholders' Exemption.—The statutory requirement that an affidavit of publication of notice that stockholders are exempt from the debts of the corporation shall be filed with the Secretary of State is not mandatory. (p. 407.)

CORPORATION—Diversion of Corporate Funds.—When a stockholder transfers his shares to another stockholder, and receives therefor a certificate of deposit issued to the latter upon the presentation of a note to the bank by the corporation, the first stockholder, having no knowledge of the manner in which the certificate was obtained, and the corporation then being solvent, the transaction does not amount to a diversion of stock injurious to creditors. It is no more than a retirement of outstanding stock. (pp. 408, 409.)

CORPORATION—Stockholders' Liability After Forfeiture of Franchise.—The forfeiture of a corporate franchise does not in itself create of the stockholders a partnership, nor does the continuation of business in the name of the corporation thereafter create a liability against stockholders other than those who participated therein. To constitute a partnership there must be an agreement, express or implied, to that effect. (p. 409.)

CORPORATION—Stockholders' Liability After Forfeiture of Franchise.—A stockholder who does not participate in the management of a corporation after the forfeiture of its charter is not liable to act as a purchasing agent is not liable personally on contracts renewed by it after the forfeiture. (p. 410.)

APPEAL.—Where the Trial Court in the Course of a Written Opinion recites the facts as he finds them, and thereupon dismisses the petition, the defendant is not entitled to appeal from the ruling of his motion to eliminate certain statements from the opinion as not sustained by the evidence. (p. 410.)

APPEAL.—Findings of Fact are not Essential to the Reversal of a judgment or order, under section 4107 of the Iowa code, when made they may be assailed by the appellee as not warranted by the evidence, in order to sustain the judgment. (p. 411.)

Reed & Robertson, for the appellant.

J. J. Stewart, for the appellee.

¹⁸⁰ **LADD, J.** In 1898 the Iowa Fruit and Produce Company was organized with a capital stock of five thousand dollars, which was distributed among the three incorporators. Later A. V. Frush acquired all the stock and sold a portion of it to G. G. Bell. The two conducted the company's business until August 22, 1906, when Frush sold one-third of the stock to the defendant, B. Gilinsky, for two thousand and five hundred dollars. The latter did not become an officer of

company, but rendered some services for it for \$ paid, and on May 18, 1907, sold the stock for \$ back to Frush, as he supposed. The business was conducted by Frush and Bell until March, 1908, when it was appointed to wind up its affairs, and but enough of its property to pay about forty per cent of its debts.

The plaintiff loaned the company three thousand dollars on August 20, 1906, taking its promissory note which was renewed March 20, 1907, and again on August 20 of the same year. The alleged liability of defendant is based on several grounds which will appear hereinafter. Section 1613 of the code exacts the publication of incorporation for four weeks, "which must be in addition to the other things enumerated in the statute: "(7) Whether private property is to be exempt from corporate debts. Proof of such publication by the publisher of the newspaper in which it is required to be filed with the Secretary of State and shall be sufficient to establish the fact." Section 1616 of the code provides that corporations are to substantially comply with the foregoing requirements in relation to organization and publicity shall be sufficient to establish the fact. Individual property of the stockholders liable for the debts." The notice was published within the required time, but read that "the private property of the corporation was exempt from corporate suits," and no affidavit of publication appears to have been filed with the Secretary of State. The use of the word "suits" instead of "debts" in the notice was manifestly by mistake, but we do not think it fatal to the notice. Anyone in reading the notice could reach no other conclusion than that the stockholders were not to be liable in suits against the corporation for debts payable by the corporation. This was equivalent to saying that the debts of the corporation might not be paid against the stockholders. In other words, in saying that private property would be exempt from corporate suits it in effect declared an exemption from suits for corporate debts, which would lead to the same result. It seems to be the requirement that affidavit of publication be filed with the Secretary of State mandatory. The object of the publication is that parties dealing with the corporation be informed of its character, and that it is not a corporation: *Sealon v. Grimm*, 110 Iowa, 145, 81 N. W.

The court noted that the statute enumerates seven things which must be contained in the notice, and when these are included and the requirements are exacted, it would seem that the requirements of publicity had been substantially complied with. The filing of this affidavit affect the publicity given by the notice? The affidavit is but proof of

the publication as the statute declares. This construct in harmony with section 1614 of the code, which provides "the corporation may commence business as soon as the certificate is issued by the Secretary of State, and its acts be valid if the publication in a newspaper is made three months from the date of such certificate." Why the filing of proof of publication omitted if this were essential to render the acts of the corporation valid? If filing proof is not essential within the period here designated, must it be filed? No doubt the purpose of the filing of proof is to perpetuate the evidence of the fact of publication as contended by appellant, and this could not well be done without placing on record the "substance and form" of the notice; but this in no wise can affect the publicity given to its publication, and, as we conclude, is not essential to substantial compliance with the statute with respect thereto. Is this requirement the essence of the thing to be done? Is mere proof of it, and, as no time is fixed within which an affidavit must be filed, and no prejudice could result from delay, the provision should be construed as directory.

2. The defendant negotiated a sale of his stock to the plaintiff individually May 18, 1907, and understood that he was to deliver it to Frush, though the stock was merely delivered to the plaintiff. In payment he received a certificate of deposit in the Council Bluffs Savings Bank for two thousand five hundred dollars in favor of Frush, which the latter assigned to him. This certificate had been issued to Frush upon the execution of a check of a like amount to the bank by the Iowa Fruit and Produce Company unknown to defendant. The stock was carried on the books of the company. At the time Frush gave defendant the company's note for three hundred dollars as his share of the profits while he held the stock. This note was subsequently paid. In the second count of the petition the plaintiff predicates the right of recovery on section 1614 of the code, which declares that: "The diversion of the funds of the corporation to other objects than those mentioned in the articles and in the notice published, if any person be indebted thereby, and the payment of dividends which leaves insufficient funds to meet the liabilities thereof, shall be such as will subject those guilty thereof to the penalties of the preceding section; and such dividends or their equivalent in the hands ¹⁸³ of stockholders shall be subject to such liabilities." The defendant had no part in the diversion of the funds of the company save in receiving the certificate of deposit from Frush without knowledge as to where or from whom he obtained the money. Nor does the record disclose any evidence of the insolvency of the company at that time or that the execution of the note to the Council Bluffs Sa-

ed it insolvent. On the contrary, Frush testified that he believed it was then solvent, and the fact was found to be insolvent about a year later was sufficient to warrant the inference that it was so at the sale or then became such. In these circumstances it cannot be said that plaintiff or other creditors were deceived by the transaction, which amounted to no more than a sale of outstanding stock.

Plaintiff also alleged that at the time the indebted corporation was contracted the Iowa Fruit and Produce Company forfeited its franchise as a corporation by non-compliance; thereafter it was merely a voluntary association of persons, each of whom became liable for debts incurred. Section 1628 of the code provides that "any corporation organized under this chapter shall cease to exist by forfeiture of its franchise for two years at any one time, but the directors or officers shall not work a forfeiture, if they are held within two years of the time appointed for the winding up of its affairs: Code, sec. 1629; *Muscatine Turnverein v. Horton*, 38 Iowa, 33; *Muscatine Turnverein v. Horton*, 38 Iowa, 33; *Muscatine Turnverein v. Horton*, 38 Iowa, 33; *State v. Fogerty*, 105 Iowa, 32, 74. If the charter was forfeited by nonuser, and this is regarded as self-executing, the necessary implication is that during the period to which the existence of the corporation is extended, no powers can be exercised except as may be necessary for the winding up of its affairs: *Code on Corporations*, sec. 6737. But the forfeiture of the franchise does not of itself create of the stockholders a copartnership, nor does the transaction of business in the name of the corporation thereafter create a liability to the creditors other than those who participate therein. In a copartnership there must be an agreement to that effect, either express or implied. Thus in *National Union Bank v. Walker*, 45 N. Y. 410, some of the stockholders of a corporation whose franchise had expired agreed to continue to do business in the name of the company, and this was held to create a partnership as to third persons. But in *Central National Bank v. Walker*, 66 N. Y. 424, where a note was issued by the authorized agent of the company after it had ceased to exist by the limitation of its statutory existence, it was held that a stockholder who had not participated in any way in the business for the payment of the indebtedness, the court said: "The stockholders, who were but cestui que trust, and without other evidence than the proof of their interest, were authorized each other, as partners, to pledge the property of the whole, and to have empowered any one of

their number to bind all in any matter within the ordinary course of business of the defunct corporation. As cestui trust having a common interest, each had dominion over his own share, but had no power over that of others." "There was an entire absence of any intent of the parties to subject themselves to the risks and to the powers which are vested in each member of a partnership. By the law-merchant, individual shareholders have received any part of the earnings of the business carried on by the trustees after the corporation ceased to exist, or have shared in the property of the corporation, they may perhaps be held to account, in equity, to the extent they have profited; but this does not make ¹⁸⁵ them liable in an action at law upon the contracts of the trustees of the corporation": See 1 Cook on Corporations, section 10. The loan on which plaintiff bases its action was made by the defendant acquired the stock, so that if the charter was forfeited, as it contended, he did not become liable therefor. Subsequently, and while he was a stockholder, the note was renewed by the company's name being attached to a new note by some one, but without defendant's knowledge, and without new benefit accruing to the company or to the defendant. After he had disposed of his stock, it was again renewed in the same manner. Had the indebtedness grown out of the business prosecuted in the name of the company while defendant was a shareholder, or were he shown to have received a benefit therefrom, the case would have been different. The note of plaintiff as well as the renewals was executed and received on the theory that the corporation might exercise corporate powers, and without thought of a copartnership on the part of the bank or the stockholders of the Iowa Fruit and Produce Company, and we are of opinion that no such partnership existed. The defendant's relation to the business transaction while he was a shareholder was that of purchaser for value of fruit and produce in Omaha, and, aside from this, he did not participate at all in the management of the company's affairs. This being so, he cannot be charged with having induced the plaintiff to deal with the company as a corporation or otherwise, and the court rightly held him not to be liable for the defendant's indebtedness.

4. The trial judge in the course of a written opinion, which appellant embodied in its abstract, recited the facts as found by the court, and thereupon the petition was dismissed. Later, defendant moved that certain statements be eliminated from the opinion as not sustained by the evidence. This motion was overruled, and from such ruling the defendant ¹⁸⁶ appealed. Appellant's motion to dismiss such appeal was sustained: *Jenks v. Smith, Lichty & Hilman Co.*, 129 N. W. 396, 105 N. W. 396. But its motion to strike appellee's

et should be overruled. The suit was at law, and the court. The additional abstract purported to be the evidence, none of which was included in the abstract prepared by appellant. The latter insists that the abstract appearing in the opinion cannot be questioned. In *Jenks v. Smith, Lichty & Hilman Co.*, 129 N. W. 396, the decision on the findings of fact was for the defendant, and therefore the right of the latter to a new trial was not involved. In *Kelso v. Ely*, 11 N. W. 512, and *Warner v. Foreman*, 11 Iowa, 512, and *Warner v. Foreman*, 391, the unsuccessful party was challenging the findings of fact to support the findings of fact by the court. In *Roberts v. Hoyt*, 12 Iowa, 345, *Heirs of Miller*, 14 Iowa, 97, and *Allman v. Gilbert*, 14 Iowa, 512, there were no findings of fact. In *Corner v. Gas-*, 512, the ruling was on a motion to dismiss the case on the ground that the finding of facts did not appear in the request of either party, and the motion was overruled. In *Conners v. Burlington etc. Ry. Co.*, 71 N. W. 814, 32 N. W. 465, was that an appeal based on a special verdict of the jury might be sustained, even though the abstract did not contain the special findings of the court are no more conclusive than the special verdict of the jury, if the verdict is unsupported by the evidence, it ought not to be the basis for the reversal of a correct judgment. The findings of fact are no longer essential to the review of a judgment (Code, section 4107), and, when made, may be set aside by the appellate as not warranted by the evidence, and sustain the judgment of the trial court. Affirmed.

of the Dissolution of a Corporation is the subject of a note in *O'Brien*, 7 Am. St. Rep. 717, and acts and proceedings of a corporation are the subjects of the note to *Commercial v. Mallers*, ante, p. 309.

of Corporation Franchises is the subject of a note to *on etc. E. E. Co.*, 8 Am. St. Rep. 179.

of Stockholders to creditors of the corporation for cor- is the subject of a note to *Thompson v. Reno Sav. St. Rep. 806*.

STATE BANK OF IOWA FALLS v. BROWN

[142 Iowa, 190, 119 N. W. 81.]

VENDOR'S LIEN.—The Question of the Waiver of a Lien cannot be raised in the appellate court, if it is not presented in the issues or appears to have been submitted to the trial court. A waiver, to constitute a defense, must be pleaded. (pp. 414, 415.)

VENDOR'S LIEN—Enforcement—Transfer to Equity Calendar.—When an amendment to a petition in a law action seeking the establishment and foreclosure of a vendor's cause is properly transferred to the equity calendar for trial. (p. 415.)

VENDOR'S LIEN—Whether Arises by Implication.—Under the Iowa statute a vendor has an implied lien for the purchase price upon the property sold. (p. 415.)

VENDOR'S LIEN—Whether Passes to Assignee.—The purchase price for the purchase price passes to an assignee as an incident of the debt, whether or not the title to the property passes. (pp. 415, 416.)

VENDOR—Representations to Vendee—Fraud.—A vendor who sells by a vendor of town lots to the vendees that they will not use any money, and their obligation will only be to resell the lots and turn the proceeds over to him until payment is made, standing alone, constitute fraud, in that it amounts to nothing more than a promise. (p. 416.)

VENDOR—Representations to Vendee as to Value.—Representations of a vendor as to the value of the property, being mere matters of opinion, are not actionable. (p. 416.)

VENDOR—Representation to Vendee as to Value.—A representation by a vendor to a vendee who is acquainted with the facts that it is bound to be the finest residence part of the city is not to be a profitable investment is a mere matter of opinion. (p. 416.)

VENDOR—False Statements to Vendee—Laches.—A vendee induced to purchase property by fraud must, within a reasonable time after discovering the fraud, rescind the contract and place the property in statu quo. (p. 417.)

VENDOR—Delay by Vendee in Rescinding Contract.—A vendee who purchases land with knowledge, or means of knowledge, of the truth or falsity of the vendor's statements in regard to it, and several times renews the purchase money notes without objection, waives the fraud if any has been perpetrated. (p. 417.)

This action was originally brought upon a promissory note executed by the defendant to the plaintiff. The action was aided by an attachment upon real estate. An amendment was made to the petition, seeking to establish a vendor's lien against property which it was claimed the defendant had purchased from one Bliss, the note in suit representing a part of the purchase price. On plaintiff's motion the case was transferred to the equity docket and tried to the court. The court's decree for the plaintiff the defendant appeals.

J. H. Scales, for the appellant.

Nagle & Nagle and F. M. Williams, for the appellee.

ER, J. On or about July 12, 1902, one B. B. Bliss, a public sale at Iowa Falls of some town lots in great defendant was a bidder and buyer at and consideration of \$4,402.50. As part of the purchase price was paid and delivered to Bliss his note for the sum of \$4,402.50, to secure the money with which to make the purchase, he borrowed from plaintiff the sum of \$442.50, and gave a note therefor to the bank. By the terms of the purchase Bliss was to execute deeds and convey the same to defendant upon full payment of the purchase price. On or about July 31, 1902, plaintiff purchased the same from Bliss, and on March 7, 1903, the time of payment was extended and renewed, and three other notes then outstanding to the bank were merged into the renewal of the purchase for the amount thereof \$5,000. On July 29, 1903, Bliss again applied for an extension, and also for a full accounting of the amount due on the purchase of the lots. This was found to be \$4,714.21, and defendant executed a note for that amount, and another note for \$5,000, and also paid a small amount in cash in settlement of the \$5,000 note. Thereafter defendant paid the \$300 note. On July 29, 1904, he again renewed the note for the purchase of the one now in suit for \$4,632.30, being the amount on the note at that time after deducting plaintiff's claims that this note ¹⁹⁰³ represents the balance of the purchase price of the lots, and asks that the amount thereof be established and the balance paid. Defendant claims that the same was without consideration, and that the same was given to him in pursuance of a fraudulent scheme on the part of the officers of plaintiff bank, with or without the knowledge of Bliss, and for the purpose of defrauding him of

that Bliss laid out an addition to the city of Iowa Falls and held a public auction of the lots in this addition. Bliss was a customer of plaintiff bank, and at the time of the sale was largely indebted to the bank. H. C. Miller, at that time president of the bank and defendant's customer of the bank. Defendant is a farmer living at a short distance from the town, and not far from the place where Bliss had laid out. Defendant had dealt with Bliss through Miller for more than twenty-five years, and had turned over his business matters with him. After Bliss sold his addition and advertised his sale, Miller told defendant about the matter, and it is claimed that he said: "Do not miss the sale. There is a chance to get some money there. You do not have to have any money of your own property. You can't lose anything. You

know I told you that you don't have to put up a d this property. You can sell on contracts, taking sm ments down, and we will take the paper. We don money and don't care for it." It appears that de attended the sale, and that, when some of the lots w up and bids were being made, Miller said to Brown God, Brown! What are you thinking about? Are yo to let that lot go at that price? It is worth dou money." Brown claims that, relying upon these matt some other statements not necessary to be set forth, upon the lots and afterward entered into contracts f purchase, giving the notes heretofore referred to as the purchase ¹⁰⁴ price. He claims, among other thin he was induced to do this by reason of Miller's st that he would not have to pay anything on the no would make the amount out of the sale of lots. Most all, of these statements are denied by Miller, and it is that Brown relied upon his own judgment in the mat is further shown that, at Miller's request, Brown signed the original note as surety. It is practically a that Brown sold some of the lots purchased by him, a he received something like \$1,500, and it is shown amended abstract that since the trial Brown has sold remainder of the lots. This matter is introduced into for the purpose of showing that he, Brown, has no prosecute the appeal. No attempt was made by Br rescind the sale, or to tender back the lots or the p price thereof received by him before this action wa menced, and, if there be any attempt at rescission a is to be found in defendant's answer, or certainly not than March of the year 1905. In view of the showin in appellee's abstract regarding the sale of the lots by after the decree was entered in the trial court, wh not been denied by appellant, it is doubtful if there right to further prosecute this appeal; but, in view entire record, we have concluded to consider some of th tions made on the theory that defendant may have th to have the question of the establishment of a vendo upon the lots determined. No objection was made defendant to plaintiff's amendment to the petition in w set forth the facts regarding the sale of the real esta asking for the establishment of a vendor's lien. Inde record does not show that defendant ever filed an an any other pleading thereto.

His counsel now argue, however, that plaintiff wa vendor's lien, if it ever had any, first, by taking a su the note given for the purchase price; and, seco ¹⁰⁵ attaching the real estate upon which the prayed. As neither of these questions was presen

or appear to have been submitted to the trial court to consider them. Waiver, to constitute a defense, must be pleaded: *Kinkead v. McCormack* H. M. Co., 22, 76 N. W. 663; *Murray v. Thiessen*, 114 Iowa, 22, 76 N. W. 672. There is a decided conflict in the decisions on the question of the waiver of a vendor's lien in the absence of a surety upon a note given by the vendee for the purchase price: See cases cited in 29 Am. & Eng. Law, 2d ed., 763-765. In this state it seems to be a question of intent to be derived from the acts and the parties: See *Gnash v. George*, 58 Iowa, 492, 463; *Zook v. Thompson*, 111 Iowa, 463, 82 N. W. 930. However, we make no definite pronouncement upon the question at this time for reasons already suggested.

The appellant contends that the trial court was in error in refusing to set aside the case to the equity calendar for trial. The court refused to do so, to the petition, to which no objections were filed, for the establishment and foreclosure of a vendor's lien. It was held that a lien cannot be done in an action at law, and there was no ordering a transfer upon the issues as they stood, or the making of the amendment to the petition: *Smith v. Iowa*, 285, 53 N. W. 250. Courts of equity, and courts at law, have jurisdiction to foreclose vendor's liens: See *Porter v. Dubuque*, 20 Iowa, 427, and cases cited. Appellant contends, as we do, that courts of equity in this state do not have the right of a vendor to an implied lien for the purchase price, and he relies upon *Porter v. Dubuque*, 20 Iowa, 427. This case does not in any manner determine the question. The opinion expressly states that the point is not decided. It does hold that where the vendor retains the title, as he did here, there is a vendor's lien. However, we have a statute which expressly recognizes implied liens, and numerous decisions ¹⁹⁶ construing this statute to the effect that a vendor has an implied lien for the purchase price upon property sold by him: See *Hodgson v. Iowa*, 136 Iowa, 515, 114 N. W. 39; *Johnson v. McCormack*, 555; *Jordan v. Wimer*, 45 Iowa, 65; *Zook v. Thompson*, 111 Iowa, 463, 82 N. W. 930; *Owen v. Higgins*, 35, 84 N. W. 713.

The next point made by appellant is that the lien, if it was in favor of the vendor, did not pass to his assignee, the plaintiff herein. There is nothing in this proposition which we have expressly held that the lien in favor of a vendor survives the payment of the purchase price passes to an assignee as an incident to the debt: *Paramore v. Nabers*, 42 Iowa, 147; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Bills v. Reynolds*, 329; *Reynolds v. Morse*, 52 Iowa, 155, 2 N. W. 2. And this rule obtains no matter whether the title

has passed or not: *Blair v. Marsh*, 8 Iowa, 144; *Bills v. 42 Iowa*, 329.

3. Finally, it is argued that there should have been judgment for plaintiff because of the fraud perpetrated on him by the officers of the bank acting either independently or in collusion with Bliss. Defendant testified that he relied upon statements made by Miller to the effect that he 'did not have to use any money, and the obligation would be to sell the lots and turn the proceeds over to him or the bank until payment was made.' Of course, this, if established, would not amount to a defense to the notes: *De v. Lee*, 73 Iowa, 53, 84 N. W. 613. Such statement, if true, may be considered upon the issues of fraud; but, standing alone, it does not constitute fraud, in that it amounts to nothing more than a promise.

The claimed fraud consists in statements made by the bank president. It is said that the day before the sale he asked defendant if he was not going to attend, and told him that he did not want to miss it, ¹⁸⁷ that there was a good chance to make good money there, and that it was to be the finest resident part of the city. It is also claimed that during the sale Miller urged defendant to bid up the lots, saying they were dirt cheap, were worth more than being bid, and that he, defendant, could lose nothing, might turn around and resell, and then pay the purchase price. We have already quoted some of the declarations said to have been made by Miller at the time of the sale. No relations of trust or confidence are shown between defendant and Miller, and Miller denies having made some of the statements testified to by defendant. Defendant was familiar with the lots, lived but a short distance away, and, as he relied upon the statements made by Miller that he would have to pay the notes, but could meet them out of the proceeds of the sales thereof. Generally speaking, statements made by the vendor as to the value of property he is offering for sale, being mere matters of opinion, are not regarded as fraudulent: *State Bank v. Mentzer*, 125 Iowa, 101, 100 N. W. 311; *State Bank v. Gates*, 114 Iowa, 323, 86 N. W. 311, and others are cited. An exception is made where the parties occupy fiduciary relations; but such relations are not shown here. The location of the lots was as well known to defendant as to Miller, and that it was bound to be the best residential part of the city and certain to be a profitable investment was a mere matter of opinion. Remembering that Brown testified so squarely as to what he relied upon, we are in much doubt as to regarding the sufficiency of the testimony to show any fraud or deceit.

Moreover, there is no proof of collusion between Miller and Bliss. But, assuming for the purposes of the case that

and collusion on the part of both Miller and the defendant to purchase, we are constrained to hold that he elected to waive the fraud and to rely upon the promise that he might pay the note out of the proceeds of the resale of the lots, which ¹⁹⁸ promise, as we have said, did not constitute a fraud, and is not relied upon by the defendant based upon a sufficient consideration which would be considered as superseding the original promise as to the note.

It appears that defendant thrice renewed his mortgage for the purchase price of the property. Upon one occasion he had a full settlement of all his accounts with the bank for the old lots which brought him something like fifteen years' interest, which was more than he paid for them. He could have known, after he became the owner of the property, that he was attempting and was in fact selling them, and as to whether or not Miller had misrepresented the value. He knew of the location of the lots, and that they were desirable for residential purposes. He made his purchase in July of the year 1902, and he did not rescind until in March of the year 1905. If he knew of the alleged fraud perpetrated upon him at that time it was due to his own fault and negli-

gences. A universal rule that, where one is induced to purchase property by fraud and deceit, he must, within a reasonable time after discovering the fraud, rescind the contract, and return the property in statu quo. In other words, he has the right, after discovering the fraud or after the means of rescinding are at hand to treat the contract as valid or to rescind, if he fails to act promptly and to rescind, he is held to have waived his right to do so: *Moore v. Howe*, 127 N. W. 750; *German Sav. Bank v. Des Moines*, 222 Iowa, 737, 98 N. W. 606; *Stetson v. Northern*, 104 Iowa, 393, 73 N. W. 869, and cases cited. The means for discovering the fraud were at hand, and, by failing himself thereof and ascertaining the true facts after discovering the fraud and electing to rescind, he relied upon the alleged promise that he might pay the purchase price ¹⁹⁹ out of the sales of the property purchased, and thus discharge his obligation. Moreover, it appears that after defendant knew of the fraud, he could have known thereof by the use of reasonable care. He settled his accounts with the bank, not only for the mortgage suit, but other accounts as well, and secured at the bank renewals thereof. In the absence of sufficient explanation this constituted not only a waiver of the alleged fraud, but a final and complete settlement thereof: *Keyes v.*

Mann, 63 Iowa, 560, 19 N. W. 666; Aultman v. Wheeler, 647.

The decree seems to be correct, and it is affirmed.

Evans, C. J., and Weaver, J., taking no part.

A Vendor has a Lien on the Property for so much of the price as remains unpaid and unsecured otherwise than by personal obligation of the buyer, unless he waives it: Finnell v. Finnell, 156 Cal. 589, ante, p. 143, and see cases cited in the reference note thereto.

A Vendor's Lien is Said not to be Assignable in Avery v. Avery, 619 Cal. 619, 22 Am. St. Rep. 272. See, however, Allen v. Allen, 251 Ala. 251, 74 Am. St. Rep. 31. That the assignment of money notes transfers, as an incident, the vendor's lien, see Land Co. v. Ginn, 144 Ind. 434, 55 Am. St. Rep. 181; National Bank of Commerce v. Lock, 17 Wash. 528, 61 Am. St. Rep. 923.

The Misrepresentation by a Vendor of Material Facts as to title, quantity or title to land, relied upon by the vendee entitles him, as a rule, to repudiate the sale: Cressler v. Cressler, 515 Neb. 515, 20 Am. St. Rep. 691; Newton v. Tolles, 66 N. H. 49 Am. St. Rep. 593; Wilson v. Carpenter, 91 Va. 183, 50 Am. St. Rep. 824; Perry v. Boyd, 126 Ala. 162, 85 Am. St. Rep. 824; tendency of recent authorities is to restrict rather than extend the doctrine of caveat emptor; the unmistakable drift is toward the doctrine that the wrongdoer cannot shield himself from the consequences of his wrongdoing by asking the law to condemn the credulity of his victim: Benton Water Co. v. Benton Water Co., 54 Wash. 124, 132 Am. St. Rep. 1102.

False Representations on the Part of a Vendor are not actionable, though relied upon by the vendee, if the means of knowledge were open to the vendee as it was to the vendor: Lawson v. Lawson, 422 Wash. 422, 107 Am. St. Rep. 880.

BODENHOFER v. HOGAN.

[142 Iowa, 321, 120 N. W. 659.]

OFFICERS—Contract to Serve for Less Than Salary.—Where the statutes make it the duty of a sheriff to perform certain acts, and the contracts of a public officer to render services required of him for less than the compensation provided by law are unenforceable as against public policy. (p. 421.)

SHERIFF—Contract of Deputy to Serve for Less Than Salary.—Where the statutes make it the duty of a sheriff to perform certain acts, and the duty of the board of supervisors to pay the salary, to be paid by the sheriff out of compensation allowed by law, a contract by the sheriff with his deputy to serve for a less compensation than that fixed by the supervisors is void, and no action lies for his recovering the amount fixed by the supervisors from the sheriff. And it is no bar to the action that he has received the sum in full payment under the illegal contract. (pp. 421-423.)

Herrick & Bauder and Remley & Remley, for the appellees.

B. H. Miller and W. I. Chamberlain, for the appellants.

AIN, J. The statutory provision relating to the and compensation of deputy sheriffs is: That shall in writing appoint one or more deputies he shall require a bond, which appointment and approved by the officers having the approval of 's bond, and such appointment may be revoked all appointments and revocations to be filed and auditor's office; that the board of supervisors number of deputies and the salary of each, and deputy shall be paid by the sheriff out of the allowed him under the provisions of the pre-n, and all other deputies shall be paid by the ts 29th General Assembly, c. 27 (Code Supp. 0b).

the year 1905 the plaintiff was the deputy sheriff unty and defendant was the sheriff, ³²³ and at er meeting of the board of supervisors in that rd fixed the salary of deputy sheriff at \$50 per January 1, 1906. At its January meeting, 1906, day of January, the board of supervisors by ation fixed the salary of deputy sheriff for that er month, to be paid to him out of the compensa- the sheriff as required by the statute above re-lays previous to this last action of the board the s sheriff, had in writing appointed plaintiff as and the plaintiff had accepted the appointment bond, to which was attached an oath of office, d had been approved on the same day by the ode, section 1188), and the written appointment on the back as approved by the county auditor. is made as to the regularity of the appointment so far as the necessary formal action by the he county authorities is involved, nor as to the the plaintiff of the duties of his office during 6. Alleging these facts, plaintiff seeks to recover from the defendant at the rate fixed by the supervisors, asking judgment for \$480.50, the after crediting defendant with \$119.50 paid to us dates during the year. The defense is that not hired or appointed deputy sheriff under and any resolution passed by the board of super-nder an agreement that he should perform all necessary and required of him for the compensa- per year, payable at the rate of \$40 and expenses f each of the four terms of court, except that at he fourth term the balance of the agreed annual should be paid to him, and that at the close of terms of the court—three in number—prior to 1906, the defendant paid the plaintiff in full

under the contract, and plaintiff accepted and acknowledged the ³²⁴ money so paid to be in full payment and satisfaction of the amounts due him as deputy sheriff, and defendant offers to pay a balance of \$72, being the full amount remaining due plaintiff for services for the year 1906 under contract. Plaintiff's motion to strike from the answer allegations relating to an alleged agreement to receive more than the compensation provided by the board of supervisors and alleged acceptance of compensation in full satisfaction of services rendered up to October 12th, on the ground that the allegations were incompetent, irrelevant and immaterial, is overruled, and upon admissions by plaintiff that he sought his appointment in January, 1906, and was informed by defendant that the services of a deputy sheriff were required except during court time, and that those required were not worth the sum of \$50 per month, and that defendant declined to hire or appoint him at a salary of \$50 per month, and that he offered to accept the position for the agreed compensation of \$200 per year payable as alleged by defendant, and on the further admission by both parties that plaintiff was the only deputy that defendant had during the year 1906, judgment was rendered in plaintiff's favor for the sum of \$72, admitted by defendant to be due under the alleged contract, and against plaintiff for the costs of the action.

It is practically conceded in argument for defendant that plaintiff was during the year 1906 the "chief deputy," he was the only deputy, and that his compensation was fixed by the board at \$50 per month, payable according to law by the defendant. But defendant's contentions are, as we understand them, these: First, that plaintiff was not appointed as such deputy as contemplated by statute, but under a private contract to perform only a part of the services which have been required of a deputy duly appointed; second, that plaintiff was a party to an illegal agreement with reference to his appointment, an agreement ³²⁵ against public policy, and therefore not entitled to recover any compensation thereunder; and, third, that plaintiff, by accepting payment under the alleged illegal contract in full of services rendered, is barred from recovering the compensation provided by statute.

1. The claim that plaintiff was not appointed under the statute, but under a private agreement with defendant, that he perform the duties of deputy at a different rate of compensation than that fixed by the board of supervisors in pursuance of the statutory provision, is entitled to no consideration whatever. There was a formal appointment, acceptance, a fixing of compensation, and the performance of services, all as contemplated by the statute. Defendant has no authority whatever to make a private arrangement

to discharge the duties of deputy without being deputy as contemplated by law. The statute requires that there shall be a deputy, and when only is provided for, he is necessarily the "chief" whose compensation is to be paid by the defendant, and of supervisors so expressly provided. Defendant under obligation to appoint one deputy whose compensation should be paid by him at a rate fixed by the board, could not escape the duty of paying such compensation by a private arrangement to have the duties of deputy discharged by contract at a less rate of compensation. An appointment of deputy is valid unless approved by the board. The approval of the board was of the appointment as the deputy provided for by law. Without such approval plaintiff's appointment would be invalid, and his appointment would not be lawful: *Buck v. Hawley*, 129 N. W. 688.

The legality of the alleged contract is pleaded by the defendant. Plaintiff makes out his case by alleging and proving that the contract is in accordance with law, carrying the compensation fixed by law. Now, it seems to us that the defendant will not be allowed to plead that the contract is for the purpose of avoiding his statutory obligation to pay plaintiff the compensation fixed by law. That the contract as defendant alleges to have been made with the defendant is void as against public policy is not seriously questioned. The statute contemplates and requires the appointment of a deputy for the entire time of his absence from the office of sheriff, and he could not be allowed to escape such appointment for the purpose of escaping the compensation required by him to be paid, nor could a private contract relieve himself of a portion of his duties. That contracts on the part of a public officer to perform his duties for less than the compensation required of him for less than the compensation fixed by law is against public policy has been fully settled in many states: *Daniels v. Des Moines*, 108 Iowa, 484, 129 N. W. 689; *Peters v. Davenport*, 104 Iowa, 625, 74 N. W. 641; *Robinson v. Independence*, 75 Iowa, 356, 39 N. W. 641; *Robinson v. Independence*, 65 Ala. 610, 39 Am. Rep. 17; *Hall v. Board of Aldermen*, 390; *Emmitt v. Mayor of New York*, 128 N. Y. 291; *Kehn v. New York*, 93 N. Y. 291; *Hope v. Board of Aldermen*, 58 N. J. L. 627, 55 Am. St. Rep. 614, 12 N. J. L. 627.

The defense of counsel for defendant is that plaintiff was a party to the illegal contract, and therefore his action is defeated; and this would be so if he were a party to the illegal contract to make out his case. But the plaintiff's good cause of action without reference to

any illegal contract, and defendant cannot be allowed to and prove in his own behalf an illegal contract to plaintiff's recovery.

It is to be further noticed that the alleged illegal agreement was made on or before the 3d of January, and ³²⁷ before the board of supervisors had acted with reference to the compensation to be allowed the deputy for the ensuing year. When the board came to act with reference to the compensation for deputy, they might have fixed such compensation at the rate agreed upon between defendant and plaintiff. If they had done so, the whole arrangement would have been perfectly valid, and therefore the agreement between defendant and plaintiff was not at the time it was entered into necessarily illegal. Such arrangement only became illegal when the board so fixed the compensation of the deputy at a rate greater than the compensation agreed upon between defendant and the plaintiff when the appointment of plaintiff was made.

In short, the situation was simply this: The defendant had no power to make an agreement for compensation other than that which should be provided by the board, but until the board acted an understanding of a specified rate of compensation would be satisfactory, provided it was approved by the board, was not against public policy. The element of public policy enters into the case only when the defendant insists that he shall not pay to the plaintiff the compensation fixed by the board in accordance with the authority given it by law. Clearly the action of the board could not be controlled by defendant's private contract. If there had been any authority to appoint a deputy otherwise than by the approval of the board of supervisors, and at a rate of compensation to be fixed by it, then there might be some force to defendant's contention that plaintiff's appointment was made under this authority, and not under the authority of the statute. In the case of *Daniels v. Des Moines*, 108 Iowa, 484, 79 N. W. 269, might be applicable, in which it was held that a matron appointed under resolution of a city was not necessarily entitled to the compensation authorized to be paid to matrons appointed under provisions of statute, but, as already indicated, defendant had no authority ³²⁸ to appoint a deputy otherwise than as provided by statute, and it was his duty to make an appointment under the statute, and it is now for him to say that he attempted unlawfully to procure a deputy in some other manner.

3. If, as already indicated, plaintiff was entitled to be released from defendant compensation at the rate fixed by the board of supervisors, his acceptance of part payment in full for his services would not relieve defendant from obligation to make full payment. An agreement to release a debtor on part

amount acknowledged to be due as between them, consideration for such release, is not binding: *Long*, 104 Iowa, 585, 73 N. W. 1071; *Marshall v. Iowa*, 462, 87 N. W. 427, 54 L. R. A. 862. And reference to such a situation as is now before us held that one who is entitled to a statutory compensation not estop himself by receiving a less amount in satisfaction from afterward insisting on full payment: *Lincoln*, 63 Neb. 339, 88 N. W. 505; *Abbott v. y*, 78 Neb. 729, 111 N. W. 780; *Kehn v. New*, 291; *People v. Board of Police*, 75 N. Y. 38. Actions of defendant's answer with reference to the between plaintiff and defendant at the time of plaintiff's payment, and also with reference to the acceptance of a less amount of compensation than that fixed by the supervisors, should have been stricken from the judgment and judgment should have been rendered for the full amount of compensation authorized by the supervisors, less the amounts received from defendant is reversed.

of an Officer Tending to Injure the Public Service is policy of the law and will not be enforced: *Cheney v. y*, 550, 117 Am. St. Rep. 391; *Schneider v. Local Union*, 270, 114 Am. St. Rep. 549. A public office cannot be a contract: *Water Commrs. v. Cramer*, 61 N. J. St. Rep. 705; *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 705. Agreements for compensation to procure appointment to office, or to resign such office in another's favor for a term of years, are void: *Basket v. Moss*, 115 N. C. 448, 44 Am. St. Rep. 103; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 103. A public officer who, in the exercise of his office, is not to be controlled or restricted, or tends or is calculated to restrict, the free exercise of a discretion for the public interest, acting in a public official capacity, is illegal, and the courts are bound to declare it so, and to grant redress by the courts that no redress can be given to a public officer for himself in respect of it: *Hope v. Linden Park*, 58 N. J. L. 627, 55 Am. St. Rep. 614.

MCDANIELS v. McCLURE.

[142 Iowa, 370, 120 N. W. 1031.]

HUSBAND AND WIFE—Liability for Family Expense is proper to charge a wife, as for a family expense, with purchase price of a base-burner, clothes-wringer, heating stove, and can, and a buggy for family use, under a statute providing the expenses of the family are chargeable upon property of either of the spouses. (p. 425.)

Action upon an open account for goods sold to the defendants, who are husband and wife. While the trial court did not allow all the items as against the wife, it did render judgment against her for \$151.95. She appealed.

Genung & Genung, for the appellant.

W. S. Lewis and Flickinger Bros., for the appellees.

370 DEEMER, 'J. Plaintiff was a hardware merchant in the town of Tabor, Iowa, and defendants are husband and wife, who live near that town, the wife, Julia McClure, the owner of the farm upon which they lived and other property. During the years 1899-1903 plaintiff sold and delivered to William McClure certain goods and merchandise amounting in the aggregate to \$381.91. The ³⁷¹ goods to have been charged to William McClure and wife. In the year 1899 certain credits to the amount of \$12.60 were made by plaintiff, and on January 1, 1903, the account was closed by note in the sum of \$326.60, leaving a balance due upon the open account of \$43.30. The note was signed by William McClure alone. Action is brought upon the note and judgment against both defendants, and against the wife upon the account alone, upon the theory that the goods sold were a family expense properly chargeable against her. The trial court rendered judgment against the husband for the amount of the note, and against the wife for the sum of \$151.95, upon the theory that goods to this amount were properly charged against her as a family expense. The case is at law, submitted upon errors assigned; appellant's chief contention being that the judgment is without support, for the reason that it is not shown that the goods, or any part thereof, were actually used in the family, or were such as to be regarded as items of family expense. It is also claimed that there was no actual agency on the part of the husband to purchase goods for the wife. Defendant Julia McClure owned the farm, and her testimony shows that many of the items sold to her husband were used thereon. She claims that she notified plaintiff not to furnish any goods to her husband expecting her to pay therefor, but this is denied by plaintiff; and, as the case

The trial court found for plaintiff, we must assume notice was given. There is also testimony to the effect that many of the articles furnished to the husband were for the farm, and that the wife knew of some at least of the husband's purchases.

The judgment was based upon the theory that the articles furnished were a family expense, we shall consider the case from that standpoint. Code, section 3165, provides that expenses of the family are chargeable upon the property of the husband, either, and that in relation thereto ³⁷² they may be paid by or separately. The term "family expense" has never been very clearly defined in our cases, and perhaps no attempt should be attempted. Generally speaking, the only definition which the statute furnishes is that the account must be for expenses of goods furnished for and on account of the family to be used therein. No limitation is put upon the nature of the expenses, and it need not appear that they be "necessaries," as that term is generally used: *Smedley v. Felt*, 41

It has been held that a cook-stove and fixtures, wash-bureaus, bedsteads, organs, watches, and other jewelry, and other services, wearing apparel, etc., are family expenses. *Smedley v. Felt*, 41 Iowa, 588; *Frost v. Parker*, 65 Iowa, 21 N. W. 507; *Finn v. Rose*, 12 Iowa, 565; *Marshall v. Plaugher*, 60 Iowa, 148, 14 N. W. 214; *Schurz v. Schurz*, 82 Iowa, 432, 48 N. W. 806; *Schrader v. Hoover*, 13 Iowa, 3, 45 N. W. 734; *Murdy v. Skyles*, 101 Iowa, 549, 73 N. W. 411, 70 N. W. 714. It is essential, of course, that the expenditures be for property which was used or kept in the family: *Fitzgerald v. McCarty*, 55 Iowa, 702, 38 N. W. 46. But a reaping machine or other agricultural machinery, used by the husband in the prosecution of his business, or farming, rent of a farm, medical assistance to a family member away from home, or money borrowed to pay for expenses incurred for the family, are not properly chargeable as family expenses: *McCormick v. Muth*, 49 Iowa, 536; *Russell v. Russell*, 82 Iowa, 250, 3 N. W. 75; *Hecht v. Gitch*, 82 Iowa, 182, 1 N. W. 988; *Sherman v. King*, 51 Iowa, 182, 1 N. W. 988.

On the weight of the evidence and these rules we have gone through the record with care, and find that appellant should be allowed the purchase price of a base-burner used in the furnace, a wringer, a round oak heating stove, a can of kerosene for use by the family, and coal-oil and can, in all amounting to \$150.85. This is within \$1.10 of the amount found by the trial court. Had the trial court also allowed an exchange for a family carriage, we have found fault with the decision. Plaintiff does

not appeal, however; ³⁷³ and, as the judgment has stood in the testimony, we shall not interfere.

The result is that the judgment must be, and it is, affirmed.

Where a Statute Imposes upon the Wife a Liability for Family Expenses which is a mere counterpart of the liability therefor imposed by the common law upon the husband, there seems no reason why the words "necessaries" or "family expenses" should not have the same meaning under the statute that they had at common law. In the latter case the criteria by which to determine what are necessaries are the condition in life and social position of the husband. See note to *Cunningham v. Irwin*, 10 Am. Dec. 462; *Bergh v. Van Dine*, 47 Minn. 250, 28 Am. St. Rep. 362; *Baker v. Carter*, 83 Me. 471, 10 Am. St. Rep. 764. It has been held that a diamond shoe worn by the husband for personal use and adornment is a family expense for which the wife may be liable under a statute which makes the property of husband and wife, or of either of them, liable for family expenses: *Neasham v. McNair*, 103 Iowa, 103, 104 Am. St. Rep. 202.

As to What are Necessaries for which a husband is liable when furnished to his wife, see the note to *Wanamaker v. Weaver*, 104 Am. St. Rep. 641.

STATE v. MATHESON.

[142 Iowa, 414, 120 N. W. 1036.]

WITNESSES—Impeachment.—In a Prosecution for Murder with intent to murder, if a witness on direct examination does not testify to any facts tending to show that the shooting was intentional, the state should not be permitted to ask on cross-examination, for the purpose of impeachment, regarding declarations indicating his belief of defendant's guilt and allow proof of such declarations. (p. 428.)

ASSAULT TO MURDER—Instruction on Reasonable Doubt.—In a prosecution for assault with intent to murder, in which the sole issue of fact is whether the discharge of the revolver was accidental, the jury should be instructed that the prosecution must overcome evidence tending to show an accidental shooting by proof beyond a reasonable doubt that it was intentional. (p. 428.)

EVIDENCE.—An X-ray Photograph of a Wound, made in the direction of a physician and in his presence, and testified to by him to be a correct representation of the condition of the body at the time when taken, is admissible in a prosecution for an assault with an intent to murder, over an objection that it should be excluded as hearsay, identified by the electrician who made it. (p. 429.)

EVIDENCE.—X-ray Photograph.—While Neither the physician who took an X-ray photograph of a wound nor the photographer who was present can testify that a spot indicated on the radiograph is a bullet, it is competent for either of them to testify that the spot is such as a bullet imbedded in the body would produce. (pp. 429, 430.)

Misconduct of Attorney in Argument.—It is im-county attorney in his argument to the jury to refer at the case has once before been tried and a verdict ed which has been reversed on appeal. (p. 430.)

ley and Flickinger Bros., for the appellant.

rs, attorney general, and C. W. Lyon, assistant ral, for the state.

AIN, J. This is the second appeal in this case, ving been previously convicted, and the convic- for errors in the admission of evidence and the tructions: See 130 Iowa, 440. The opinion on ppeal sufficiently states the nature of the case, eral way, the evidence relied upon to sustain a

the last trial Henry Matheson, defendant's ring as a witness in his behalf, was again asked, rious trial, to state on cross-examination whether certain declarations tending to show his belief at was guilty of the shooting, and on his denial g of such declarations witnesses were allowed, endant's objection, to testify that such declara- ade. The error now urged in this respect is the urged on the former appeal, wherein we held itness had on his direct examination given testi- ing a belief on his part that defendant was not entional shooting, he might be asked, on cross- as to declarations inconsistent with such a be- urpose of laying a foundation for impeachment ch declarations. On the present trial, however, id not testify on direct examination to any facts ow that the shooting was not intentional; nothing e jury could infer a belief, one way or the other, f the witness as to the revolver in his son's pos- g been accidentally discharged rather than inten- Under these circumstances his testimony was eached by proof of his prior declarations to the fendant had shot the officer. Those declarations e mere declarations of a third person of a be- dant's guilt, and were not admissible, and the tion with reference to such declarations for the aying a foundation for proof thereof was im- eclarations which were proven for the purpose ent were manifestly prejudicial to defendant, as o show that his own father believed him to have shot the officer. Even the declarations of a his belief in his son's guilt are not admissible on in a criminal prosecution, unless they serve

the purpose of impeaching the father's ⁴¹⁷ testimony trial in favor of the son, or are brought under some recognized rule as to the admission of declarations of persons. Now, as the father had not testified as to intending to show that the son was innocent with reference to the shooting, there was nothing in his evidence inconsistent with his prior declarations, and the latter became simply declarations against the defendant. They were nothing more. Under this state of the record on the second trial, differing in this respect from that of the first trial, the court could allow the prosecution to cross-examine the father and his witnesses in reference to these declarations, and in allowing them to do so, the court was not impeaching the father thereof by way of impeachment.

2. On this trial, as on the one reviewed on the former appeal, the injury to the officer by the discharge of a revolver in the possession of defendant was admitted, and the sole question of fact was as to whether the discharge of the revolver was accidental or intentional. On the former appeal the conviction was reversed because the court had not told the jury that the burden was on the prosecution to establish, beyond a reasonable doubt, that the shooting was not accidental. The instructions given on this trial referring to the issue were to the effect that whether the discharge of the revolver was accidental was a question for the jury to determine, and the following:

"(12) If you find from the evidence that said pistol was accidentally discharged while being withdrawn from the pocket of the defendant, or by catching upon the clothing of the defendant while being thus withdrawn from his pocket, then such fact would not be sufficient to make out an issue for the jury."

"(13) The defendant claims that he was carrying a revolver in the hip pocket of his overalls, and that he was charged with the act of taking the same from his pocket, when it was charged, without any intention upon his part of discharging the same."

"(14) It is for you to determine, from the evidence, ⁴¹⁸ what were the circumstances under which the question was fired, if it was fired, and you must determine the question in the light of all the facts and circumstances surrounding the transaction and tending to throw light thereon."

It is quite evident from the first of these instructions that the jury were to understand their duty to be to make a finding as to whether the revolver was accidentally discharged, and that only on an affirmative finding that it was discharged would the defendant be relieved from the presumption that an unlawful assault had been committed; and other two instructions are not inconsistent with such a finding. If the rule that the prosecution should overcome the presumption tending to show an accidental assault by proof beyond

that such assault was intentional is to be found in the instructions given, it must be so found in an instruction reading as follows:

"The defendant is, in the first instance, presumed guilty of the crime charged in this indictment, or of any other crime you should proceed to a consideration of the evidence in this case with this presumption in mind. This presumption continues until the state has shown by the evidence beyond all reasonable doubt all the facts necessary to constitute an offense under this indictment, under the rules of law; that is, the evidence must be such as to fully satisfy and convince you that such matters are proven. If the evidence does so satisfy and convince you, then the presumption has been shown beyond all reasonable doubt." The instruction last quoted contains no direct reference to the accidental character of the injury. What facts are which must be proven beyond a reasonable doubt cannot be determined from this instruction, nor, can we see, from any instruction given. For the purpose of an instruction was asked in the following language: "The state must prove, not ⁴¹⁹ only by a preponderance of evidence, that the injury to Baker was not the result of an accident, but must satisfy your minds beyond all doubt that it was not an accident." The defendant was allowed to have this instruction, or some instruction to the same proposition, given to the jury; and, as we are told, and any equivalent statement in the instructions, the court reached the conclusion that the court erred.

On the former appeal an exhibit, consisting of an X-ray photograph, which it was claimed showed the bullet close to one of the vertebrae in the neck, was held to have been properly admitted in evidence and was identified by the electrician who made it as a photograph. On the last trial the electrician who made the photograph was not called as a witness, and it is argued that the exhibit was improperly admitted. We think, however, there was no error in the ruling of the court in admitting the exhibit, for the physician who directed the taking of the photograph, and who was present when it was taken, testified that it was a correct representation of the condition of the officer's body at the time it was taken. This the jury could know, as well as the man who operated the machine that the radiograph was the result of the action of the machine in producing a representation of the bony structure of the body, and of any piece of metal, such as a bullet, which might be imbedded therein.

The operator nor the physician would be able to point out the spot indicated on the radiograph was a bullet,

but it would be competent for either of them to testify that the spot was such as a bullet imbedded in the body would produce. For the reasons just indicated the testimony of the physician that the spot on the radiograph to which his attention was called represented a bullet in the body was competent.

⁴²⁰ 4. The county attorney, in his opening and closing arguments to the jury, referred to the fact that the case had once before been tried, and a verdict of guilty had been returned, and that the sentence on this verdict has been reversed on appeal. Such comment, we think, was improper, but the only complaint thereof made by counsel for the defendant at the time was by interposing an objection after the closing arguments were made and asking an exception. The court made no ruling with reference to the matter. In this condition of the record we cannot see that the court erred, for it was not asked to do anything which could have saved the defendant from the prejudicial effect of the improper statements. Whether the statements were such as would in themselves constitute misconduct requiring a new trial, we need not determine, as we have no occasion to anticipate the repetition of such improper statements on another trial.

For the errors pointed out, the judgment is reversed.

Photographs and X-ray Pictures as Evidence are discussed in notes to *State v. Matheson*, 114 Am. St. Rep. 437; *Baustian v. State*, 75 Am. St. Rep. 468.

ROBERTSON v. SCHARD.

[142 Iowa, 500, 119 N. W. 529.]

COURTESY—Trust in Lieu of—Rights of Creditors.—Upon the death of a wife the title to a one-third interest in her estate does not vest eo instante in her surviving husband subject to the claims of his creditors. The right which vests in him is the right to elect between what the law offers him and benefits which the law bestows; and if he chooses the latter, which is exempt from the demands of his creditors, they have no recourse. (pp. 432, 433.)

WILL—Election by Husband.—The Right of a Surviving Husband to elect between what the law gives him and what he chooses will bestows cannot be controlled by his creditors, notwithstanding the enforcement of their demands will depend upon the election he makes. (p. 433.)

WILL—Trust in Favor of Husband.—A Wife may Create a Testamentary Trust from which her surviving husband will benefit, without vesting him with any interest subject to the demands of her creditors' demands. And if he accepts this gift, and waives the

confers, he takes no interest subject to the claims
 (p. 433.)

TRUSTEES' TRUST — Trust Property Subsequently Conveyed.—
 in trust for a debtor, and not subject to the demands
 at the time of his discharge in bankruptcy, is not
 to debts antedating the discharge by a subsequent
 him in pursuance of a discretion given to the trustees.
 the trustees delayed the conveyance until his debts
 by the bankruptcy proceedings works no fraud upon
 (p. 434.)

ons, W. J. Roberts and B. A. Dolan, for the ap-

awyer and James C. Davis, for the appellee.

VER, J. Prior to the year 1898 Mary Robertson,
 Iowa, died testate, devising the property now in
 with other property of which she was seised and
 trustees, directing them to use such of the profits
 herefrom as they might deem best for the use
 of her surviving husband, Hugh Robertson, but
 that he should have any claim to or upon any
 or portion of said trust estate. The trustees
 in their discretion to deliver to said Hugh
 any specific article of personal property, or to con-
 any part or parcel of the real estate included in
 in July, 1898, said property being still held by
 under said trust, one Petzel obtained a judgment
 against Robertson in the district court of Lee county.
 1899, Robertson, having become involved in heavy
 mercantile business, filed a petition in bankruptcy
 in the United States district court for the southern district
 of Iowa, including, among his debts and liabilities, the claim
 against him by the judgment above mentioned. He also
 claimed the property of which he claimed to be possessed,
 therein no reference to the interest, if any, he
 had in the trust property held by the trustees under his de-
 ceased wife's will. On March 8, 1899, he was duly adjudged
 bankrupt. The owner of the judgment filed a transcript
 of the judgment with the referee for allowance in the bankruptcy pro-
 ceedings, not being supported by the required proof, it
 was disallowed. On the application of 502 creditors of the
 estate of Robertson under the will of Mary Robertson were
 appointed to the proceeding, to determine whether they
 were or were not liable to be subjected to the payment of the
 debts. These matters appear to have been thor-
 oughly investigated by the referee, who upon full hearing held
 that Robertson had no interest in, or title to, the trust
 property which could be subjected to the claims of the cred-
 itors. After, on application of the bankrupt for final

discharge, the creditors and the trustee in bankruptcy objected thereto, alleging as a reason therefor that said bankrupt had concealed and failed to list among his assets his interest in the trust estate created by the will of his deceased wife. After the report of the referee holding that the trust estate was not subject to the payment of the debts of the bankrupt, Robertson, the objections to his discharge were withdrawn, and on August 7, 1899, an order was entered by said United States district court that said Hugh Robertson be discharged from all debts and claims made provable by the acts or omissions of the bankrupt in the course of his business or otherwise in the progress against his estate. Later, because of some informality in the entering of this order, the case was reopened, a new notice served on all creditors, and on July 2, 1900, another and final order of discharge of said bankrupt was duly entered. More than two years later, on October 2, 1902, the trustees under the will of Mary Robertson exercised the power and discretion thereby vested in them by conveying the property in controversy to the said Hugh Robertson. Five months later, the defendant Schard, claiming to have received an assignment of the Petzel judgment, caused an execution to be issued thereon, and levied upon said property, and to effect its sale by the sheriff, Robertson began this action in equity. On trial to the court the facts substantially as above outlined were developed without material dispute, and decree was entered for the relief prayed by the plaintiff, and defendant appealed.

⁵⁰³ If we understand appellant's proposition it is: that Robertson upon the death of his wife became instantaneously seized of a one-third interest in the real estate left by her, and that such interest became subject to the lien of the Petzel judgment rendered in the following year; and, secondly, that the effect of the discharge in bankruptcy was simply to release the bankrupt from personal liability, but left the force of the judgment unimpaired. As we are compelled to agree with appellant upon the first proposition, we shall have no occasion to consider or pass upon the latter.

Counsel say that the provision made in the will for the benefit of Hugh Robertson was not made in lieu of dower or distributive share, while appellee insists that it was. Appellant has not seen fit to furnish us with a copy of the will, and in its absence the usual presumption in favor of the husband of the trial court requires us to assume that appellee's testimony in this respect is correct. But, assuming that the will does not expressly declare the provision to be in lieu of the husband's legal share, yet even, as stated by appellant's counsel, it is of such nature as necessarily excludes the idea that the husband may claim the benefit of both the will and the dower. The record does disclose that he made no claim of dower.

gave written consent to the approval of the trustees showing that they had taken and were on the terms of the trust all the property so devised. It is not correct to say that upon the death of the testator the title to a one-third interest in her estate vests, in the surviving husband: See *Shields v. Keys*, 104 Iowa, 534, 114 N. W. 200. The right which is vested with is the right of choice between what he takes under the will and the increased or other benefits offered by the will. The choice is to be made by him, and not by the court: *Potter v. Worley*, 57 Iowa, 66, 7 N. W. 298. The fact that by his choice to take under the will he gets nothing which can be subjected to the payment of his debts while had he taken under the statute the property could be seized by his creditors, is wholly immaterial: *Brightman v. Morgan*, 111 Iowa, 481, 82 N. W. 200. *Rock v. Knoer*, 136 Iowa, 534, 114 N. W. 200. A husband has no equity by which the husband may be controlled. The wife is under no obligation or devise to an insolvent husband her own property. She knows that it will be immediately absorbed by her husband's creditors, and if she can construct a trust from which she can derive some benefit, without vesting him with an estate which is subject to levy, or other legal process, at the instance of his creditors, and thereby make sure that he will not be an object of public charity, there is no good reason why she could not be allowed to do so. See *Meek v. Briggs*, 87 Iowa, 610, 43 Am. St. Rep. 456, though not involving the relation of husband and wife, is authority for the proposition that a testamentary trust which places property in the hands of trustees for the benefit of the cestui que trust creates no lien in favor of the creditors of the latter. See also *Perry on Trusts*, section 386a, 59 Vt. 530, 10 Atl. 258, *Rife v. Geyer*, 59 Pa. 473, and *Keyser v. Mitchell*, 67 Pa. 473, and *Gray*, 3 Gray, 405. Directly in point see the late case of *Nat. Bank v. Crist*, 140 Iowa, 308, 132 Am. 118 N. W. 394, 23 L. R. A., N. S., 526. That the devise to Hugh Robertson is of this nature, and that with the thought that he should take dower in the property, we regard as clear; and, as we have already said, also, that he elected to take under the will. Hence when this will came into effect the statute requiring a written election filed in court the only way in which a surviving husband could express his choice

in the matter, and any act or declaration of such s
 "plainly indicating a purpose to take under the will"
 sufficient election: *Craig v. Conover*, 80 Iowa, 355, 45
 892; *Brightman v. Morgan*, 111 Iowa, 481, 82 N. V.
 Indeed, even if the provisions of the will were not so
 sistent with the husband's statutory right as to requ
 to elect between them, yet if the parties in interest
 garded them, and the husband voluntarily elected
 under the will and relinquished all right to a statutory
 we are not prepared to hold that his creditors have an
 to complain: *Shields v. Keys*, 24 Iowa, 298.

According to the cited case the will of the wife l
 effect to pass the entire title to the devisees named t
 subject only to be defeated by the demand of the su
 husband for a statutory share. If he sees fit to wa
 right to make such demand and allow the will to ha
 effect according to its terms, he has a perfect right so
 and in such case nothing vests in him unless it be by f
 the terms of the will. It follows of necessity, under th
 of the present case, that unless the will of Mary Ro
 vested her husband with some estate which was subject
 lien of the Petzel judgment, then, upon appellant
 theory of the law, she has no case, and the decree of t
 strict court is right. The rule recognized in *Meek v.*
 87 Iowa, 610, 43 Am. St. Rep. 410, 54 N. W. 456, and
 authorities of like import above cited sufficiently upho
 doctrine that trust property, committed to the discre
 trustees without power of control in the beneficiary
 trust, is not subject to levy and sale by the creditors
 latter. At no time prior to the date of his discharge in
 ruptcy had Hugh Robertson any title, legal or equita
 this property. The trustees were under no ⁵⁰⁸ obligat
 convey or deliver the property to him otherwise than i
 own discretion. He had no right therein which he cou
 or convey to another. He had nothing to which the lien
 attach. There being no lien, and the discharge in
 ruptcy having released the debtor from personal li
 then upon appellant's own theory of the law the ju
 cannot now be enforced against his property.

The fact that two years or more after his dischar
 trustees exercised their discretion in his favor and co
 the property to him in his own right does not aid t
 appellant. Even if we assume that they delayed this c
 ance until after his debts had been wiped out b
 bankruptcy proceedings, it worked no fraud upon hi
 itors. It is enough that at the time of his discharge
 surrendered to his creditors all his legal and equitable
 which they could subject to the payment of their
 What he has since acquired he holds free from all

adjudication as a bankrupt. The trial court the plaintiff entitled to have the collection of permanently enjoined, and the decree appealed sustained.

ant has moved to strike an amendment filed to amended abstract as being an unnecessary addendum, and to strike appellee's argument as filed too late. We find neither motion well they are overruled. All costs will be taxed to

the Curtesy is the subject of an extended note to Donovan Am. St. Rep. 474.

Between the Right of Dower and the right to benefits the will of a deceased husband is the subject of a note of Gordon, 92 Am. St. Rep. 695. A widow's right to one-half of her childless husband's estate subject to statutory, and cannot be upheld unless she complies with provisions of the statute: Wash v. Wash, 189 Mo. 352, p. 353.

of Spendthrift Trusts has been recognized in a number of cases: See Merchants' Nat. Bank v. Crist, 140 Iowa, 308, p. 267; Morgan's Estate, 223 Pa. 228, 132 Am. St. Rep. 243; Allen v. Allen, 195 Mass. 226, 122 Am. St. Rep. 243; Derder, 100 Md. 36, 108 Am. St. Rep. 380.

CASES

IN THE

COURT OF APPEALS

OF

KENTUCKY.

EAST JELICO COAL COMPANY v. HAYS

[133 Ky. 4, 117 S. W. 307.]

PRESCRIPTION—Presumption of Grant of Land.—When a person has been held adversely for fifteen years, the law conclusively presumes a grant; and if the adverse holding has not been continued for that time, still the law may presume a grant from this adverse holding. Whether the presumption of a grant will be made depends not alone upon the length of time that has elapsed, but upon all the circumstances. (p. 439.)

PRESCRIPTION—Presumption of Grant of Land.—When the prescription has not run, other facts may be shown justifying the presumption of a grant. (p. 439.)

EQUITY—Stale Claim not Barred by Limitation.—A claim may be stale, so that a court of equity will not enforce it upon the facts shown, although it is not barred by the statute of limitations. (p. 439.)

PRESCRIPTION—Presumption of Grant Against Successor Purchaser.—A purchaser with notice stands in the shoes of his vendors, in respect to the presumption of an adverse grant of land. (p. 440.)

James D. Black, for the appellant.

James M. Hays and J. Smith Hays, for the appellee.

⁵ **HOBSON, J.** J. Smith Hays brought this suit against the East Jellico Coal Company to quiet his title to a tract of one hundred acres of land granted by the commonwealth to Joel D. Partin on September 27, 1867, alleging that the defendant is the owner and in possession of the land. The defendant answered traversing the allegations of the petition, and after hearing the circuit court entered a judgment in favor of the plaintiff as prayed by him. The defendant appeals.

Both parties claim under Joel D. Partin. On March 1, 1868, Joel D. Partin and his wife conveyed the land to Silas Parson and on February 8, 1906, the heirs at law of Silas Parson conveyed it to the plaintiff, Hays. On the other hand, the East Jellico Coal Company claims the land under a deed made by it on January 2, 1896, by William Bays and wife. Bays

er a deed made to him on February 28, 1889, at law of Elijah Rhodes, and a deed of partition and H. H. Rhodes made on March 1, 1889, s being also one of the heirs at law of Elijah defendant produced no title papers to Elijah Silas Partin, but it showed these facts: A man e bought the land from Joel D. Partin some e venties, and built a house and lived on it, in- ke possession of the tract; but this ⁶ house, as he survey are run, was about two hundred feet e line. He cleared and inclosed a body of land use, and this clearing and inclosure included t acres of the patent boundary. He sold out n, and gave him possession about the year 1880. moved into the house where Miller had lived session of the survey claiming it as his own, n, the patentee, making a deed to him. In the las Partin traded this land with a man named tract about a mile and a half away, and moved e traded for. Hensley traded the tract he got to a man named West, and West traded it to s. How these trades were made does not ap- s, no writings evidencing them are produced. Partin was living on the tract which he got from ird person set up claim to a lien on that tract ollars. Silas Partin then sold that place to an- for a mare and colt, and from that time until ated land in the neighborhood of the tract in He claimed that there was twenty dollars com- n this tract of land. Elijah Rhodes sold the e land, the purchaser of the timber paying s of the purchase money to Silas Partin, and then said he was ready to make Elijah Rhodes this occurred about the year 1882 or 1883. s held the land, using it as his own from that s death, in 1886, and after his death his heirs t until 1889, when William Bays purchased it, t until about the year 1894, when he sold it to co Coal Company, and it has held the land since Silas Partin at no time after he received the s ever set up any claim to the land, although by and on land which he was renting. He did s for taxation. It was held and used by Elijah those claiming under him, as their own, as he and yet he made no objection, although from timber was cut off the land, which then consti- f value, he and his son assisting in getting the e off. After his death his heirs at law set up e claim to the land, but on February 8, 1906,

sold it to the plaintiff Hays for five dollars an acre, and it was then worth fifteen or twenty dollars an acre.

It is earnestly insisted for Hays that the judgment of the circuit court is right, because the defendant has produced no deed or other writing from Silas Partin divesting him of the title to the land; but, although no deed is produced, the question arises, Are the facts established by the proof sufficient to warrant a presumption that a deed was executed? It is a matter of common knowledge that mountain land of this sort twenty-five or thirty years ago was considered valuable only for the timber on it, and that little care was taken in preserving or recording the muniments of title. The valuable salable timber on this tract was cut off in the lifetime of Elijah Rhodes, and perhaps no controversy over title would ever have arisen but that a valuable vein of coal was since been discovered in the vicinity. William Bays testified that, after he bought the land, H. H. Rhodes delivered to him a deed which, as shown by it, was signed by Silas Partin and his wife, and acknowledged, as shown by the certificate on it, before a deputy clerk. He then delivered the deed to the county clerk to be recorded, but did not pay the fee. The deed now cannot be found.

It is insisted that the testimony of William Bays that the deed cannot be considered, because he conveyed the land to the defendant and stands under the code as though he had not made the conveyance, but he does not testify to anything done by Silas Partin. He simply testifies to his possession and having in his possession a certain document. He does not testify that Silas Partin had signed it. He only testifies to the existence of the paper. His testimony does not establish the deed, and the question remains, Are the facts shown sufficient to raise a presumption that Silas Partin signed the deed? In Greenleaf on Evidence, section 2522, the rule is thus stated: "Jurors are often instructed or advised in more or less forcible terms, to presume conveyances between private individuals in favor of the party who has proved a right to the beneficial enjoyment of the property, and whose possession is consistent with the existence of a conveyance, as is to be presumed; especially if the possession, without such conveyance, would have been unlawful cannot be satisfactorily explained." In 4 Wigmore on Evidence, section 2522, the rule is thus stated: "When the title to land is to be proved, the execution, contents and the appropriateness of the document of grant may be presumed in certain circumstances; the inference resting on a principle of relevancy already considered: Ante, secs. 148, 157. In such circumstances are the long-continued possession of the land (or an appurtenant right) by a party claiming as owner."

possible opponents, and such other varying circumstances in the particular case as increase the probability of grant for the situation as a whole": See, *Cornelius*, 41 W. Va. 59, 23 S. E. 599, 30 L. Ed. 2d 1011; *Cahill v. Cahill*, 75 Conn. 522, 54 Atl. 201, 732, 1006; *Townsend v. Boyd*, 217 Pa. 386, 66 Atl. 2d 1011; *A., N. S.*, 1148. In *Badger v. Badger*, 2 Wall. 36, the United States supreme court thus stated "In such cases courts of equity, acting upon their well settled doctrine of discouraging for the peace of society the demands, refuse to interfere where there has been a long acquiescence in prosecuting the claim or a long acquiescence in the assertion of adverse rights. Long acquiescence and long possession out of possession are productive of much injustice to others, and cannot be excused by showing some actual hindrance or impediment to the prosecution of the claim, or fraud or concealment of the parties in possession. The proper appeal to the conscience of the chancellor." In *Severns v. Baxter*, 104 N. H. 240, this court held that where the claimant had not prosecuted his claim for more than twenty years after a purchaser had settled on the land, the court would refuse the claimant its aid. The same rule was applied in *Barnett v. Emerson*, 6 T. B. Mon. 607, and *W. v. Baker's Admr.*, 13 B. Mon. 406. When a claim is held adversely for fifteen years, the law consumes a grant; but if the adverse holding has not lasted for fifteen years, the law may presume a grant in some cases and other circumstances. Whether the presumption of a grant will arise, as shown by the authorities, is not alone upon the length of time that has elapsed, but upon all the circumstances. When limitation has run, no need to call in play the presumption; but when it has not run, other facts may be shown justifying the presumption of a grant, although this conclusion is not made by operation of the law from the lapse of time. Thus a claim may be stale so that a court of equity will not enforce it under the facts shown, although not barred by limitation: *Gatewood v. Gatewood's Admx.*, 100 Fed. Rep. 931, 70 S. W. 284.

It is shown here by three witnesses that Silas Partin said he would make the deed unless he got the twenty dollars, and that the twenty dollars was paid him, and he then said he would make the deed. It is shown by two witnesses that he received the twenty dollars and was ready to

make the deed. It is shown that after this Elijah treated the land as his own, Silas Partin ¹⁰ acquiesced, and, although he lived in the neighborhood for so long like twenty years, he set up no claim to the land and acquiesced in the ownership of it by Elijah Rhodes and claiming under him. He did not give in the land for sale. He lived on rented land. He had actual notice of the land by Rhodes as his property, and of the subsequent sales that were made, and was all the time living on the land near by. If a conveyance cannot be presumed from proof as this after twenty years, and after the death of the parties to the transaction, then it is hard to understand how such a presumption would arise. The suit was not brought until more than twenty years had elapsed. The conduct of the children of Silas Partin after his death was perfectly similar to his conduct, until they made the conveyance to Hays at less than half the real value of the land. If the suit had been brought by them, they could not recover. Hays stand in their shoes?

The record shows that in February, 1906, he made a contract with them by which he was to pay them five dollars an acre for so much of the land as they should manifest title to. In July they made him a deed to the boundary of the land for \$500 dollars an acre. At the time of these transactions the defendant had possession of the land. Its possession was not taken from him of its claim. About this time, or a little before, the children of Elijah Rhodes brought a suit for partition of the land his father owned, he not having joined in the suit with Hays. This suit was brought by James M. Hays, who was a partner with J. Smith Hays, the appellee, in the purchase of the land in controversy. In that suit the boundary in controversy is included in the petition filed by James M. Hays, and so he had actual notice of Rhodes' claim to the land. In addition to this, the venditors told J. Smith Hays, as shown by himself, the connection with the price at which they sold ¹¹ the land was sufficient to put him on notice. We therefore conclude that he is not a purchaser without notice, but stands in the shoes of his vendors, and that against him, as well as against the children, a conveyance of the land by Silas Partin to Elijah Rhodes must be presumed.

Judgment reversed, and cause remanded to the circuit court for a judgment as above indicated.

In Determining Whether or not a Claim is Stale, equity is not limited to the period named in the statute of limitations, but may give relief in cases where the delay is less or greater than that named in the statute: *Neppach v. Jones*, 20 Or. 491, 23 Am. St. 100; *See*, in this connection, *Colton v. Depew*, 60 N. J. Eq. 454.

Pillow v. Southwestern Va. Imp. Co., 92 Va. 144, 53 804; *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. it is said that if the statute of limitations does not title to land, laches cannot: *Waldron v. Harvey*, 54 02 Am. St. Rep. 959; and that courts of equity are statute of limitations, and must give effect to it when *vin v. Williams*, 74 Ark. 316, 109 Am. St. Rep. 81.

PHILLIPS v. STEWART.

[133 Ky. 134, 97 S. W. 6.]

ARIES—Proof of Corner or Line by Reputation.—It o prove the location of a corner or line of a public utation. (p. 442.)

ARIES—Evidence of Reputation.—Where Procession- d people in the neighborhood to locate a corner where ce stood, and from the location pointed out by them s a line, he and the processioners, after the death of s, may, in order to show the location of the corner ify to the facts brought out at the processioning pro- 443.)

L—Whether Action will be Treated as Equitable or re a suit in equity was transferred to the common-law order of court, which order was ignored by the court s and the case tried as an equitable action, it will be ppeal. (p. 443.)

urum and J. W. Alcorn, for the appellant.

ams, for the appellee.

AR, J. The litigated question in this action is tion of the boundary line separating appellant's s lands. The land in dispute is uninclosed, save two buildings of small value have within the last en built upon it by ¹³⁵ appellee. These, how- ot been built long enough to ripen into a title , so that the question is the one of the location Appellee's title papers recognize and call for rs in appellant's line. One of the corners called ant's ancestor's deed, more than fifty years old, st. The next corner is a beech, and so is the next o beeches were found in surveying the lines after instituted. One (the last named) is admittedly signated. We think the other is established by he second corner. The true location of the point ate-post stood will settle all that part of the in dispute. The gate-post has long since dis- here is no trace of it now left. It was shown in

evidence that appellant and appellee's ancestor, from the latter inherited, had a dispute as to the location of the gate-post corner, as well as the first beech corner twenty years ago. Appellant and her husband then applied to the county court for the appointment of processioneers to establish and re-mark the obliterated corner. They were appointed, and with the county surveyor met upon the site. They had called a number of old people living in the neighborhood, who were requested, and probably sworn, to locate the old gate-post. Each of the witnesses so called stuck a stake down at the point where he remembered the post to have been. They differed some few yards. The surveyor placed Jacob's staff in the center of the points so selected, and thence ran the line to the beech which was then pointed out as the next corner, and which is the one above named, recorded to in the record by the witnesses as a broken top beech corner. The magnetic degree of that course was seventy degrees and the distance twenty-one and one-quarter poles. The county surveyor who was present and ran the line at the time made a written memorandum of what had been done, and signed it. But it was not signed by the processioneers, and it returned to the county ¹³⁶ court, as was required by law. Appellee's ancestor, the then owner of appellee's land, was present at this proceeding and seems to have acquiesced. On the trial of this case the surveyor who then ran the line was called as a witness, and testified to the foregoing facts, and produced the certificate which he had given at the time of processioneering. His testimony was objected to. But we think it was relevant. The old citizens who were called upon to be processioneers, and upon whose statements the corner was established, are now all dead. It is competent to prove the location of a corner or line of public survey by reputation. In the nature of the thing those who marked an original corner, and who knew personally of its location, will in time be gone away, and so in some instances will the corners themselves. Such matters of common concern are discussed in the neighborhood, and are accepted and treated by those interested as being of a certain nature, so that their reputation becomes established and known of all in the community. After the death of the original witnesses and the destruction by fire of the monuments marking the corner, the only thing which its location might be identified is the reputation established and made notorious when both witnesses and monuments were in existence. It is, therefore, that the law receives evidence of the reputation in proof of the fact of the location of such corners and lines as the best evidence obtainable in the nature of the case. The surveyor's certificate was as receivable as a processioneer's report, because it did not

statute concerning the processioning of land. s said then to the surveyor by the persons who fore him was evidence of reputation of the loca- original monument and corner. One or two of processioners also testified substantially to the s the surveyor did. Their testimony was like- ent for the same reasons. Other witnesses yet stified that they knew where the old gate-post orroborated the location made by the surveyor, d. Running thence north, seventy degrees east, and one-quarter poles, brings the line to the broken This evidence outweighs, in our opinion, the con- unsubstantiated statements of appellee's witness post was north of the point located by Wood.

ontends that by beginning his line at a fence it some rods short of the corner called for in running thence the requisite distance called for t would carry his line to a point some rods north where appellant claims the gate-post stood, and l the disputed land to appellee. There is no war- contention. He did not own, nor did his father g north of the gate-post, and though his north and ould have begun at the cross-fence, instead of t would have to stop at the gate-post, wherever n located.

was begun in equity by appellant to quiet title. in ejectment. Appellee was in possession of the use and barn on the disputed territory. The nsferred to the common-law docket by an order of s order was ignored by the court and the parties to the trial, and the case was tried as an equitable appeal we treat it the same way. The weight of was on appellant's side, and the judgment should ordinglly.

ent is reversed, and cause remanded for judgment rewith.

Rules for the Location of Boundaries are discussed in the ny v. Allen, 129 Am. St. Rep. 990. Evidence of com- to a boundary established under the United States eys is competent where the monuments set in making have disappeared: Thoen v. Roche, 57 Minn. 135, 47 600; City of Racine v. Emerson, 85 Wis. 80, 39 Am.

CINCINNATI, NEW ORLEANS AND TEXAS PA RAILWAY COMPANY v. CURD.

[133 Ky. 138, 89 S. W. 140.]

RAILROADS—Whether Conductor is Fellow-servant principal.—If a freight train is recklessly run on to a sid
wrecks a car standing there, causing a heavy casting to be
from such car on to the main track, where, fifteen minutes
causes the wreck and injures one of the crew of a passeng
the crews of the freight train and passenger train ceased to b
servants when the freight train wrecked the standing car,
ductor of the freight train, under the rules of his company,
coming a vice-principal charged with the duty, first, of p
oncoming trains, and next, ascertaining the extent of the w
removing the obstructions, and his negligence in omitting
is the negligence of his principal and the proximate cause
wreck of the passenger train and injury to the member of
for which the principal, the railroad company, is responsib
448, 449.)

REMOVAL OF CAUSES—Effect of Filing Record.—
state court refuses to remove a cause to the federal court, th
the defendants in having the record copied and filing the sa
the clerk of the United States court does not take the case i
court and render it an action there pending. (p. 449.)

RAILROADS—Injury to Employé—Evidence of Rules
action against a railway company by a fireman on a passeng
injured by the collision of his train with a wreck caused a f
utes earlier by a freight train, the freight conductor havi
negligent in not warning approaching trains, a rule of the
requiring conductors, in case of accident, to take charge of m
work and take precautions against further accidents is prop
mitted in evidence. (p. 449.)

DAMAGES—Measure of Recovery for Personal In
Where a railroad fireman, of sound health and thirty-three
age, has his head split open, his arm fractured, thereby losing
of it, and has his spine permanently injured, causing a sort of
paralysis, and receives many other serious injuries, all of whic
him unable to perform manual labor, a recovery by him o
thousand dollars is not excessive. (p. 450.)

E. H. Gaither and Galvin & Galvin, for the appell

Robt. Harding, Denton & Robinson, E. M. Hard
Greene & Van Winkle, for the appellee.

139 NUNN, J. In September, 1903, the appellee,
Curd, filed his petition against appellant and the trust
the Cincinnati Southern Railway Company, and again
J. Shipp, conductor, and William Crissman, engineer
freight train, for damages for personal injuries, allegin
gross negligence of the defendants. Previous to th
of this suit the appellee had filed a suit for the same c
action in almost the same words, making the same par
fendants with the exception of Shipp. To this first
the appellant and its codefendants, trustees of the
nati Southern Railway, filed a petition for removal

as nonresident defendants, executing bond with surety, approved ¹⁴⁰ by the court. The court granted the petition for removal; but, notwithstanding this removal to the federal court, the record, properly certified, was carried up to the federal court, and was at the time of this petition, in September, 1903, pending in the federal court, and is still pending. The petition for removal, however, was, after the filing of the petition in 1903, dismissed without prejudice. A petition for removal of the second suit, with bond as required by law, was granted to the appellant and the trustees of the Cincinnati and Great Northern Railway, but was overruled. Demurrers to the petition were overruled, each of the defendants answered. The answer of the appellant pleaded, first, to the merits of the case; second, a traverse of the plaintiff's claim; third, that the injury occurred wholly within the state of Tennessee, and that the accident was caused by the fellow-servants of the plaintiff under the laws of Tennessee; fourth, that there was then pending in the federal court for the eastern district of Kentucky, an action involving the same subject matter involved in this action. The appellee demurred to the affirmative matter in the answer. The case was tried at the February, 1904, term, and resulted in a verdict of eleven thousand dollars against the appellant and Crissman. Motion and grounds for a new trial were overruled, and the appellant alone appeals.

The appellant relied upon many grounds for a new trial, but insists upon the following grounds as material and reversible in this court: First, that by the laws of Tennessee and Crissman, whose negligence it is conceded caused the accident, were the fellow-servants of the appellant, and that the appellant was not responsible for the acts of the fellow-servants; second, that the proof the appellant was entitled to a peremptory verdict, the negligent act charged and ¹⁴¹ the recovery being too remote to hold appellant liable therefor; third, the same action being then pending in the federal court, the Mercer circuit court had no jurisdiction of the action; fourth, that the court admitted incompetent testimony; fifth, the verdict is excessive. The facts are about as follows: The appellee was a fireman on the appellant's road, and at the time of the injury was on his petition was firing upon a locomotive of a passenger train. His run was from Somerset, Tennessee, to Chattanooga, Tennessee. There is on the road a small station known as Somerset, Tennessee, and at the time of the occurrence there had been upon the siding at this station a number of

freight-cars. Upon one of these cars, a flat-car, there was a heavy casting, weighing about three thousand pounds, which was being fired upon by a train upon which Curd was firing was due at Sunbright station a little before 5 o'clock in the morning, which at that time of the year—December—was before daylight. His train was headed south. A freight train, the same upon which Crissman were the conductor and engineer, was headed north, and took the siding on the time of the passenger train. This siding was about eight hundred yards from the north end of it being at the depot. Instead of taking the siding from the south end, they passed up the main track and backed in on the siding, and ran in with such speed that this freight train struck the standing cars on the siding with such force as to derail one of the loaded cars, and the freight train and break this flat-car, on which was the casting, throwing it off about twelve feet, on to the main track. About fifteen or twenty minutes after the passenger train, upon which appellee was situated, came along, running at the rate of about fifty or sixty miles an hour. The locomotive struck the casting and wrecked the passenger train, and appellee was thrown from the locomotive and severely ¹⁴² injured. The wrecking of this train was due alone to the negligence of the appellant company's conductor and engineer of the company's north-bound train, who caused this obstruction of the main track, suffered and permitted it to remain obstructed with this piece of machinery without giving any notice or warning to the fast south-bound passenger train, which they knew was due to come south over the main track at the time and place they obstructed this track with this machinery. It is conceded that under the law of the state of Kentucky, under the facts established, the appellant would be liable to the appellee for his injury. As stated, the appellant pleaded in this court that the common law of the state of Tennessee, as construed by the courts of that state, governed and controlled this case. Admitting, for the purposes of this action, that this is true, we will proceed upon this assumption.

Appellant's contention is that appellee's injuries were received by reason of the wrongful acts and negligence of the crew in charge of the freight train, and that every member of that crew, including the conductor, was the fellow-servant of the appellee, and for that reason the company, the appellant, is not responsible in damages, and that, when appellee took to serve the appellant as employé, he assumed all the risks. To substantiate this claim, the appellant took the deposition of two eminent lawyers of the state of Tennessee and put to each of them a hypothetical question. In answer to this, they each stated in substance that they were of the opinion that the appellee and the other mem-

and those of the freight crew, were all fellow-employees, that the appellant was not responsible to the injured parties for these injuries. They both, however, stated that the appellant had made some exceptions to the common rule. On the cross-examination some of these exceptions were brought out. The following question was put to one of the witnesses by Judge Estill: "Under the state of facts as given in the hypothetical question of Colonel Gaither [attorney for the appellant] your direct examination, I will ask you if there was any member of either of the crews who would not be a part of the fireman on the passenger train." His answer was as follows: "The members of both crews were all employed on the passenger train, unless it was the duty of some one of the crew to look after the freight trains, or both, of them, to see that the track was clear; that is to say, unless it should appear it was the duty of some one or more of the members of these crews to look after the condition of the track, and to see that it was free from obstructions. In the performance of a number of duties devolving on the conductor of the train, as, for instance, in making of train orders and looking to the movements of the trains, so as to prevent collisions with other trains, or of either a passenger or a freight train stands in the place of vice-principal to brakemen and firemen; but it is not that an injury results from the negligence of the conductor that does not necessarily charge the railroad company. The conductor stood in the place of the railroad company in reference to the particular matter. In other words, the mere fact that an injury results from the negligence of a servant superior in rank to the injured servant does not make the master liable; but, in order to charge the master with such negligence, the superior servant must so act as to stand in the place of the master as to be charged in the particular matter with the performance of the duty toward the injured servant, which under the law the master owes."

If it is no part of the duty of the conductor, or any member of either crew, to look after the condition of the railroad track, then the mere fact that the conductor or other members of the crew that stood in the place of vice-principal may have seen the obstruction on the track and did not remove it ¹⁴⁴ would be regarded as the negligence of the conductor, not the official negligence of such employé. This was very clearly pointed out in the case of *Allen v. Tennessee Ry. Co.*, 385, 21 S. W. 760, before referred to. Of course it should be made to appear by proof that it was the duty of any member of either crew, other than the injured party, to look after the condition of the track, and they failed to do so, this would be official negligence of the railroad company, and the railroad company would be liable. In other words, the doctrine of respondeat

tain, the standing cars upon the sidetrack, and, if any, placed upon the main track, and to put the first thing he should have done under to send out a flagman to signal the oncoming train for its protection. And it appears that the conductor did not perform, or attempt to perform, any of these duties. Under this rule it was made the duty of the conductor of this freight train, under the circumstances, to see after the protection of the oncoming passenger train, the condition of the track; and Judge Estill held, if, under such circumstances, he negligently failed to do so, this would be official negligence of the vice-principal, and the railroad would be responsible. In other words, the doctrine of respondeat superior would apply. It is argued by counsel for appellant that the conductor of this heavy iron being thrown upon the track, was the cause of the flat-car, and the derailing of the loaded train. It is true the conductor testified that he believed the collision was a very light one, and that he did not suspect any of these things, and that the collision was so light that there was no reason to suspect such results. But little weight can be given this statement, when the results of the collision are considered.

Second proposition of appellant, we do not see how the negligent act charged and the resulting injury were chargeable to appellant liable. The negligent act of the conductor, when acting as the vice-principal, was the direct cause of the injury.

Third proposition, we are of the opinion, from the facts which appear in this record, that the appellee never brought his case pending in the United States court. The appellee refused to remove the cause to that court. The record copied and filing same with the clerk of the United States court was appellant's own act, and not the act of the appellee in any sense, and he never undertook to prosecute his case in the United States court, nor did he become a party to it. His action remained in the state court.

Fourth proposition, appellant complains that the court admitted improper testimony in admitting the rule hereinbefore stated as evidence. It does not present any authority to show that it was incompetent, and we are of the opinion that the court was competent. This court has in many cases so de-

clared, and last, ground is that the verdict is excessive. The evidence shows that appellee was unconscious ¹⁴⁷ for ten days after the wreck; his head was split open to the bone; his arm was broken in the joint where the arm goes into the shoulder; there were four places on his back which were punctured by the rods of the engine; his left leg was punctured,

the muscles being torn for ten inches in length; one ear was torn half off; his nose was cut open; cinders ground into his forehead and face, and are still under the skin, clearly to be seen, giving it a bluish appearance; the use of his right arm, and it had dropped an inch and a half from the socket at the shoulder; his spine is permanently injured, causing a condition like creeping paralysis; unable to turn his head without at the same time turning his whole body; he is unable to control the action of his bowels; he has been reduced in weight thirty pounds, and is far from his former physical manhood, and unable to perform manual labor. It is true the testimony of the appellant tended to contradict the extent and permanency of the injury, but the jury had the appellee and all the witnesses examine them; and, if the appellee was injured to the extent testified to by himself and his witnesses, the verdict of the jury is not too large, considering the fact that at the time he was injured he was only thirty-three years old, and in sound and robust health.

The instructions given by the court were not objected to by either party, and in fact there is no complaint made of them. The court properly refused the instructions offered by the appellant, as all that was in them was embodied in the instructions given.

For these reasons, the judgment of the lower court is affirmed.

As to Who is a Vice-principal and Who a Fellow-servant, see Mast v. Kern, 75 Am. St. Rep. 584. It has been held that a conductor and a fireman, working upon different trains belonging to the same employer, are fellow-servants in the absence of authority to the contrary: Still v. San Francisco etc. Ry. Co., 154 Am. St. Rep. 177, and see cases cited in the cross-reference thereto.

KIDDER PRESS COMPANY v. J. V. REED & SONS

[133 Ky. 350, 117 S. W. 950.]

SALE—Contract to Furnish Machinery Satisfactory to Buyer

Where a person agrees to construct a press for printing which is in the nature of an experiment, the contract provides that if the machine is not satisfactory it shall be returned, and title shall not vest in the buyer unless the press is satisfactory. If the purchase price paid, the seller is bound by the decision of the buyer as to whether or not the press is satisfactory. (p. 450)

SALE—Contract to Furnish Article Satisfactory to Buyer

A contract of sale which requires the article to be "satisfactory to the buyer" without stating the person to whom it is to be satisfactory is enforceable as to the person to whom it is sold or furnished. (p. 450)

Rescission by Buyer and Return of Article.—Where one press under an executory agreement that it shall be made after many efforts the seller fails to make the press ready, and the buyer then refuses to accept or pay and refuses to return it until his claim for living expenses of experts while trying to make the press work have been paid (p. 457.)

Lee, Wm. Marshall Bullitt, Keith L. Bullitt and
Bullitt, for the appellant.

W. H. Bullitt, for the appellee.

C. The plaintiff, Kidder Press Company, in action against J. V. Reed to recover the sum of the purchase price of a printing-press. The defendant, set up the contract hereinafter noted, and the plaintiff's liability for the purchase price. It also set up a claim for the purchase price. It also set up a claim of \$343.46. At the conclusion of all the evidence the court peremptorily instructed the jury to find in favor of the plaintiff on its claim as set out in its petition and for the plaintiff's counterclaim. Judgment was entered accordingly and the Kidder Press Company appeals.

The contract entered into between the parties is as follows:

"GIBBS-BROWER COMPANY,
Agents American and European Machinery.
150 Nassau ³⁵² Street, New York.

The Kidder Press Company hereby agrees to sell at the sum of \$343.46 to J. V. Reed & Company, Louisville, Ky., one (1) 3 Roll Feed Bed and Platen Presses for two multiple feed and cut, and fountain both sides, to be boxed on cars at Louisville, about the 1st of January, 1900, warranted free from defects of material and workmanship and with the following attachments: Slitting at \$5.00; 7 sets slitters at \$5.00, \$35.00; 3 crosswise cutters at \$135.00, \$405.00; rewinder for narrow rolls, \$200.00 and erector expenses, \$200.00. J. V. Reed & Company hereby agrees to buy said property as above described and to pay therefor after satisfactory trial, cash or by check, its equivalent. Deferred payments, if any, bearing interest and exchange on New York. Said property is guaranteed to do a good quality of printing and to be of narrow width, hard and even wound. The attachment is to have in addition to crosswise cutters attachments for cutting cross. Register is to be satisfactory and to accomplish the desired results. The rollers are to be changed in size to 3 in. x 2 in. so as to be possible to print nine (9) wrappers, the long end of the press and to print six (6) in width, size of press bed and measures 27 in. x 13 in. Attachments working

three (3) times each to each impression of the press, it possible to cut cross X each three (3) inches in each. As this X is to register with wrapping machine, register be satisfactory to accomplish the desired result. If machine is not satisfactory it is to be returned free of cost to the purchaser. Main shaft, diameter ————
 353 Speed ———— turns per minute. To belt from belt motor connections. The seller to send erector to supervise erection of said machinery, for erector's time, hotel bills and all traveling expenses. The purchaser agrees to insure said machinery fully, immediately upon its receipt. The purchaser agrees to report to the seller in writing all defects of material or manufacture, if any, in the above machinery within ten days after receipt of same, and that the seller shall be liable for any defects not so reported within said time. Upon payment of the purchase price in cash, Kidder Press Company agrees to execute and deliver a good and valid bill of sale of the above-described property, but such bill shall be made subject to the condition that said machine shall not be used in the manufacture of sales slips or counter tickets or books by said purchaser or successors in interest and that hereto is taken subject to said restriction, of which restriction shall be given upon transfer.

"KIDDER PRESS COMPANY

"Per GIBBS & BROWER COMPANY

"General Agent

"J. V. REED & COMPANY

"By J. V. REED

"Louisville, Ky., November 27, 1905."

On the margin, written in red ink, is the following:—It is agreed that the whole agreement between the parties contained in the contract, and that all representations, warranties, unless reduced to writing and inserted hereinto, be void."

For some time prior to the date of the above contract, J. V. Reed, a printer of Louisville, Kentucky, was engaged in furnishing to the Colgan Gum Company, of that city, a certain quantity of hand-made wrappers to be used in wrapping gum tolu. In the latter part of the year 1905, appellant's agent, L. M. Cain, ³⁵⁴ came to appellee for the purpose of inducing him to permit the Kidder Press Company to construct and furnish him a machine to be used in furnishing wrapper rolls. As an inducement to the appellee's consent to purchase the machine, appellant's agent agreed to assist the appellee's representative and help him make a contract with the Colgan Gum Company. They succeeded in getting an order from the latter company for fifty million wrapper rolls. Thereupon the above contract was entered into. The contract itself was in the nature of an experiment. Therefore, the contract provided that if the machine was not satisfactory

returned, free of expense to the purchaser. The
 vided that appellant should deliver the press to
 Louisville, Kentucky, on March 1, 1906. The
 not arrive until April 23, 1906. A representative
 came to Louisville at that time to direct and
 machine. He having failed to adjust the machine,
 then sent its chief expert, W. C. Williams, who
 Louisville May 22, 1906. He claims that he put
 in good running order and then left on May 24,
 ward other experts were sent by appellant. Many
 alterations were made. On July 7th appellant
 settlement for the press, but was refused on the
 the machine was not satisfactory. On July 14th
 te appellant as follows: "The press sent us has
 red satisfactory work, and we are inclined to
 it never will as it is now constructed. Some
 , which your erector promised to have sent to us
 e never arrived, and as a result we have done
 e he left the city." On December ³⁵⁵ 26, 1906,
 te appellant, in part as follows: "We are very
 sed in not hearing further from you in regard to
 us appointments in regard to your press that we
 possession. As you know this press has never
 our requirements, and is not at all satisfactory to
 ve seem unable to hear from you on the subject,
 sidering another press for our needs." After
 nt's general agent was sent to Louisville twice,
 uary, 1907, and the next time in May following.
 time appellant attempted to sell appellee another
 the price of \$7,500. An offer to this effect was
 tter from appellant to appellee, dated February
 February 27, 1907, appellee wrote Gibbs-Brower
 appellant's general agents, to the effect that the
 urningish an output of only about forty per cent
 ppers promised. On May 20th appellant sent
 tter containing the following: "Since the writer's
 e city, he has interviewed the Kidder Press Com-
 ard to the press they sold you, and has been in-
 dvide you as follows: 'That you may return the
 we sold you under contract dated November 27,
 ten days from date, or pay for same as per con-
 n May 29, 1907, appellee wrote Gibbs-Brower
 the effect that it would be impossible for him to
 proposition to return the machine, unless the
 d against the machine were paid. On May 22,
 appellant, through its general agents, Gibbs-Brower
 wrote to the Gibbs-Inman Company, of Louis-
 containing the following: "We are not taking
 ge of our relation with Mr. Reed in giving you
 tion which we have, and suggest that you take

over the press and contract, because we know that Reed's present state of mind, it is just the way he like to settle the whole deal."

Upon the question whether or not the machine was satisfactory, the overwhelming weight of the evidence is that it did not register properly, the output was insufficient, a large portion of the work which was done for the Colgan Gum Company was returned as not being up to their requirements. Because of certain statements of appellant's to the effect that the machine worked all right when he was in Louisville, because of the fact that appellee returned the machine from January until May and did certain work for the Colgan Gum Company thereon, and because there is some evidence to the effect that the failure of the machine to work satisfactorily was due to the fact that the press was defective and the operator employed in managing the machine was slow, it is insisted that the court erred in submitting to the jury the question whether or not, as a matter of fact, the press was satisfactory. The determination of this question depends upon the further question whether or not the facts of this case bring it within the line where the purchaser of an article has the arbitrary right to decide that it is unsatisfactory, or that other line where he must decide the question of satisfaction as a reasonable man.

Upon this question the authorities are by no means uniform. Thus in *Hummel v. Stern*, 21 App. Div. 544, 100 N. Y. Supp. 528, Stern contracted to furnish and install ventilating machinery upon the ³⁵⁷ premises of Hummel, the contract providing as follows: "We guarantee to receive the room to your satisfaction; otherwise, we will move the wheel without cost to you." In that case the court said: "A wide distinction is drawn in the cases between contracts for doing work or furnishing material to suit the taste or fancy or caprice of a party, and contracts such as those in suit. . . . One who makes a suit of clothes or a bust may not unreasonably be expected to be bound by the opinion of his employer honestly entertained; but where the parties contract to do work not of the character referred to above, and it is stipulated that the person to whom the work is to be done is to be satisfied with the work, when the final construction has been given that, to justify a rejection of the work and a refusal to pay therefor, there must be some reason for the dissatisfaction shown." Authorities holding the contrary doctrine may be found in *Wood R. & M. Machine Co. v. Smith*, 50 Mo. App. 45, 45 Am. Rep. 57, 15 N. W. 906, where it was held that the contract of a vendor of a harvesting machine gave a warranty that the contract of purchase should be of no effect unless the

the buyer's satisfaction, it was held the purchaser had the absolute right to reject the machine, and reasons for doing so could not be investigated. A case is that of Plano Mfg. Co. v. Ellis, 68 Mich. V. 841. The agreement was that a certain grain machine should do good work and "give satisfaction." It was held that unless the defendant was satisfied with the machine, he did good work, he was not bound to purchase. ³⁵⁸ McCormick Harvesting Machine Co. v. Minneapolis & N. W. 846, the plaintiff agreed to furnish the defendant a cord binder guaranteed to work satisfactorily. It was held that in case, upon reasonable trial, the binder did not work satisfactorily, it was unnecessary for the defendant to return the binder to the plaintiff, but was sufficient to notify plaintiff, in substance, that it did not work satisfactorily, and that he declined to purchase it.

The same ruling was announced in regard to a case in Gray v. Central R. Co., 11 Hun, 70. The defendant in that case agreed to buy a steamboat for \$15,000. It was held, upon trial, they are satisfied with the soundness of the machinery, boilers, etc. It was held that no return could be had unless it was shown that defendants were not satisfied with the boat; whether or not they ought to be satisfied was immaterial. In the case of Aiken v. Boston & N. E. R. Co., 138 Mass. 183, the same doctrine was laid down with reference to a machine for generating gas; also, in Goodrich v. Twick, 43 Ill. 445, with reference to a fanning machine. Singler v. Thayer, 108 Pa. 291, 56 Am. Rep. 530, in regard to a passenger elevator. Another case in support of the same doctrine is Osborne & Co. v. Commonwealth, 18 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591. The defendant bought a harvesting machine upon condition that if it did not work to his satisfaction he might return it. It was held that his right to reject was not waived by his reasons for so doing could not be investigated. Also, Frary v. American Rubber Co., 52 Minn. V. 1156, 18 L. R. A. 644; Blaine v. Knapp & Co., 41 S. W. 787; ³⁵⁹ Wood Reaping & Mowing Machine Co. v. Smith, 50 Mich. 565, 45 Am. Rep. 57, 15 N. E. 385; and Evans & Co. v. Chandler, 113 Ill. App. 167.

In the case before us the printing-press to be constructed was of the nature of an experiment. Appellant had never before made one like it before. The purpose was to enable appellant to supply his customers with machine-made wrappers instead of hand-made wrappers. The contract of sale was executory. The contract provided that if the machine was not satisfactory it was to be returned. A careful reading of the contract shows that the title was not to pass to the purchaser unless the machine was satisfactory and

the purchase price therefor paid. It was a condition made upon the condition that the machine should be satisfactory. It is insisted that the meaning of "satisfactory" is to be determined by the actual warranty contained in the contract, to the effect that the "said machine is guaranteed to do a good quality of printing and to produce narrow width, hard and even wound." In our opinion it would be taking entirely too narrow a view of the word "satisfactory" as repeatedly used in the contract if the machine might comply with the guaranty referred to and still be utterly useless for the purposes for which it was constructed. The work might be of good quality, but the output so small that the machine could not be run at a loss. When we consider the relations of the parties and the peculiar circumstances under which the contract was made, into, and the further fact that the title to the property was not to vest unless the machine was satisfactory, we conclude that the parties intended to be bound by the decision of the appellee as to ³⁶⁰ whether or not the press was satisfactory for it is well settled that, where the contract requires the article to be satisfactory, without stating the person to whom it is to be satisfactory, it means satisfactory to him to whom it is sold or furnished: *Taylor v. Brewer*, 1 Maule & McCormick Harvesting Machine Co. v. Chesrown, 33 Pa. 32, 21 N. W. 846; *Singerly v. Thayer*, 108 Pa. 291, 10 Atl. Rep. 207, 2 Atl. 530. It may be that appellant was injured and indiscreet in undertaking to furnish the press to the appellee for upon the happening of a contingency so hazardous and doubtful as the approval or satisfaction of appellee, he assumed the risk. Against the consequences resulting from his own bargain, the law affords it no relief. Having voluntarily assumed the obligations and risk of the contract, appellant's legal rights are to be ascertained and determined solely according to its provisions: *McCarren v. McCarron*, 139 Pa. Gray, 139. In the record before us there is nothing which it could be even inferred that appellee was dissatisfied with the press. For months appellant endeavored to get the machine work to his satisfaction. It utterly failed. By letter of May 22d to the Gibbs-Inman Company he stated that it recognized the fact that appellee was not satisfied with the press. As the contract in question was merely executory and the sale was made upon the condition that the machine should prove satisfactory to appellee, as he alone had the right to determine whether or not it was satisfactory, as he at no time, either by word or deed, intimated that he was satisfied, we conclude that the trial court properly instructed the jury to find against plaintiff on its claim for the purchase price.

proof shows that appellee, after receiving ap-
 pter of May 20th requiring him either to pay or
 machine, boxed the machine up and declined to
 until appellant paid him the sum of \$343.46 ad-
 him as the living expenses of appellant's experts.
 was a nonresident. The evidence shows that ap-
 m was just. Indeed, there is no evidence to the
 it was not incumbent upon appellee to return the
 his valid claim against appellant was satisfied:
 us Glass Co. v. Alvey-Ferguson Co., 31 Ky. Law
 02 S. W. 870. The court did not therefore err in
 the jury to find for appellee on his counterclaim.
 t affirmed.

a Contract may Stipulate That Performance by one of
 e satisfactory to the other. And when a contract is
 orm work for or render services to another to his satis-
 word "satisfaction" refers to his mental condition, and
 t the work performed or the article produced if not
 to him, at least if he acts in good faith and not arbi-
 reasonably: Hollingsworth v. Colthurst, 78 Kan. 455, 130
 382, and cases cited in the cross-reference note thereto.
 held that if a person contracts to manufacture articles
 "to the satisfaction" of another, the latter is the sole
 quality of the work done, and his right to accept or
 osolute, conclusive and binding upon the parties, without
 of his reasons, unless he acts fraudulently: Barrett v.
 W. Va. 416, 90 Am. St. Rep. 802.

KENTUCKY HEATING COMPANY v. HOOD.

[133 Ky. 383, 118 S. W. 337.]

DAMAGES—Measure of for Cutting Gas-pipe and Removing
 re the employ's of one gas company remove the pipes
 f another company so as to deprive a householder of
 ht, in consequence of which she loses her tenants, she
 from the first company the cost of replacing the fix-
 ss of rent, and compensation for her personal incon-
 discomfort. (pp. 459, 460.)

DAMAGES—Measure of for Commission of Tort.—A person
 a tort is liable for all the damages that naturally flow
 e the result of his wrongful act, although he may not
 have given any thought to or have anticipated that in-
 quences would follow. The rule applicable to breach of
 t only such damages can be recovered as are actually
 such as it is reasonable to conclude were within the
 n of the parties at the time the contract was entered
 t apply to actions sounding in tort. (p. 460.)

DAMAGES—Exemplary Damages for Cutting Gas-pipes.—
 employ's of one gas company, without any reasonable or
 excuse for their conduct, cut the pipes of another com-

pany and throw out a meter so that a householder is deprived of gas for herself and tenants, she may recover exemplary damages from their company for the wrong. (pp. 461, 462.)

Morton K. Yonts, for the appellant.

Eugene R. Atkinson, for the appellee.

³⁸⁵ CARROLL, J. The appellee rented a house on Walnut street, in Louisville, for the purpose of subletting to boarders. The house consisted of a basement and two stories, the third story being an attic containing two bedrooms. She paid as rent for the property sixty dollars a month, and, when the incident out of which this suit occurred, several of the rooms in the house were occupied by persons who had rented them from her. Some of these rooms had grates, but they were not used, as the appellee heated the entire house by heating gas furnished by the Louisville Gas Company. In May, 1907, Mrs. McDonald, a subtenant, who occupied, as a restaurant, a part of the basement, desired to use in her place the natural gas furnished by the Kentucky Heating Company, and applied to that company to connect her stove with its gas mains. At that time there was in that part of the basement under the control of appellee three gas-meters; two that had been installed by the Louisville Gas Company, one for illuminating gas and the other for heating gas, the third meter belonging to the Kentucky Heating Company. When the employés of the Kentucky Heating Company went to the residence of Mrs. McDonald for the purpose of connecting the stove of Mrs. McDonald with the mains of that company, they disconnected the heating gas of the Louisville Gas Company, cut out and used some fifteen feet of the pipe, took down the meter, and threw away an ash barrel, thereby cutting off all the heat in the house that was supplied by the Louisville Gas Company. As a result of this all the renters of appellee left, because the weather was too cold to occupy the rooms without heat. At the time the employés cut off the heat, Mrs. Hood was in the house, but they did not notify her what they were going to do, or what they ³⁸⁶ did, nor did she know anything about it until the renters complained to her of having no heat in the rooms. When she discovered the cause of the trouble she once notified the Kentucky Heating Company, and requested it to repair the injury its employés had done, and attended on several different days to get the company to replace the fixtures, but without success. About a week after the gas was disconnected the Louisville Gas Company sent its men to the house and they replaced the fixtures and turned on the heat, charging appellee for this service six dollars. Thereupon the appellee brought this suit against the Kentucky Heating Company to recover damages for the willful

wrongful acts of the employés in interfering with fixtures of the Louisville Gas Company, thereby depriving her of the heat that company furnished, causing her to inconvenience and discomfort, but causing her to lose from whom she had been receiving about one hundred sixty dollars a month to leave the premises. Upon the jury assessed the damages at five hundred dollars. The case is asked upon two grounds: First, because the error was excessive; second, for error in instructing the jury. The instructions given was the following: "I further instruct you, gentlemen, that if you believe from the evidence that the appellants or employés of the Kentucky Heating Company, intentionally, or in wanton disregard of plaintiff's rights, cut off the meter of the Louisville Gas Company, and the supply pipe, whereby she was deprived of the use of the heat, you may or may not in your discretion award her damages, or damages by way of punishment. I instruct you by 'malicious,' as used in this instruction, to mean the intentional ³⁸⁷ doing of a wrongful act without just cause." It may be conceded at the outset that unless the plaintiff was entitled to recover punitive damages, the error was excessive. And we are also of the opinion that instruction No. 2 was deficient in failing to specify the character of the damages appellee was entitled to recover as damages. But the error in this instruction was not so great as to authorize a reversal, especially in view of the fact that the jury were not confined in assessing the compensation.

It is stated that the appellee was only entitled to recover the cost expended by her in replacing the fixtures taken from the employés of the appellant company, but in this we do not agree. The appellee had the unquestioned right to have at her house with gas furnished by the Louisville Gas Company, and to enjoy the profit she might have realized from the persons to whom she rented rooms; and it is plain that the employés of the appellant had no authority to in any manner interfere with or disturb the use of the heat by which the heat was obtained. And the evidence tends to show that at the time the heating fixtures were removed, it was necessary that the rooms of the house be heated in order to make them comfortable and habitable, and also that the deprivation of the heat caused the plaintiff to leave. As appellant's servants wrongfully deprived the appellee of the convenience and comfort of having her house heated, and also by this conduct caused her to lose the rent she received from the tenants, she was entitled to recover compensation, not only the cost of replacing the fixtures, but in addition thereto reasonable compensation for the loss sustained in being deprived of her tenants, and

for personal inconvenience and discomfort. It would be far short of the relief to which appellee was entitled for her recovery to the money she was required to pay out for the injury repaired. A person cannot either negligently or wantonly injure the property of another, thereby causing another to suffer loss in business or profits, or in the deprivation of the ordinary and reasonable comforts he enjoyed, and to assert that all the injured party is entitled to recover is to assert the cost of replacing the injured property. Waiving, for the moment, the question of exemplary damages, we must lay it down that, whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as may spring from the deprivation of business or profits, as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment, and in addition thereto, the facts justify an award of compensation for personal inconvenience and discomfort. In the case before us the loss sustained by appellee, aside from the personal inconvenience and discomfort, was not only the sum she paid out for having the fixtures replaced, but the profit she suffered in being deprived of the profit she had the right to expect would be received from the renters. This profit was not uncertain nor speculative. It was as reasonably certain as any kind of business profit can be that depends upon the development of happenings in the future; and, furthermore, it was capable of reasonable ascertainment by a jury. At the time appellee, when her tenants left, was receiving from them a fixed sum. This income she lost when they withdrew from her premises, and ³⁸⁹ the loss of this source of income was the proximate result of the wrongful act complained of.

It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts the measure generally held to is that only such damages can be recovered as are actually sustained, or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into: 2 Chitty on Contracts, § 100. But this measure that obtains in contracts will not be applied in actions sounding in tort. There is a wide difference between the rights and remedies allowable in the one class of cases and in the other: 1 Sutherland on Damages, sec. 15. In the case of a wrongful act done, and the consequences that naturally flow from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are the result of, this wrongful act, although he may not at the time have given any thought to or have anticipated that such consequences would follow. It is no excuse or defense

that he did not mean to commit any wrong, or did not intend that any injury or loss would ensue. The general rule with respect to the recovery of consequential damages in tort is very well stated in Sutherland on Damages (section 16): "In an action for tort, if no improper act is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the loss he has received so far as it might reasonably have been expected to follow from the circumstances; such as, according to the ordinary experience and the usual ³⁹⁰ course of events, which might have been reasonably anticipated. The damages are recoverable so far as they are compensatory, or by reason of the fact in contemplation by the party in fault. He who is responsible for a negligent act must answer 'for all the consequences which follow therefrom, by ordinary experience.' Whether the injurious consequences which have followed are 'reasonably expected' to have followed from the act is not at all determinative of the liability of the person who committed the act to respond to the claim for suffering therefrom. . . . There need not be in the mind of the individual whose act or omission has wrought the damage the least contemplation of the probable consequences of his conduct; he is responsible therefor because the damage naturally follows his wrongful act or nonaction. All that is imperatively required to foresee what will be the consequences of their acts and omissions, according to the ordinary course of nature and the general experience": *note to Wallace v. Pennsylvania R. Co.*, 195 Pa. 485, 52 L. R. A. 33; *Wyant v. Crouse*, 127 Mich. 1, 85 W. 527, 53 L. R. A. 626; 13 Cyc. 28, 29, 49; *Slaughter*, 124 Ky. 345, 30 Ky. Law Rep. 500, 124 W. 402, 99 S. W. 247, 8 L. R. A., N. S., 1228.

Whether contended by counsel for appellant that it was proper to instruct the jury that they might assess exemplary damages. But, considering the circumstances under which the tort was committed, we think it was proper to instruct the jury that they might in their discretion allow exemplary damages, and hence the instruction in this particular.

It is a general rule that exemplary damages in tort are of a punitive character and are not allowable unless the wrong complained of is committed in a malicious, ³⁹¹ aggravating manner, or with reckless disregard of the rights of another person: *Major v. Pulliam*, 3 Dana, 582; *Parker v. Bush*, 587; *Jennings v. Maddox*, 8 B. Mon. 430; *Singer Mfg. Co.*, 20 Ky. Law Rep. 1089, 48 S. W. 2d 1110; *Arnold v. Braithwaite*, 131 Pa. 416, 18 Atl. 1110; *note on Damages*, secs. 1031, 1092-1095. Measured by these standards, we have little difficulty in reaching the conclusion that the conduct of the servants of appellant in cutting and throwing the meter in an ash barrel was,

to say the least of it, a high-handed, aggravating piece of business, done in utter and reckless disregard of the rights of the appellee. The employes of the appellant company do not make any reasonable or satisfactory excuse for their conduct. They make plain the fact that it was not the result of ignorance or mistake or accident. It was not necessary for them to connect the mains of the heating company with McDonald's stove, that they should either cut the pipe of the Louisville Gas Company or tear down its meter, although they testify that it was more convenient and less expensive to do it in this way than it would have been to make the necessary connections, as might have been done, without disturbing the fixtures of the other company. Looking at the matter from any reasonable standpoint, it is inconceivable why these men should have acted in this manner, unless they did it with the malicious intention of interfering with and injuring the property. Nor did the appellant company injure the appellee in a proper, becoming or reasonable manner. When she notified it that her fixtures had been disconnected, it acted recklessly, if not maliciously, its employes. Although the appellee was notified of the trouble on the day following the commission of the wrong, it did not repair ³⁹² the injury or make a reasonable effort to do so.

Upon the whole case we see no reason for disturbing the judgment, and it is affirmed.

Damages Recoverable for a Tort Include All Injuries resulting from the wrongful act, whether they could have been foreseen by the wrongdoer or not: *Vosburg v. Putney*, 80 Wis. 523, 27 Am. St. Rep. 47; *Cowan v. Western Union Tel. Co.*, 122 Iowa, 379, 101 Am. St. Rep. 268.

Loss of Profits as an Element of Damages is discussed in recent cases of *Williams v. Atlantic Coast Line Ry. Co.*, 56 F. 131 Am. St. Rep. 169; *Harper Furniture Co. v. Southern Express Co.*, 148 N. C. 87, 128 Am. St. Rep. 588; *Gregory v. Slaughter*, 134 Minn. 345, 124 Am. St. Rep. 402; *Emerson v. Pacific Coast etc. Packing Co.*, 96 Minn. 1, 113 Am. St. Rep. 603; *Kelley, Maus & Co. v. Lehigh Valley Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971.

EDWARDS v. KEVIL.

[133 Ky. 392, 118 S. W. 273.]

DEER—Pleading Privilege or Justification.—When the defendant pleads that he spoke them, or words of that kind that would of themselves be actionable. But it is not sufficient that he should admit speaking the precise words; it is necessary that he admits their substance or so much of them as will support the charge. (p. 464.)

DEER—Pleading Privileged Communication.—In an action for slander when the defendant pleads that the words spoken were privileged, he may deny that they were spoken maliciously and set up the language used by him, although it may not be identical with the language charged in the petition; but it must be so nearly similar that it admits enough of the language charged, to maintain an action. (p. 465.)

DEER—Privileged Communication Regarding Incendiary.—A communication that a certain person was the incendiary, made confidentially in good faith by one whose property has been destroyed by fire, and whose friend whose property also has been burned, in an effort to obtain advice and assistance, is a privileged communication.

DEER—Privileged Communication Regarding Incendiary.—A communication for slander in charging the plaintiff with burning certain property where evidence is introduced that he made statements expressing a desire or intention to burn the buildings, it is immaterial whether it concerns the defense of privilege, whether or not he made such statements, provided they were communicated to a person as coming from him, were believed, and they were such as a reasonably prudent man would believe; and the plaintiff's defense that he did not make the statements was properly excluded. (p. 466.)

Wadley and S. D. Hodge, for the appellant.

W. S. Sanby, for the appellee.

ROLL, J. This action in slander was instituted by the appellant, who was plaintiff below, against the appellee, defendant below. The actionable words, which were spoken and have been spoken during a fire that destroyed a building owned by appellee, are these: "I reckon Ed Edwards is a damned fool; he burned this out. I received word some time ago that he intended to burn them." When asked what he meant by this language, he replied: "Well, I heard that Ed Edwards was going to burn them."

In the first paragraph of his answer, the appellee denied that he spoke the words charged; and, in the second paragraph, set up that the appellant, previous to the fire, had threatened to burn the building, and during the fire he (appellant) had a conversation with G. C. Dollar, the owner of a building that was injured by the fire, communicated to Dollar that he was going to burn the building, and for the purpose of aiding him and secur-

ing his assistance and co-operation in investigating the of the fire, the information he had received concern threats of appellant, and, in ³⁹⁴ the course of the co tion with Dollar, said to him without malice, and for purpose of procuring his aid in ascertaining the au the fire, "I reckon Ed Edwards is satisfied now my b burned. I was notified he intended to burn it. I c think he was mean enough to do it, but I took additi surance." It will thus be observed that appellee, wh mitting he spoke substantially the language charged, that it was under the circumstances a privileged comm tion. The point is made, however, that appellee, if he to justify or to claim that the words were spoken unc umstances that amounted to a privilege, must admit ing the identical words charged in the petition.

The rule is that, when the defendant, in an act slander justifies, or when he pleads that the words were a privileged communication, he must admit that h the words charged, or words of similar import that w themselves be actionable. It is not necessary that fendant should admit speaking the precise words cha the petition. It will be sufficient if he admits the su of the words, or so much of them as would sustain an for slander. Thus in *Shipp v. Patton*, 29 Ky. Law Re 93 S. W. 1033, the words upon which the action wa were these: "Miss Nellie, when she was employed as in my store, dishonestly took away goods from the sto did not belong to her. I found in her grip a lot of that she had dishonestly taken from my store and put grip, and I accused her of dishonestly taking these goo she broke down and cried and begged me not to dis her because it would disgrace her, and I kept her a fe longer in the store, and then discharged her. I ³⁹⁵ say this to anybody, because I can prove it, and I w hesitate to go into her own family and say just what said to you." The defendant in that case filed an ans which, after admitting that he spoke the words as c except that he did not use the word "dishonestly," that he spoke them maliciously, and further averred th were spoken under circumstances that made them a pri communication. The lower court required the defende fore permitting him to rely on the defense that the were privileged, to admit speaking the identical charged in the petition. In criticising this ruling of the court, this court said: "To say that a defendant in a suit must admit all the words charged, before he is to plead a qualified privilege, places the defendan dilemma. If he denies the speaking of the words, the tiff will often prove the substance of them and recov

led to admit all the words to plead the privilege, but often admit that which is not true in fact, and show that he was actuated by malice, which will

The plea of the defendant in this case was in plea of confession and avoidance, and, while denying of the word 'dishonestly,' confessed enough to appellee's petition; that is, left uncontroverted to give her a cause of action." Adhering to the rule of the court in the Shipp case (29 Ky. Law Rep. 480, 1033), which we believe to be correct, it follows that for slander, when the defendant pleads that the words spoken were privileged, he may deny that they were maliciously and set out the exact language used although it may not be identical with that charged in the petition; but it ³⁹⁶ must be so nearly similar to it, that enough of the language charged, to maintain an action, applying this principle to the case before us, it is that the words admitted by appellee to have been actionable, and, although not the identical words they were in substance and effect the same, and so we did not err in holding the answer to be good.

There is no doubt that, if the words were spoken under the circumstances described by appellee in his answer, they were privileged in the sense that appellee is entitled to show the facts surrounding their publication and the defense or justification for the utterance. A person whose property is destroyed by fire may in a confidential way inform his neighbors and friends whom he suspects as the cause of the fire if his suspicions are based upon reasonable information, and his declarations are made in good faith. *Starke v. Starke*, 9 Dana, 128, 33 Am. Dec. 536; *Grimes v. B. Mon.* 301; *Harper v. Harper*, 10 Bush, 447; *Bannister*, 79 Ky. 205, 2 Ky. Law Rep. 72; *Nix v. Nix*, 81 Ky. 293, 50 Am. Rep. 163, 5 Ky. Law Rep. 163. See also *Whend on Slander and Libel*, p. 440. There was a conflict in the evidence as to the circumstances under which the words were spoken. According to the evidence for appellee they were not spoken confidentially, or in good faith, but in an effort in advising or consulting with friends to determine the origin of the fire. On the other hand, the evidence testified that, in confiding his suspicions to a fellow neighbor, the fire, he believed that the information previously given to him that appellant was the incendiary was true, and the language imputed to him in an effort to get assistance from his friend, whose property was destroyed. It is, ³⁹⁷ however, sufficient to say, in respect to the conflict in the evidence, that it was a matter for the jury, upon proper instructions, to decide which story they believed to be true. If the version of appellant and his

St. Rep., Vol. 184—80

witnesses was believed by the jury, the communication of was not a privileged one; but the jury accepted appellee's account of it as correct.

On the trial of the case the appellee introduced witnesses, who testified that previous to the fire the appellant made remarks that indicated an intention upon his part to burn or have burned the building of and that previous to the fire they communicated to these threats. After this evidence was introduced, the appellant offered to show by his own testimony that he had made any of the statements attributed to him by the witnesses; the trial judge refused to permit him to deny that he made these statements, putting his ruling upon the ground that it was immaterial, so far as the question of privilege concerned, whether he in fact made the statements or not, the statements previous to the fire had been communicated to the appellee as coming from him. Of this ruling serious consideration is made. In our opinion the decision of the trial court on this point was correct. For the purposes of the case it was not material whether or not appellant used the language attributed to him by the informants of appellee. If the appellee in good faith believed what was communicated to him, it was such as a man of reasonable prudence would believe, and had the right to act upon the assumption that it was true, although as a matter of fact it may have been false. *See* *Commonwealth v. Commonwealth*, 124 Ky. 643, 398 30 Ky. Law R. 99 S. W. 945, 10 L. R. A., N. S., 335. If appellant had been permitted to deny the remarks, the effect would be to throw into the case a question of veracity that threw no light upon the issues being tried. Under circumstances like those developed in this case, when information, such as a reasonable prudent man would believe, is communicated to him, he is required, before acting upon it in good faith in a natural and reasonable way, to investigate its truthfulness.

The judgment of the lower court is affirmed.

As to What Libelous Statements are Privileged, see *the Holmes v. Clisby*, 104 Am. St. Rep. 110. As to whether the privilege can avail under a general denial, see *Anderson v. Anderson*, 72 Conn. 335, 77 Am. St. Rep. 310; *Hess v. Sparks*, 44 Kan. 100, 72 Am. St. Rep. 300.

The Plea of Justification in Actions for Slander or Libel is the subject of a note to *Rutherford v. Paddock*, 91 Am. St. Rep.

MEADE v. RATLIFF.

[133 Ky. 411, 118 S. W. 271.]

CHAMPERTY.—A Conveyance of Land in the Adverse Possession of a person is not void as being within the champerty act, if made at the instance of the parties in adverse possession; and a person who has previously sold land to another seeks to recover the land, it maintains his action upon the ground that the sale was champertous. (p. 469.)

RESCINDING.—Where a Deed Conveys Land Held Adversely, the vendee may rescind it and place themselves in statu quo, although the sale was made in good faith and for a valuable consideration. A provision that "neither party to any contract made in violation of the provisions of this chapter shall have any right of action thereon" has no application to such a case. (p. 469.)

ADVERSE POSSESSION.—Extent of Possession.—The entry of a person of title on land does not oust a person in actual possession of a tract of which such land forms a part, except to the extent of the actual inclosures made by the person entering. (p. 470.)

Stephenhenson, F. W. Stowers and Hazelrigg & Hazelrigg, appellants.

Johnson, for the appellee.

JOHNSON, J. Appellant sued appellee in ejectment to recover about one hundred acres of land. On the trial the court gave a peremptory instruction to the jury to find in favor of the appellee. The only question necessary to be considered is whether there was any evidence introduced by appellant sustaining his claim to the land. It appears that in the year 1881 a patent was issued by the commonwealth a patent to the appellee covering about three hundred acres of land. The land has a well-marked and defined boundary. Appellant's testimony shows that this patent boundary includes the land in contest. Appellant introduced as evidence this old deed, the conveyances intervening between the patentee and the appellee which conveyed the land to Rhodes Meade, the appellee. In 1881 Rhodes Meade conveyed to appellant's son, the whole of this patent boundary. The testimony, without contradiction, shows that the patentee and the intervening purchasers thereof lived within the patent boundary and claimed to the extent thereof from soon after the issue of the patent to the time of the trial in the lower court. Their inclosures, however, did not include any part of the land in controversy. About the year 1871, one Ratliff, the appellee, entered within this patent boundary and built a cabin and inclosed four or five acres of land around another point inclosed about three acres. Since that time a part of the land in contest has ever been cleared or

inclosed. Immediately prior to the year 1871, Rhodes conveyed the land in ⁴¹⁴ contest to one Ferguson, who instituted an action against Ratliff, father of appellee, to recover it. Ratliff interposed a plea of champerty and succeeded in defeating Ferguson in the lower court, and no appeal was taken. No further proceedings were had to oust Ratliff, as there was any other conveyance made of the land, until Rhodes Meade made the conveyance to his son in 1881. The son remained in possession of the land with his son until 1881, at which time the father died. This action was brought in by appellant to oust appellee from the possession of the one hundred acres. Appellee denied the ownership of the land by appellant, and alleged ownership in himself, and interposed a plea of champerty as to his title of actual adverse possession of the land for more than fifteen years, and pleaded the former judgment in the case of Ferguson, the vendor, Rhodes Meade, against the father of appellee, as a bar to this action. Appellee concedes that this last defense cannot apply to this case, for neither appellant nor his father, Rhodes Meade, were parties to that action.

We are not called upon nor can we determine whether or not appellee is the owner of the land in contest, for it is not put to the necessity of introducing testimony on that point to show by what right he claimed to own the land. What we have stated with reference to the property appears from appellant's testimony alone. Appellee also claims: That Rhodes Meade conveyed this one hundred acres of land to Ferguson, the title passed from him to Ferguson, although the deed was afterward declared void in the action of Ferguson against appellee's father; that when he attempted to convey to appellant, his son, in 1881, he had no title to pass to him, and therefore the lower court properly instructed the jury to find for appellee. Appellant contends that, as the deed is champertous and void, no title passed, and therefore remains in Rhodes Meade. Some of the cases tend strongly to support this theory, but other and later cases construing the statute establish what we conceive to be a better principle. These opinions properly hold that the champerty statute so far as it applies to the sale and conveyance of real estate was enacted for the benefit of those in the adverse possession and claiming the land. It leaves the vendor and vendee in the position they placed themselves by the sale and conveyance.

In the case of *Ft. Jefferson Improvement Co. v. Dupont*, 108 Ky. 792, 21 Ky. Law Rep. 515, 51 S. W. 810, 48 Ky. A. 537, the court, in considering the effect of a champerty conveyance, said: "Taking this view of the case, appellant contends that the deed is therefore absolutely void, as being within the champerty statute, and respectable author-

ing counsel's position; but, construing the statute, and in view of the decision of this court in the *Green v. Wilson*, 85 Ky. 503, 9 Ky. Law Rep. 83, 3, we are of opinion that the deed is not void, but voidable at the instance of the parties in adverse possession. In the case of *Luen v. Wilson*, the court said: "It is held by this court in more than one case that, if a person has previously sold land to another seeks to recover the land, he cannot maintain his action upon the ground that the contract was champertous. The champertous contract must be rescinded or rescinded in good faith before he brings his action." *Robson v. Hendrick* (November 12, 1885), 7 Ky. Law Rep. 355. *Harman v. Brewster*, 7 Bush, 355. . . . In such a case the appellant ⁴¹⁶ can rely upon the still existing champertous contract. The law of champerty was intended as a bar to the possession, and not as a weapon of offense, as to the remedy sought by a plaintiff, and a grantor who has conveyed property adversely held cannot, without rescinding or abandoning the contract in good faith, be heard to say that it was champertous, and it cannot therefore be rescinded. This is the right of the occupant, and his protection is clearly the aim of the statute."

The construction of the statute is a just one. Often such contracts are made in the best faith, and the purchaser gives valuable consideration. Nevertheless the conveyance is voidable if there be an adverse claimant in possession. In such cases should be allowed to rescind and stand upon themselves in statu quo. Section 216, Kentucky Statutes, provides that "neither party to any contract made in violation of the provisions of this chapter shall have any right of suit thereon," has no application to a case like the one at hand. The section referred to applies only to conveyances made in consideration of services to be rendered in the prosecution or defense, or the aiding in the prosecution or defense, in or out of court, of any suit, whereby the party is induced to sue, or any part thereof, is to be taken or rendered for the services or assistance. The testimony in the case at hand did not show that the conveyance from Rhodes to Ferguson was of the character described. It was a conveyance as could be rescinded or abandoned. We do not want to be understood as holding that there was sufficient evidence introduced by appellant to show that this contract was rescinded or abandoned by the parties. This was left for the ⁴¹⁷ jury to determine. It is sufficient to say that there was some evidence introduced to that effect. Green, brother of appellant, who has never had any interest in the matter in controversy, stated that, soon after the case of *Ferguson against Ratliff*, Ferguson told him that he would have nothing more to do with the matter,

that he stated, in effect, that he had no interest in the land and that Rhodes Meade could sue for it if he wanted. This tended to show a rescission or abandonment of the conveyance made by Rhodes Meade to Ferguson. Rhodes Meade afterward, in the year 1881, conveyed the land to appellant. He claimed the land as his until this conveyance to appellant, his son, and the court erred in not submitting this question to the jury for its determination. Under the proof adduced by appellant, his father and those under whom he claiming had had the actual possession of the whole of the Trout patent boundary, which includes the land in controversy before appellee or his ancestors obtained possession of any part of the land in controversy. If this be true, the entry of Ratliff, father of appellee, upon the land sued for does not have the effect to oust Meade from the possession thereof except to the extent of the actual inclosures made by him, unless it appears that he had a superior title to Meade.

It is our opinion that appellant's testimony made the case for him which should have been submitted to the jury and the court erred in giving the peremptory instruction. See *Miller v. Humphries*, 2 A. K. Marsh. 446; *Shreve v. Summers*, 1 Dana, 239; *Moss v. Currie*, 1 Dana, 266. In other cases and more recent decisions to the same effect may be cited.

⁴¹⁸ For these reasons the judgment of the lower court is reversed and remanded for further proceedings conformably herewith.

Conveyances of Land Adversely Held by a Stranger are regarded as champertous under the Kentucky statute: *Adkins v. Whalin*, 153, 12 Am. St. Rep. 470; *Altamus v. Nickell*, 115 Ky. 506, 11 Am. St. Rep. 333. But this law of champerty does not apply to a contract made to carry into effect a contract for the sale of land of which there was no adverse possession at the time the contract was made, although the land is held adversely when the deed is made, and this rule applies to an executory verbal contract of sale: *Wintersmith v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613.

WEBSTER v. CADWALLADER.

[133 Ky. 500, 118 S. W. 327.]

DEED—Lien of Covenant to Support.—A covenant in a deed which charges the grantee with the support of a third person as a part of the consideration creates a lien on the land for support. (p. 473.)

DEED—Agreement to Support Third Person.—Under a deed with a covenant that as a part of the consideration the grantee will support a third person "in the event that from disease or other

come an invalid and unable to provide for himself," the support does not come into existence and become a property until the necessity for the support arises. (p.

AL—Review of Commissioner's Report.—The fact that no exceptions filed to the report of a commissioner does a review of the order of confirmation. (p. 474.)

ITION—Receiver—Payment of Charges on Premises.—a for partition, in which a third person intervenes to right to support from the property, the court may ap- ver to take charge of the property and rent it out, and paid from the rents the taxes, other preferred claims, and e due the intervener for support. And the court may, es desire, sell the land, but before the proceeds are ision must be made for the support of such intervener.

awford and George Denny, for the appellant.

B. Kinkad, for the appellees.

N, J. It appears that George Cadwallader and Mary, were the owners for several years prior to the small tracts of land, all adjoining, amounting to hundred and thirty acres, and were situated about from Lexington, Kentucky. His wife owned most . He possibly owned one of the tracts in fee and e in one or two of the others. His wife, with his ecuted a will whereby she devised the whole of the rah J. Campbell. After the death of his wife, to title perfect, he executed a conveyance to Sarah l. On July 13, 1883, Sarah J. Campbell conveyed land to Charles A. Finnell and Sarah Elizabeth s wife. One consideration named was "love and and the additional ones were as follows: "And valuable consideration ⁵⁰² moving from the said Campbell unto them and hereinafter set out, promise and do hereby promise and agree to and with her for her and to furnish to her a home for and dur- at the residence now occupied by her, and herein- bided, and further to provide her with a maid- ring her life, of such character and qualification suitable for her and agreeable to her, and to supply, d provide said Sarah J. Campbell and said maid- th suitable, proper and convenient diet, lodging, uel and other necessities of all sorts, and also to ke care of the phaeton and such pony or horse y of the first part may at any time have, of which n and pony or horse she is to have the exclusive trol. And the said parties of the second part have omised and agreed, and do hereby promise and d with the said party of the first part to provide a with necessities of life George Cadwallader now

of the city of Lexington, and State of Kentucky, in that that from disease or other cause he should become an and unable to provide for himself, and the said Cha Finnell has further agreed and promised, and does agree and promise, to and with the said Sarah J. Ca to assume and pay off and discharge the mortgage deb the interest due or to become due thereon, now held Cassandra Inskeep, on the property hereby conveyed the habendum clause of the deed there is the follow cital, to wit: "That they [meaning the Finnells] their executors, administrators and assigns shall and will faithfully and truly perform and execute ⁵⁰³ the covenants and covenants aforesaid." So far as appears from the record Finnells executed all the covenants and agreements contained in the deed, except the one referring to appellee Cadwallader. On the third day of November, 1887, the Finnells so conveyed the lands referred to to one L. G. Webster for a price of \$7,500, \$7,000 of which was paid by him at that time. L. G. Webster made a gift of this land to Zinamon Webster and several other parties named in the deed. The gift was to Zinamon for life and to the others in fee. The net price was \$500, that part of the purchase price remaining unpaid was executed by Zinamon Webster. He having died, this trust was instituted in the month of February, 1904, by the maindermen then alive, and the children and descendants of those who had died before Zinamon Webster for the purpose of having the land sold and the purchase money divided among those interested, as the land could not be divided among them without materially impairing its value. A sale was ordered, and one W. R. Stone became the purchaser, for therefor about \$5,000. Stone filed exceptions to the record of the sale, because, among other reasons, George Cadwallader had not made a party to the action, which he stated should have been done because the land was charged with the support of Cadwallader for the rest of his life. The court sustained the exceptions and set the sale aside.

On February 13, 1905, George Cadwallader filed an answering pleading in the action and asked to be made a defendant. He alleged that, by reason of his incapacity for labor, he was entitled to support from the land described in the deed by virtue of the provisions ⁵⁰⁴ of the deed from Sarah J. Finnell to the Finnells; that he was sixty-five years old; that he was uneducated and had no capacity to earn a living by his own efforts; that by reason of his age and the hardships of life theretofore endured, he was utterly incapacitated to do manual labor, and incapable of providing and furnishing himself with the necessaries of life; that he was without means and had never received anything in the way of support or assistance from the parties holding the land. There were

led by the parties in interest controverting the of his pleading. The court referred the matter to a commissioner to take proof and report with reference to the physical and mental condition of George Cadwallader to ascertain whether he was incapable of making for his support; what means he had, if any, and what would be necessary to support him. The commissioner took the proof and reported that he was not supporting himself; that he was without means; that he was entitled to \$450 a year for support, beginning on the first day of January, 1903. The court confirmed this report, and overruled the exceptions having been filed. A short time after the appellants appeared and asked that the order of conveyance be set aside, and they be allowed to file exceptions thereto. The court overruled their motion and rendered judgment in behalf of George Cadwallader in conformity with the commissioner's report, and appointed the Lexington Bank Company receiver to take charge of the lands and to receive the taxes and other preferred claims, and to pay to George Cadwallader \$450 a year for his support, beginning on the first day of January, 1903. From this judgment this appeal is prosecuted.

The appellants contend that the provisions in the deed charging support upon the land for the benefit of George Cadwallader was only a personal obligation upon the part of the grantor to furnish this support; that it did not create a lien upon the land, and for that purpose. We are of a different opinion. The provision for the support of Cadwallader was a consideration for the conveyance. The deed represented the payment for the purchase of the land. This court, construing a deed in the case of *Keltner v. Keltner*, 100 Ky. 40, said: "The stipulation for support constitutes part of the consideration for the deed." In the case of *Admr. v. Moberly etc.*, 9 Ky. Law Rep. 149, the same principle was recognized. That the consideration for the purchase and support can be maintained as a lien on land, is shown in the case of *Bevins v. Keen*, 23 Ky. Law Rep. 757, 100 Ky. 428. Section 2358, Kentucky Statutes, provides: "When any real estate shall be conveyed, and the consideration therefor in any part thereof, remains unpaid, the grantor shall be liable for a lien for the same against bona fide creditors or purchasers, unless it is stated in the deed what part of the consideration remains unpaid." The converse of this section is necessarily true; that is, when the consideration is paid for the conveyance not to have been paid, a lien exists in favor of the grantor.

It is the opinion of the court, however, that the court erred in rendering judgment for too great a sum for the support of appellee, and in rendering this support back in January, 1903. So far

as this record shows, he had lived without creating an until ⁵⁰⁶ he filed his petition in February, 1905, a allowance should have been from that date. The pr in the deed from Campbell to the Finnells was not purpose of making a charge upon the land to reimburse pellee for cost incurred in his support. It was intended help him live when he became an invalid. Therefore court ought not to have given him aid out of appellants' before he asked it. The proof shows that Cadwallader a second wife, who is about fifty-six years old; that they and have been keeping a boarding-house for many years during the summer months in the town of Latonia, Kentucky, that they have been able to live from the proceeds of it. He has not been sick, but has had slight trouble with his kidneys. He is able to move about and do the market work of his wife. His greatest trouble is weakness from age. The opinion is that the charge as fixed by the lower court is great; that \$250 a year, beginning at the time he filed his pleading, would be amply sufficient to support him in the manner contemplated by the provisions of the deed referred to. Appellees say, however, that we cannot give appellants relief in this respect for the reason that there were no objections filed to the report of the commissioner; that it was affirmed and is therefore binding upon them. In the *Adkisson v. Dent* etc., 88 Ky. 628, 11 Ky. Law Rep. S. W. 950, this court, in speaking upon the subject of confirmation of a commissioner's report, said: "The only confirmation should be, as it is, merely interlocutory, subject to the chancellor's revision and correction until final judgment is rendered in the case." This rule should be followed, especially in this case where the rights and interests of many infants are involved.

⁵⁰⁷ The court did not err in appointing a receiver in charge of the property and rent it out, and in ordering paid out of the rent proceeds the taxes, other preferred claims and the allowance to Cadwallader, and the remainder to the persons owning the land. The court may, however, if the parties desire, sell the land; but before the proceeds are divided among the parties in interest, provisions for the support of appellee must be made.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent with.

Conveyances in Consideration of the Support of the Grantor
grantee are discussed in the note to *Davis v. Davis*, 130 Am. 1039. It has been held that a condition or covenant in a deed obliging the grantee with the duty of supporting the grantor creates an equitable mortgage: *Price v. Hobbs*, 47 Md. 359; *Doescher v. ...*, 61 Minn. 326, 63 N. W. 736. But in *Bethlehem v. Annis*, 4

Dec. 700, it is said that a deed conditioned for the support is not a mortgage. And in *Robinson v. Robinson*, 9 Am. Dec. 301, it is held that a bond by a grantee to his consideration of conveyance, and conditioned for the support during his life, and in case of neglect or failure in the reconvey the land, does not constitute a mortgage; in case failure to so support, the grantor is entitled to relief in decree of reconveyance. Equitable mortgages are discussed in *Hutzler Brothers v. Phillips*, 4 Am. St. Rep.

GUARDIAN v. CALOR OIL AND GAS COMPANY.

[133 Ky. 614, 103 S. W. 309.]

WAYS—Gas-pipes as Additional Servitude.—The laying in a country highway by a corporation desiring to convey gas from its plant to a city, there to be sold for heating purposes, is an additional servitude for which abutting owners are entitled to compensation. (pp. 478, 479.)

Strother, for the appellants.

Hines & Humphrey, for the appellee.

CAR, C. J. The fiscal court of Jefferson county has granted to the appellee the right to lay its pipe-lines for conveying natural gas from its field in Meade county to Louisville, under a certain public highway in the county. The highway is owned only the easement for the public travel in it. The fee was owned, as to particular parts of it, by the abutting owners. The question for decision is whether the use of the highway by appellee's pipe-lines is an additional servitude upon appellants' estate. The argument is made that it is not, because appellee is a gas corporation, whose business it is to bring natural gas to the metropolis of the state, to be sold there for illuminating and heating purposes; that, as the public has acquired the highway for one public purpose, it may be used for all purposes of a kindred and similar kind. As tending to confirm the doctrine, it is cited that a steam railroad on a public highway is not an additional servitude (*Lexington & Eastern Ry. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497); that a street railway is not an additional servitude upon a street (*Louisville Bagging Mfg. Co. v. Central Ry.*, 95 Ky. 50, 15 Ky. Law Rep. 417, 44 Am. St. Rep. 23 S. W. 592); that an electric railway is not an additional servitude upon a county highway (*Georgetown Traction Co. v. Mulholland*, 25 Ky. Law

Rep. 578, 76 S. W. 148); and that a telephone line additional servitude upon a county highway: *Cum Telephone & Telegraph Co. v. Avritt*, 27 Ky. Law 85 S. W. 204. Some point is made in argument doctrine of additional servitude upon rural public is, in some jurisdictions, different from that of a servitude upon urban highways; but we do not deem consideration of that question necessary in this case. In cases above cited, the fundamental fact was that the servitude was of the same kind in effect as the original servitude. In each instance, travel by the public was the fact. It was pointed out that, as the original easement obtained to accommodate travel by the general public means of travel, as by the adoption of vehicles not known in use when the easement was first granted, were in use much as were those then known. In any event, the fact was being served in the matter to the extent originally contemplated. Whether the public went afoot, traveled horseback, or in chaises, or in stages, or cars propelled by steam or electricity, was all one. The public was over the route dedicated, and was in the use of the easement granted to it. The analogy of telephone and telegraph to such travel is not so clear, as is evidenced by the conclusions on the subject reached by the courts of various jurisdictions. Still it is ascertained that the analogy holds. As was pointed out by this court in *Cumberland Telephone & Telegraph Co. v. Avritt*, 27 Ky. Law Rep. 394, 85 S. W. 204: "The telephone takes the place of the private messenger in the transmission of messages by telephone as a business of the same character, which is conducted under public control in the same manner as the carriage of persons or property."

The question is not made to turn at all upon the character of the person using the new means, but upon the question of the use. Appellee is incorporated to do the business of producing gas for illuminating and heating purposes in the city of Louisville. It either manufactures gas or gathers it from the subterranean deposits of natural gas. In either case it must be confined as well as conducted to the place of production. Appellee serves the public in such manner as to be no different sense from the butcher or coal dealer, for the use of gas is no more essential to the public than meat or coal. It can be truly asserted that the coal dealer might build a road to run along and upon a public highway to enable him to transport coal to the public market from his mine, so that the public might serve the public? If he were building and operating a tramroad on which the coal of all shippers who desired to use it would be transported, the case would seem to come within the line of authorities noted above. In the case at hand, the appellee is not a common carrier. It does not propose

property—the owners of all wells along its line—poses to carry its own gas alone to the market. The fact that its gas is a private enterprise, just as would be a dealer carrying his coal to market. The analogy is not to be extended by the argument that, if the coal dealer is entitled to haul his coal by wagons, or, if a landowner appellee hauled its gas in transportable retorts, it would be no question of their right to use the highway for other purposes; and as the means adopted is an improved one, really ⁶¹⁸ imposes a less burden upon the highway, than the fee, it ought not to be excluded from the public easement. But it is not true that, because a man has a right to haul his wares over a highway, he may erect thereon any means of transporting them. A logger would not be allowed, for example, to erect skids along the highway to draw numerous logs over it, instead of hauling them in wagons; nor do we apprehend that a coal miner, or a manufacturer, would be permitted to build a tramway along the highway to expedite and cheapen the transportation of his product, although to do so would tend to obstruct the highway of a different and lawful means of travel for him for its movement. That is more than its use. It is a perpetual occupancy; not to the exclusion, or even to the partial exclusion, of the public, it may be true, but nevertheless it is a possession of the land, to the exclusion, to that extent, of the owner and all others for any purpose whatever. If it is laid out, it is not for use by the public, as are electric railways, or even telephone and telegraph lines; it is the exclusive use of the part actually occupied by the owner for his own convenience. That he is engaged in a business, or is a member of the public in the sale of his wares does not affect the principle. The test in these matters is this: Is he serving the public, or carrying the public, or carrying his wares, in his business which he is setting up on the public highway under the guise that it is a part of the public easement? The question at the bottom is not so much whether the public in some way, directly or indirectly, benefited by the use, or it may be safely assumed that it is benefited by the price that adds ⁶¹⁹ to its marketable stock of the commodity (of life), but have the legal rights of the individual been invaded? The greatest safety of the rights of all is found to be in the due respect of individual rights. Payment of the fee, by contract or legal compulsion, has created an easement to the public for its travel over his land. It must be confined to the route selected, as well as to legitimate public uses of the kind embraced in the easement. To allow the public highway to be taken for every use, even that of a public nature, simply because it had been used by the public for a particular use, would be to add

to the contract of the parties, and to deprive the his property without compensation. Appellee's c no more a public use than its retorts, pumping st office buildings. It in a sense, and in the same sen the public by the use of all these appliances. Coule ment granted to the public for a tollhouse on a turn be converted by the consent of the public author without the consent of the owner of the fee, into th occupy the lot with a gas retort, or a pumping stati appellee's private use? It is pointed out that the a city may be used, in virtue of the original easemen dedication as public streets, in laying sewers and g beneath them, and that the owners of the fee wou such event be entitled to compensation, as for an a servitude. While the right of the public in public in rural and urban communities is in many partic same, still in many others they are not. Sewers in cities are a public necessity. The public use them a for disposing of filth. They partake, in their ⁶²⁰ p use, of every feature of a public highway in its p uses. No other place could so well and so prac adapted to use for sewers as beneath the streets. T been always so used since public sewers were kn when an easement is granted to a city for open street, it includes by every implication the right t street for all such public purposes as streets are used for. But suppose the city desired to carry its to a considerable distance beyond its limits, and had to extend its sewers for many miles into the Would it have the right to use the public highwa county for the purpose as an incident of the origi tude?

Now, as to gas mains: Public lighting is also a pul sity in cities. Not so in the country. Public light from its nature, be upon the public streets. Hence plied in the grant of land for use as a street in a the city may also light it, and, in order to light it, it it for laying gas mains. The gas so distributed be used for private lighting, but such private light the enjoyment of the inhabitants of the city. They use it, and hence all get the benefit of the use of the streets. But there is neither custom nor exigency sideration for the appropriation of a rural highwa public uses of a city of a nature that are peculiar t alone, and which the rural community cannot shar is therefore no such implication in the dedication by t of his land to the public use for a highway in the there is in the city, in so far as sewers and gas r concerned.

ing the reasoning of this opinion, and the case of Triple-State Natural Gas & Oil Co., ⁶³¹ 115 Ky. 723, 106 S. W. Rep. 416, 74 S. W. 709, the judgment of the circuit holding that appellee acquired the right to occupy the road for its gas line, without the consent of the fee owner, is erroneous, and is reversed. The cause is remanded for a judgment in conformity herewith.

Authorities Supporting the Decision in the Principal Case, see Mordhurst v. Ft. Wayne etc. Co., 106 Am. St. Rep. 266.

BANK OF RUSSELLVILLE v. CITY OF RUSSELLVILLE.

[133 Ky. 637, 118 S. W. 921.]

HOLDING.—A City may Tax Bonds Issued by It and Owned by It, if there is no provision for exemption in them or in the contract providing for their issue. The contract of purchase, in itself, is subject to the taxing power, and its obligation is not affected by the imposition of a tax. (pp. 479, 482.)

Appellant.—Bank of Russellville.

Appellee.—City of Russellville.

FACTS.—Appellant, Bank of Russellville, is the legal holder of twenty-four thousand dollars' worth of bonds issued by the city of Russellville. The sole question on this appeal is whether or not said bonds should be taken into consideration in determining the value of appellant's capital stock for the purpose of taxation. The case is based on an agreed statement of facts. The court below gave judgment in favor of appellee, city ⁶³⁸ of Russellville. From that judgment the Bank of Russellville prosecutes this appeal. The contention of appellant is that appellee is without authority to tax its own indebtedness; that, if this could be done, it would impair the obligation of its contract to pay principal and interest contracted to be paid. This is not a case for the ordinance providing for the bond issue. It exempts the bonds from municipal taxation. It will not be necessary, therefore, to discuss that question. The bonds do not have no such provision. They are simply obligations of the city to pay certain sums, with certain interest, within a specified period.

ANALOGY.—The resting case upon this subject is that of *Murray v. Commonwealth*, 96 U. S. 432, 24 L. ed. 760. In that case the plaintiff was a resident of Bonn, Germany, and was the owner of five thousand two hundred and sixty-two dollars and fifty cents of stock issued by the city of Charleston. This stock was equivalent to municipal bonds. One-third

of the interest due the plaintiff on the first days of July, and October, 1870, and January and July, 1871. Having been retained by the city, he brought an action to recover the sums retained. The city sought to justify the retention of the interest by virtue of certain ordinances which had been enacted. By these ordinances the city appraiser was authorized to assess a tax of two cents upon the dollar of the value of real and personal property in the city of Charleston for the purpose of meeting the expenses of the city government. It was further provided that the taxes assessed on such property should be retained by the city treasurer out of the interest thereon when the same became due and payable. The court held that the levy and collection of the tax in the manner provided by the ordinances of the city of Charleston violated the ⁶³⁹ obligation of its contract, and gave judgment in favor of the plaintiff. In discussing the question involved, the court uses the following language: "Is, then, property, which consists in the promise of a state, or of a municipality to pay, beyond the reach of taxation? We do not affirm that it is. A state may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the rate of the tax by the rate of interest the debt bears, if its contract be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched; but until payment of the debt or interest has been made, as stipulated, we think no act of state sovereignty can work an exoneration of what has been promised to the creditor, namely, payment to him, without a violation of the constitution. 'The principle of every case of property founded on contract with the government is this: It must first be reduced into possession, then it will become subject, in common with other property, to the right of the government to raise contributions upon it. It may be said that the government may free itself from the principle by paying the interest with one hand, and levying back the amount of the tax with the other; but the correct answer is that, to comply truly with the rule, the tax should be levied upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it should be so regulated as not to include a lien upon the fund. The creditor should be no other than as every other possessor of money, and consequently, the money he receives from the public can truly be a fit subject of taxation when it is entirely separated from the contract) and thrown undistinguished ⁶⁴⁰ into the common mass': 3 Hamilton, Works, 514 et seq."

It will be observed that the facts of the above case differ from those of the case at bar. There the owner of the property was a nonresident, and the ordinance provided that the tax should be deducted from the interest to be paid by

ton, and that the owner should receive merely the
Here the bonds are owned by a resident of the city
ville, and have an actual situs in that city. They
ought to be taxed by any arrangement by which the
the tax is deducted from the interest agreed to be
bonds are sought to be taxed like any other prop-

case of *People v. Home Ins. Co.*, 29 Cal. 533, the
a state to tax its own bonds was sustained. The
ed by the state and owned by a foreign insurance
doing business in that state, and deposited with a
re held to be property within the meaning of the
t. The court, in passing upon the question, said
ate had the power to tax its own bonds equally with
erty, and that the exercise of such a power involved
n of the contract.

case of *Champaign County Bank v. Smith*, 7
2, it was held that stocks or bonds of the state of
h were not expressly exempted from taxation either
own terms or by the provisions of the laws under
were issued, were subject to taxation by the legis-
discussing the question the supreme court of that
"One man invests capital in state stocks, as a
income and profit to himself. From the same
interest, other capital is invested in the bonds of
corporation or the notes of ⁶⁴¹ individuals. These
s are equally taxed, as property, as sources of profit
e. The consequence is that the profit is diminished
ses. This is an effect, but not the object, of the
ng the taxation. It contemplates no such purpose.
n the parties, the contract is left in full force; but
ty invested, or acquired by the contract, is taxed,
y of interference with the rights of the parties, as
nd lender, but for the support of government, and
quent protection and welfare of the whole com-
No one doubts the power of the state to tax land
territorial limits, whether held by direct grant from
r by title from a different quarter; and if the taxa-
ital invested in state bonds impairs the obligation
ract which contains no stipulation for exemption,
principle shall the taxation of bank bills, or cor-
onds, or the notes of individuals, be justified? The
hat, in the absence of any stipulation to the con-
overeign state possesses the power of taxing all
held under it, and within its jurisdiction, is funda-
l essential to the very being of government. Prop-
ly be acquired and held subject to this condition,
firmity of tenure furnishes the only adequate means
tection."

And in the case of Philadelphia etc. R. R. Co. v. 10 How. 376, 13 L. ed. 461, Chief Justice Taney following language: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is clear and unambiguous terms."

⁶⁴² There can be no doubt that the power of taxation existed in the city of Russellville long prior to the time the appellant purchased the bonds in question. The appellant purchased the bonds knowing that they were property of the city if held and owned by it were, under the charter of the city of Russellville and of the statutes of the state of Tennessee, subject to taxation. There is neither an express nor implied contract on the part of the city of Russellville to surrender its power of taxation. The contract of purchase of the bonds was made subject to the taxing power. The issue and collection of a tax upon the bonds cannot, therefore, impair the obligation of the contract, which was made subject to the right of the city of Russellville to exercise the power of taxation.

For the reasons given the judgment is affirmed.

For Authorities Supporting the Principal Case, in addition to those cited by the court therein, see Wilkesbarre D. & S. Bank v. Wilkesbarre, 148 Pa. 60, 24 Atl. 111; Hall v. Middlesex County Council, 10 Mass. (10 Allen) 100.

ROUNDS BROTHERS v. McDANIEL.

[133 Ky. 669, 118 S. W. 956.]

PARENT AND CHILD—Recovery of Minor's Wages.

Where a parent sues to recover wages earned by his minor child for an employer, the employer is entitled to a deduction of the amount expended for the support of the child during the service for board and clothes. (p. 484.)

PARENT AND CHILD—Right of Parent to Enforce Contract for Support of Minor.—A parent is entitled to the services and earnings of his child during minority. (p. 485.)

PARENT AND CHILD—Loss of Right to Minor's Services.

A parent may lose his right to the services and earnings of his minor child by failing to provide it a home, or by such ill treatment and neglect as forces it to abandon home, or by becoming insane or dissolute in character, or by emancipating the child. (p. 486.)

PARENT AND CHILD—Loss of Right to Child's Services.

A father cannot have the assistance of courts to aid him in recovering the services or wages of his child whom he has compelled to leave home by cruel treatment or dissolute habits to secure another home. (p. 487.)

PARENT AND CHILD.—When a Child has Been Emancipated.

When a child has been emancipated, he occupies the same legal relation toward the parent as if he had arrived at full age. The legal duty of the parent to support and defray his necessary expenses is extinguished, and so is the right of the parent to claim the services and wages of the child. (p. 488.)

PARENT AND CHILD.—There are Two Kinds of Contracts.—Express and implied—the former the result of express

in the father and the child; the latter when the father's conduct impliedly consents to the child leaving home, shiftless, having his own time and earnings, and implied consent may be inferred from and shown by circumstances.

FATHER AND CHILD—Revocation of Implied Emancipation.—A father gives freedom to a growing boy and tells him in effect in words, to go out and make his own living and be independent, and the boy, acting on this implied consent or direction, enters for himself the battle of life and is successful in meeting its requirements, the father will not, unless he acts in seasonable time, be entitled to reclaim the boy's services or resume the parental control if the boy has surrendered. (p. 488.)

FATHER AND CHILD—Revocation of Implied Emancipation.—A father, capable of making his own living, leaves home with his son, capable of his father, and for nearly two years receives his own support from the son at pleasure, the father's objection to the son's demand for the boy's wages at the end of that time is too late. (p. 491.)

Ellis & Sweeney, for the appellant.

and, for the appellee.

ROLL, J. This case presents the interesting question of what conduct of a father will constitute an emancipation of his minor child so as to deny the father the right to recover the child's wages during his minority? The mother of Byrne McDaniel died in 1900, when he was twelve years old, leaving his father, the appellee, with six children to care for. The father, a poor but kindly disposed man, a carpenter by trade, did not own any property, and found it necessary to place his other children—all of whom were younger than he—in orphan homes, but after doing so he aided in their support. After this the father and Byrne boarded with a relative, the father, and for two or three years thereafter they worked at different places, earning a few dollars a week which he contributed toward his support. In 1902 Byrne was then about fourteen years old, commenced to work for the appellant, Rounds Brothers. They paid him small wages at the beginning, but, finding him to be an industrious, well behaved, and capable boy, gradually increased his wages, until at the time this suit was brought in 1907 he was receiving some eight dollars or ten dollars a week. For the first two years that he worked for them he lived with his aunt and contributed all or the greatest part of his wages toward paying for his board and clothing. Byrne becoming dissatisfied with the accommodations at his aunt's, left her house and procured board and lodging elsewhere. The evidence does not disclose any reason why Byrne left the home of his aunt, but he was not a cause for so doing that the accommodations there were as comfortable as he desired, and that he could not

get his meals when he wanted them. After he left home he did not contribute anything toward his support or maintenance or expend anything in his behalf. In fact he did not, after leaving his aunt, need the assistance of his father as he was earning sufficient money to take ⁶⁷² care of himself. His father did not object to his leaving home, nor did he make any provision or arrangement for another home for him, although it cannot be said that his acts or conduct toward Byrne furnished any sufficient reason why he should have abandoned the home provided for him by his father. His father was at all times aware of the fact that Byrne was working for the Rounds Brothers, and knew that from 1904 to 1906 they paid him his wages, and that he was expending them for his own use and benefit; but he did not object or make any demand that the wages be paid to him until April, 1906, when he notified Rounds Brothers that they must pay him what the boy earned. This they decided to do, and in 1908 he brought this action to recover the wages Byrne earned after he notified the Rounds Brothers to pay the wages to him. The lower court rendered a judgment in favor of the father against the Rounds Brothers for the amount of the boy's wages after the notification, less the amount expended during this time by Byrne for board and other expenses. It may be here stated that, if the father had not emancipated his son and was entitled to his wages, no just complaint could be made of the judgment. Having the view the lower court did of the law of the case, it was correctly held that the wages should be deducted from the wages received by the father for the amount necessary to defray his expenses: *Culbertson v. Alabama Construction Co.*, 127 Ga. 599, 56 S. E. 765, 9 S. N. S., 411, 9 Ann. Cas. 507. From the judgment the Rounds Brothers prosecute this appeal, and ask a reversal on the ground that the father had emancipated his son, and therefore was not entitled to recover his wages, and in the event they are joined ⁶⁷³ by Byrne. The father's contention is that the facts before stated are not sufficient to amount to an emancipation of his son, and consequently he was entitled to recover from Rounds Brothers the boy's wages after he notified them that he claimed them. He also makes another point that even if it should be held that, by paying his son to leave home and earn his own living, he had emancipated him, yet he had the right at any time during the child's minority to revoke this constructive emancipation and resume parental control and authority, and that, after he so revoked it by notifying the Rounds Brothers that he wanted his son's wages, the status of parent and child was restored to the same as if there had never been any emancipation.

We have in this state no statute upon the subject of emancipation, nor has the question ever been directly

parent; but the subject of parent and child, and the rights, duties and obligations of each, has furnished an interesting matter for text-book writers, and has so often been considered by courts of other jurisdictions, that there is ample precedent and authority, both ancient and modern, from which to gather and formulate the general rules applicable to this relation. But this case presents some questions of the law that are not so well settled, and concerning which there is conflict of authority. The duties and obligations of parent and child are, in a sense, at least reciprocal. A duty is imposed by nature, as well as law, on the parent of supporting and caring for his offspring. As Blackstone (volume 1, page 447): "The duty of a parent is to provide for the maintenance of their children is one of natural ⁶⁷⁴ law; an obligation, says Puffendorf, on them not only by nature herself, but by their parents, who act in bringing them into the world, for they are in the highest manner injurious to their issue, if they do not give their children life that they might afterward thrive. By begetting them, therefore, they have incurred a voluntary obligation to endeavor, so far as in them lies, that the life which they have bestowed shall be supported and preserved." In Schouler on Domestic Relations, it is said: "Three leading duties of parents as to their immediate children are recognized at the common law: first, to protect; second, to educate; third, to maintain them. These duties are all enjoined by positive law, yet the law of natural affection is stronger in upholding such fundamental obligations of the parental state." From this duty on the parent comes the right to the services of the child during his minority, intended to be at least in some measure compensated by the care and attention bestowed on the child in infancy; and this right of the parent to the services of the child during his minority is everywhere recognized. *Wheeler v. Tevis*, 4 Litt. 25, 14 Am. Dec. 98; *Louisville & Nashville R. Co. v. Willis*, 83 Ky. 57, 6 Ky. Law Rep. 784, 4 Am. Dec. 124; *Illinois Central R. Co. v. Henon*, 24 Ky. Law Rep. 68 S. W. 456; 1 Blackstone's Commentaries, p. 454; Schouler on Domestic Relations, p. 334; Tyler on Infancy and Guardianship, p. 200; 29 Cyc. 1623; 21 Am. & Eng. Ency. of

Law, usually well settled that the parent, although entitled to the services and earnings of his minor child, may relinquish his right under this right: First, by failing to provide for his child, if he is ⁶⁷⁵ able to do so; second, by such ill-conducted neglect or cruel conduct as forces the child to leave his home; third, by becoming so degraded or disreputable in character that his child cannot in morals or decency associate with him; and, fourth, by emancipating his child. And

if, in this case, the father had failed to provide a comfortable home for Byrne, or if he had treated him in a cruel or inhuman manner, or if he had so grossly neglected his parental duties as to cause him to leave his home, his life was so unworthy or discreditable that his son could not with decency or self-respect longer continue to recognize his authority, we would have little difficulty in reaching the conclusion that the father could not, after driving him away or by his acts or conduct forcing him to shift for himself and make his own living, thereafter lay claim to his services. All the books are agreed upon this point, and indeed, in the absence of authority, we could have no doubt that in a state of case like this the father could not have the aid of the courts to aid him in securing the services of his child whom he had compelled by neglect, cruel treatment or dissolute habits to secure another home: 29 Cyc. 1161; *Godfrey v. Hays*, 6 Ala. 501, 41 Am. Dec. 58; *Nichols v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Swift v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. 1161; *Tyler on Infancy and Coverture*, p. 200. But the facts of this case do not warrant us in putting our decision upon any of these grounds, and so, if the judgment below is reversed, it must be because the father had emancipated his son. The doctrine of "emancipation," looking at it from a legal standpoint, is a recognition of the right of the child to relinquish ⁶⁷⁸ the control and authority over his person whose custody and service he is entitled; or to surrender he so elects and desires, to his minor son, who is capable of making his own living, the right to do so, and the right of receiving the wages that he earns. When this emancipation has been granted, it follows as a matter of course that the person for whom the child labors may pay him wages, and that the child may do with them as he pleases. In other words, when a child has been emancipated, he stands in the same legal relation toward the parent as if he had attained at full age. The legal duty of the parent to maintain and support him and defray his necessary expenses is extinguished and so is the right of the parent to claim the services and wages of the child.

There are two kinds of emancipation that may be distinguished as "express" and "implied." We should say that an "express emancipation" takes place when the parent freely and voluntarily agrees with his child, who is able to take care of himself, to provide for himself, that he may go out from home and make his own living and do as he pleases with his earnings, and he willingly transfers to another the custody and control of his child without reference to his age. Where the emancipation is expressly agreed upon, the parent cannot afterwards renounce or set aside the agreement. He is bound

extent as he would be by any other contract freely made. The parent cannot, after deliberately surrendering control or relinquishing the right to another, demand the services of his child. An "implied emancipation" occurs when the parent, without any express agreement, by his conduct impliedly consents that his minor son leave home⁶⁷⁷ and shift for himself, have his own time, control of his earnings, and it may be inferred from the facts by circumstances. But where the child leaves home goes out to make his own living under the assumption that his parent has emancipated him, his rights to his earnings and earnings are not absolute, as in the case of an express emancipation, and the parent may, by taking timely action, resume parental authority and reclaim the services of the child, but he must not delay until his implied emancipation has become an express relinquishment, or wait until it is too late to be fruitful to the best interest of the child to interfere with his individual aims and plans. It should, however, be noted that whether or not the father emancipates his child, the right rests with the father, and not with the child. The child, by his acts or conduct, may relinquish parental control and authority, but the child of his own volition, in the absence of a court judgment or other like cause, cannot sever the relation with his father the right to his services and wages until he reaches majority.

Applying ourselves with these broad statements of general principles, we will proceed to inquire whether the facts of the case authorize us in holding that the father had emancipated the child. After Byrne had reached an age when he could support his own living, and was mentally and physically able to do so, his father voluntarily consented that he might leave his home and continue in the employment of the Rounds Brothers, and he had been working, and for something like two years remained in their services, with the knowledge and approval of his father. During this time he received his own earnings and made such disposition of them as he desired. He was an industrious, economical and capable boy, there was no direct evidence. He had the respect and confidence of his employers, and in a business way was rapidly advancing. His father did not object to his employment until 1906, or to his wages until that time. He did not request him to leave his home, nor did he manifest any particular concern in his welfare. He seemed to recognize that his son was well situated and comfortably provided for, and his usefulness was being promoted by the service he rendered in and the interest his employers were manifesting in his welfare, and so he was willing to give him an opportunity to make his own way in the world.

In our opinion these facts were not sufficient to an express emancipation such as the parent could not ward revoke or set aside; but they do show the son left under circumstances that amounted to an implied emancipation. But when the appellee attempted to resume control and authority after the expiration of more than it was too late to reclaim the right. In this time the and welfare of the child had become an important factor in determining the rights of the parties. In judging of this, the court will not look exclusively to the right of the parent, but will consider what is best for the child. The father, when his child was in some measure at least attached to him, voluntarily allowed him to go out and care for himself, and after the child, prompted by prudent and independent motives, had become more than self-sustaining, sought to draw the consent he had given. To permit him to do so under ⁶⁷⁹ the circumstances of this case, be detrimental to the best interest of the child. To deprive the boy of his freedom force him to abandon his employment would seriously impair his aspirations and impair, if not destroy, the fine preparation for future success that were opening up to him by reason of his attentive, honest and sober habits.

We do not wish to extend this doctrine of implied emancipation to cases which do not justify its fullest application and do not mean to hold that every time a child who is old and strong enough to work becomes tired of or dissatisfied with his home he may leave, although without objection by part of his parents, and live at some other place and with other persons, and thereby sever the obligation he owes to his parents and destroy their right to his services and support. Minor children cannot in this way cancel the duty they are under to the parent, who by acting promptly may prevent the services of the child and the right to his earnings. If the parent must interpose his authority within a reasonable time. When a father gives freedom to a grown boy by allowing him, in effect, if not in words, to go out and make his own living, and be his own man, and the boy, acting on this consent or direction, does commence for himself the life, and is successfully meeting all its requirements, the father will not, unless he acts in seasonable time, be permitted to reclaim the boy's services or resume the parental authority surrendered.

The conclusion we have reached finds support in the authorities: In *Abbott v. Converse*, 4 Allen, the court said, in considering a similar question: "The father has the right to ⁶⁸⁰ the services of his children, and it is his duty to support and educate them; but this duty is subject to many modifications growing out of the circumstances and conduct of the parties, and the right is not absolute."

It may be forfeited by misconduct, but cases may be held to be temporary. It is referred to establish the doctrine that it may be held to the minor. It is to be regarded as being in the property, and, as a minor may hold other property wholly of his father, there seems to be no valid reason why he should not thus hold the right to his own time and earnings. He may hold it by a contract with his father under a valuable consideration, there is no more reason why that the father may revoke this contract, at his pleasure, than any other contract. On principle he should be bound by it as by a conveyance of land or other property to his child. As it may be held by gift or license without consideration, there is no reason why the gift, once accepted, should be any more revocable, without the assent of the donee, than any other gifts."

Stingale v. Withington, 15 Mass. 272, 8 Am. Dec. 181. Justice Parker said: "But where the father has discharged himself of the obligation to support the child, or where the child to support himself, there is no principle, by which slavery, which will continue his right to receive the fruits of the child's labor. Thus, if the father should support a son, should deny him a home, and force him to go abroad for his own living, or should give him no time, as is sometimes done in the country, the law would be an emancipation of the son, and although it will not prevent him to contract to his ⁶⁸¹ prejudice, it will give no benefit of such contracts as are made with him for his support, and a payment to the son, in such circumstances, will discharge of such contract."

The learned judge, in *Whiting v. Earle*, 3 Pick. 201, 18 Am. Dec. 207, said: "Although the general principle is that a father is entitled to the earnings of a son while he is a minor, yet the court thought it equally clear that he might, in some cases, give the son the right to receive them. This is necessary for the encouragement of young men, and it is often considered that a father, wishing to be relieved from the burden of supporting his son, to allow him in this manner to support himself. Where such a contract is entered into without any advantage of the son, on the principles of commerce, and according to decided cases, he is entitled to the fruits of his own labor. We go so far as to say that where a son makes a contract for his services on his own account, and the father knows of it and makes no objection, it implies assent that the son shall have his earnings." The effect is *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 181. *Vodell v. Coggeshall*, 2 Met. 89, 35 Am. Dec. 391. *Barber v. Bare*, 104 Pa. 58, 59 Am. Rep. 567, the court held that the exercise of parental authority is not necessarily

for the profit of the parent, but for the advantage of the child, the duty of service by the child being deemed necessary for the proper exercise of parental authority for its own good. Although we still recognize the right of the father to demand personal services of his children, that right is simply in subordination to the duty of the father to discipline and direct his children. His right to personal custody and personal service is not absolute, to him, therefore, in order that through them, prompted by natural affection, he may successfully impart to them the habits of industry, methods of thrift, and the means of personal success in life. . . . The right to their service being qualified for their good, whenever the father finds their interests in his own, better subserved by their emancipation, he cannot withhold them."

In Schouler on Domestic Relations, page 346, it is said: "The father may by his own delay forfeit the right to demand wages for his son's wages; as where the minor agrees to perform certain monthly wages to be paid to himself, and the father, knowing of the agreement, gives no notice of his dissent, but waits until the work has been done and payment is made to the child, before making a demand. But if the father gives seasonable notice of his dissent and demand, as in the case of a stranger hiring his son, the fact that the son continues to work against his express dissent, and that the stranger neglects to come and take his son away, and he neglected to demand wages, does not preclude him from recovering the wages." At page 370 the learned author says: "It is a well-settled principle in this country that if the parent absconds, turns his child out of doors, or leaves him to shift for himself, the son is entitled to his own wages, and our courts are very liberal in allowing children to avail themselves of any breach of parental duty, so as to earn an honest livelihood by their own exertions. A presumption raised in such cases may be termed a presumption of necessity. So where the husband abandons the wife to the care of his mother, his subsequent claims for damages or for wages of either are to be regarded with very little weight. Even slighter circumstances, which impute no misconduct to the father, but evince a consent for his son to leave the parental roof and go into the world to seek his own fortune, are often construed into emancipation."

In Louisville etc. R. R. Co. v. Davis, 32 Ky. Law 105 S. W. 455, which was an action by the father to recover damages for a personal injury sustained by his son while in the employment of the railroad company, the court said: "Assuming that the boy was under twenty-one years of age, did his father consent or acquiesce in his employment? It may be admitted at the outset that the father did not consent of the original employment, but his own testimony shows that while his son was engaged at work on the railroad in

ther went out to where he was at work and saw him the duties of his employment. The father talked man, whom he told the boy was only sixteen years upon the foreman's saying in reply that he hated up, he was such a good boy, the father left without e, and went home. . . . Afterward the father tes- his son came home on Sunday and then went back to the evidence shows without contradiction that the did off several times before he was hurt. During e the father lived within two and one-half miles his son was working in the employ of the railroad, no protest or objection to his remaining at work

We think that this was a consent on the part of to the employment of his son by the appellant. right, if he objected to the employment, to remain t until his son was hurt, and then complain that ment was without his consent. He allowed the draw his own wages, and it does not alter the case oney was delivered to the father. If the father boy to keep the money, this was a practical manu- nim. If he required him to bring it home, this was n of the employment."

efully considering this case, our conclusion is that was not entitled to the wages earned by his son, ore, the whole court sitting, the judgment is re- n directions to dismiss the petition.

Participation of Minors is the subject of a note to Vance v. Am. St. Rep. 113.

LE & NASHVILLE RAILROAD COMPANY v. STILES, GADDIE & STILES.

[133 Ky. 786, 119 S. W. 786.]

CARRIER OF LIVESTOCK—Nature and Extent of Liability. Carrier is liable for the safety of livestock committed to transportation, unless lost or destroyed by the act of God or enemy, or as a result of the inherent vice or propensities of the animal. (p. 492.)

CARRIER OF LIVESTOCK—Duty to Feed and Rest Animals. The law it was the duty of carrier of livestock for long distance, water and rest as a reasonable necessity required; and the federal statute on this subject only makes certain where the common-law duty of the carrier for the preservation of the stock shall be exercised. (p. 493.)

CARRIER OF LIVESTOCK—Liability While Animals Unloaded.—The temporary unloading and placing of livestock for feed, water and rest, as required by the federal statute,

does not reduce, for the time being, the liability of the carrier as insurer of their safety. (p. 494.)

EVIDENCE.—A Party cannot Complain of Incompetence brought out on the redirect examination of a witness, when plain incompetent testimony elicited on cross-examination.

John S. Kelley and Benjamin D. Warfield, for the appellant.

John A. Fulton, for the appellee.

⁷⁸⁸ **BARKER, J.** This is the second appeal of the case. The opinion on the first is to be found in *Stiles, Co. v. Louisville etc. R. Co.*, 129 Ky. 175, 130 Am. 429, 110 S. W. 820, 18 L. R. A., N. S., 86. The first appeal was taken by the plaintiffs to review the judgment of the trial court in sustaining a general demurrer to their petition and dismissing it upon their declining to amend. In the opinion on that appeal we held that a common carrier is liable for the safety of livestock committed to its care for transportation, unless lost or destroyed by the act of the public enemy, or where the loss or destruction is the result of the inherent propensity or vice of the animals. Upon the return of the case for further procedure, in conformity to the opinion, the defendant (appellant) answered, denying the value of the horses destroyed by fire as claimed in the petition, and pleading affirmatively that the horses destroyed were being transported by it as interstate commerce from East St. Louis, Illinois, to New Haven, Kentucky, when the animals arrived at Louisville, Kentucky, under the provisions of the federal statute, requiring animals transported by common carriers to be unloaded, fed and watered at intervals, the horses were unloaded and placed in the stockyards, to be fed, watered and rested, and while in the stockyards they were burned by a conflagration which destroyed the stockyards; that this conflagration was caused by any negligence on the part of the carrier; and that, therefore, it was not liable for the loss occurring in the manner claimed. A general demurrer to the second paragraph of the answer was sustained, and a trial upon the issue raised by the third paragraph, which is merely a denial of the value of the animals destroyed, resulted in a verdict in favor of the plaintiffs (appellees) for the sum of two thousand one hundred and eighty dollars. From the judgment based upon the verdict the carrier prosecutes this appeal.

⁷⁸⁹ The first question which we propose to discuss is the merit of the second paragraph of the answer. It is conceded that the horses in question had been transported by the appellees from Mountain Home, in Idaho, to New Haven, Kentucky, and that the appellant received them at East St. Louis, Illinois, and was transporting them

shipment, New Haven, Kentucky, when they were by fire in the Bourbon stockyards. It is not denied that the carrier had unloaded the stock at Louisville and kept them in the stockyards for the purpose of feeding, and resting them in pursuance of the requirements of a general statute regulating the shipment of livestock as commerce. Nor is it denied that the animals were kept while in the Bourbon stockyards by a general contract which was in no wise caused by the negligence of the carrier, or, so far as this record shows, by the negligence of anyone. The question then arises: Did the unloading of the animals and the placing of them in the stockyards in violation of the statute relieve the carrier from its liability settled definitely as to it by the opinion of the court in the first appeal of this case? We think this must be answered in the negative. Certainly there is nothing in the statute which indicates an intention on the part of the legislature to change the rule as to the liability of a carrier of livestock. The statute is a wise and humane enactment for the benefit of livestock being shipped as interstate commerce.

It in no wise changes the common-law duty of a carrier with reference to livestock except to make definite the time and when such stock shall be fed, watered and rested. Undoubtedly at common law it was the duty of a carrier of livestock for long distances to feed, water and rest the stock as a reasonable necessity required. Practically the statute makes certain when and where the common-law duty of the carrier for the preservation and comfort of the stock is to be exercised. The mere fact that the stock is unloaded and placed in pens for the purpose of being rested, and fed does not change the liability of the carrier. The stock was still en route. It had not yet reached its destination. The care and responsibility of the carrier does not terminate until the stock reaches its destination and notice of arrival is given to the consignee. This is not pretended in this case at bar. Here the stock was in the pen of the stockyard after it had been fed, watered and rested, as required by the statute, it was to be again loaded upon the cars and forwarded to its destination. It was still freight to be transported.

The subject of the common-law duty of the carrier of livestock is said in 5 American and English Encyclopedia, second edition, page 436: "In the absence of special contract in the contract of shipment, the carrier is bound to feed and water livestock being transported by it at proper intervals along the route, and it will be liable for a loss or injury occurring to the stock on account of its failure to do so. It is necessary to unload them in order to feed and water them, the carrier must do so, and must have suitable

and safe facilities therefor." To the same effect is 2 son on Carriers, 3d ed., sec. 634; 4 Elliott on Railroad sec. 1553; Moore on Carriers, p. 504. The rule is that if livestock is delivered to a railroad corporation for transportation, its liability commences when the stock is delivered at its stock-pens ⁷⁹¹ or warehouses for shipment, and continues until the journey is ended, the consignee notwithstanding a reasonable time given him to receive it. After that time if the consignee fails to receive and care for the stock, the carrier may place it in pens or warehouses and the complexion of its liability is changed from that of carrier to that of warehouseman, its liability for loss as warehouseman depending upon its due care or negligence. On this subject see Hutchinson on Carriers, third edition, section 141, where it is said that at each successive point of transfer from one carrier to another they are liable to be placed in warehouses, there the loss may be delayed by the accumulation of freight or other causes, and exposed to loss by fire or theft without fault on the part of the carrier or his agent. Superadded to these are the dangers of loss by collusion, quite as imminent when goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing of the goods under such circumstances should not be to be a mere accessory to the transportation, and the carrier should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers possession to the first carrier until they are delivered at the end of the route. But when they have reached their destination, nothing more generally remains to be done by the carrier after storing them and giving notice of their arrival to the consignee, and after allowing a reasonable time for their removal he becomes a mere warehouseman; and if at that time they are destroyed without his carelessness, the loss is borne, as in equity it should be, by the owner." It has been cited to no authority by appellant in support of his position ⁷⁹² that the temporary unloading and placing of the stock in a warehouse or stock-pen for the purpose of resting, feeding and watering it will have the effect of changing the liability of a carrier from that of insurer to that of warehouseman; and we feel constrained, in the absence of such authority, to hold that such unloading is a mere accessory to the transportation, and while thus temporarily unloaded the stock should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers his possession to the carrier until the stock is delivered to him at the end of the route.

The appellant, as another ground for reversal, insists that the court erred in admitting testimony as to the cost of the horses in Idaho and the expense of the plaintiffs in

We would be inclined to agree with appellant that it was not only incompetent, but prejudicial to its case. But, unfortunately for its position, the greater part of the evidence it complains of as incompetent was brought out on the redirect examination of the plaintiffs in response to the questions asked of them. It is plain that the evidence that had been developed on the direct examination was not impeached by the cross-examination by counsel for appellant. The plaintiff was asked on cross-examination what they paid for the horses in Idaho, and what their expenses amounted to, what they paid at hotels, their buggy hire, etc., and we think that appellant has no right to complain that on the redirect examination plaintiffs' counsel made more specific questions which were really commenced in the cross-examination.

Perhaps there were one or two questions and answers which, strictly speaking, might not come under this rule; but we do not think, taking these alone, that the interests of appellant were prejudiced, especially in view of the fact that the court practically eliminated it all by the instruction to the jury limiting the damages sustained by the horses to the reasonable value of the horses which were in the place of consignment—New Haven, Kentucky. On the whole case, we are of opinion that the appellant was given a fair trial at the hands of the court, and that there were no errors committed adversely to its interests, or of such a nature as to require a reversal. The judgment is affirmed.

Costs and Liabilities of Carriers of Livestock are discussed at length in the recent note to *Stiles v. Louisville etc. R. R. Co.*, 130 *Am. L. Rev.* 432.

CASES

IN THE

SUPREME COURT

OF

LOUISIANA.

STATE v. CITY OF SHREVEPORT.

[124 La. 178, 50 South. 3.]

MUNICIPAL CORPORATION—Duties of Auditor.—Charter confides to the council the power of defining the office of the auditor, an attempt to delegate such authority to the council is a violation of the charter. (p. 501.)

MUNICIPAL CORPORATION—Abolishing Office of Auditor.—A city auditor being an officer created by the charter, and performing functions to perform which are essential to the operation of municipal government and which can be performed by no other officer, the office is not one that the council is authorized to discontinue when no longer necessary. (p. 501.)

MUNICIPAL CORPORATION.—Courts Have Power to Review.—Courts have power to review the exercise of discretionary powers by municipal officers in cases of abuse of discretionary powers by municipal officers. (p. 502.)

OFFICE—Power to Abolish or Remove Incumbent.—Where the legislature or a municipal council has created an office, it may destroy it. Where either has discretionary power of removal, it may exercise it without let or hindrance. But where the legislature creates an office, the legislature cannot abolish or nullify it by direct or indirect means. And where the legislature creates an office, a city council cannot abolish or nullify it, either directly or indirectly. (pp. 502, 503.)

MUNICIPAL OFFICE—Attempt to Abolish—Mandamus.—Where a city attempts, in excess of its authority, to abolish or nullify an office, either directly or indirectly, mandamus will issue. (p. 503.)

MUNICIPAL CORPORATION—Reduction of Auditor's Salary.—Where a city council, which has discretion within certain limits to fix the salary of the auditor, but which has no authority to abolish the office or to remove the incumbent without cause, attempts to do so indirectly by reducing his salary to an extent which a competent person would act, a court will, on mandamus, require the salary to be restored to a reasonable figure. (p. 507.)

C. Butler, city attorney, and Pugh, Thigpen & the appellant.

Jack, for the appellee.

OVOSTY, J. The relator alleges that the city desiring to remove him without cause from the office of auditor, first passed an ordinance expressly so providing, then, on discovering that it had no right to do so, rescinded the ordinance, and immediately proceeded to do by what it could not do directly, namely, to pass an ordinance making the office undesirable to anyone coming to fill it, thereby practically abolishing it. This it did by reducing the salary of the office from \$1,500 to \$300 a year, and delegated to the mayor the power to designate what salary the city auditor should keep at the city hall. Relator obtained a mandamus to the mayor and members of the council compelling them to restore the salary to \$1,500 a year.

Twelve of fifteen councilmen, being the minority members of the council, filed answers in this suit averring that in their opinion the salary of the relator ought to be \$1,200 a year. The majority members and the mayor filed an exception to the answers, and on its being overruled, filed a demurrer. In this answer the councilmen allege that they acted in the exercise of the discretion conferred upon them by the city charter, and that the court is without authority to control that discretion; that they acted in the public interest; that the relator continued to perform the functions of the office after this reduction of salary was made, and is therefore estopped from contesting; that no competent person can be secured for the position at the reduced salary; that the relator "is grossly incompetent, inefficient, officious and meddlesome," and has neglected his public duties at various times; that he is particularly incompetent in that he is not a stenographer; that he has been absent on many occasions, while in the discharge of his duties; that he is in subordination, particularly in his published interference with the city administration; that he is officious, and improper in his personal conduct and demeanor, at all times, in the discharge of his duties; that "he has not been present at the city hall as designated by the mayor, and has not performed his post of duty when needed on several occasions. He was expressly instructed by the mayor to remain.

That he is guilty of misconduct in office, particularly in seeking to compel said mayor and council to pay him a salary greater than the services incident to the office will justify. The administration of the city's affairs make necessary the prosecuting suits against the city and its board

of trustees in his official capacity, in which he made his oath false and untrue charges against the council members; that he has been guilty of malfeasance in office particularly in this: that, while acting as secretary of the council, he wrongfully and illegally embodied into the minutes of a meeting held by said council on the _____, 1909, a certain protest filed by himself, and that said protest was no part of the records, proceedings, or actions of said council, and caused same to be published in the official newspaper of the city as a part of its minutes, and had the city pay the expense of its publication.

"Fourth. That the services of the city auditor are no longer worth exceeding \$300 per year; that said salary is not commensurate with the nature and character of the duties to be performed; that the council, in the exercise of its authority, has fixed the salary at \$300 per year; that the city auditor was created when the city was doing extraordinary work made creation of the office important, but that said work has been completed, and the duties devolving on said auditor are quite insignificant and unimportant, and do not justify a salary exceeding said amount."

The charter of the city of Shreveport (Act No. 138, of 1898, section 22) creates the office of auditor and provides that the officer eligible by the city council, and provides that he shall hold his office until the expiration of the term of the members of the council by whom he was elected. The charter ¹⁸¹ authorizes the council to remove by a majority vote any officer or employé "for incompetency, neglect of duty, malfeasance in office or when the service of such officer or employé be no longer necessary to the public interest." It defines the duties of the city auditor, and provides for his compensation, as follows: "The city auditor shall be the secretary of the council, keep a record of all proceedings, test all ordinances, receive and file all papers belonging to the council and shall prepare two copies of the assessment roll and file one with the clerk of the court of the parish of Caddo, and the other in the office of the city comptroller. The said council shall fully define the duties of the auditor and may impose upon him any duties herein defined. The salary of the auditor shall be fixed by the council, and may be increased or decreased by the council, except those of collection of taxes, licenses, and shall fix his salary not to exceed \$1,200 per annum, and shall give bond in a sum to be fixed by the council."

By Act No. 192, page 344, of 1906, this was amended so as to increase to \$1,500 the maximum amount at which the council may fix the auditor's salary.

cil fixed the auditor's salary at this maximum \$1,500; imposed upon him the duties of auditing of the comptroller and other officers, and of acting of the mayor and of the several committees of

This was the situation when the relator, Thurmond, elected to the office of city auditor as his own successor, November, 1908, at the going into office of the council.

On November 15, 1908, an ordinance was introduced in the council reading:

"Whereas the services of the present incumbent of the office of city auditor be and the same is hereby declared no longer in the public interest, and that T. H. Thurmond, who is hereby removed therefrom.

And whereas the mayor be, and he is hereby authorized and empowered to employ a secretary who shall be a stenographer and whose duties shall be to assist the comptroller, and who shall be a secretary to the mayor and such other officers as may be prescribed from time to time by the mayor or council, and whose compensation shall be the sum of nine hundred dollars per annum, payable monthly."

At the next meeting, this ordinance went over to the meeting of December 12, 1909. It was then voted on, but failed to obtain the requisite number of votes. Thurmond filed a protest against the right of the council to remove him. The ordinance came up again at the meeting of January 19, 1909, and was then adopted, by a vote of eight to five, the council being composed of fifteen. At the meeting of February 9, 1909, the "action of removing the city auditor was rescinded," and the relator was "reinstated." At the meeting of February 9, 1909, the following resolution was adopted by the council by a vote of eight to six, two of the members being absent, to wit:

"Resolved, that the duties of the city auditor, and fixing compensation of the city auditor, and fixing compensation of the city auditor, be and the same is hereby declared no longer in the public interest, and that T. H. Thurmond, who is hereby removed therefrom. And whereas the mayor be, and he is hereby authorized and empowered to employ a secretary who shall be a stenographer and whose duties shall be to assist the comptroller, and who shall be a secretary to the mayor and such other officers as may be prescribed from time to time by the mayor or council, and whose compensation shall be the sum of nine hundred dollars per annum, payable monthly."

At the next meeting, this ordinance went over to the meeting of December 12, 1909. It was then voted on, but failed to obtain the requisite number of votes. Thurmond filed a protest against the right of the council to remove him. The ordinance came up again at the meeting of January 19, 1909, and was then adopted, by a vote of eight to five, the council being composed of fifteen. At the meeting of February 9, 1909, the "action of removing the city auditor was rescinded," and the relator was "reinstated." At the meeting of February 9, 1909, the following resolution was adopted by the council by a vote of eight to six, two of the members being absent, to wit:

Annual Salaries of City Officials and Employés.

Mayor, \$2,000. Comptroller, \$1,800. Auditor Secretary, \$1,500. Attorney, \$2,000. City Physician, \$600. Extra

for attending pest-house, \$400. Street Commissioner, \$1,000. Plumbing Inspector, \$900. Pound-keeper, \$900. City, \$1,200. Building Inspector, \$300. City Hall Janitor, \$260.

"Total, \$18,440.00."

The majority councilmen made no attempt to substantiate the defenses based upon their having for removing the relator.

(For explaining the great reduction in the salary of the relator, they showed that there had been a great reduction in the income of the city caused by the adoption of proposition 183 which cut off the revenue theretofore derived from saloon licenses, and that no works of public improvement were going on for the moment, so that the work of the city office had greatly fallen off; and that the relator, as stenographer, and it was necessary to hire a stenographer to do much of the work which properly fell to him.

As a matter of fact, the evidence shows but a very slight cut in the salaries of officers. The salaries of the chief of police, and chief of fire department were reduced. In fact, the evidence does not show any increase in salaries, except in that of the comptroller, which was reduced \$50 a month, he now getting \$1,800 a year. The attorney stated at the bar, in the course of the argument, that his salary had been cut from \$1,500 to \$1,200. The street commissioner's salary was raised from \$1,000 to \$1,500. Additional duties were placed upon him. There had then been two assistant street commissioners at \$100 each. One of them was dispensed with, and the salary of the other was raised from \$100 (?) to \$1,000. We imagine this must be a typographical error. The other officers are the physician, plumbing inspector, sexton, pound-keeper, helpers, building inspector, city hall janitor and helpers. The evidence does not show whether their salaries were increased or not.

The evidence shows that the relator is a good business man and highly competent. The minority councilmen, the ex-mayors and other ex-city officials, testified that the salary was a fair and able salary for the work which the charter and the ordinance impose upon the auditor would not be less than \$75 a month. That the salary of \$25 is ridiculous, and that no person could be procured to accept the office at that salary. Not one of the defendants testified; and they called no witness, the comptroller, who thought that a salary of \$25 would be reasonable, and 184 agreed with the witness. The relator testified that the amount of \$25 was ridiculous, and that it could not be viewed in any other light than as a "notice to quit."

Upon the foregoing facts, there can be no difference of opinion but that the majority of the city council have

the relator from office by starving him out, and under the beck and call of the mayor. The power is left to the council itself the power of defining the duties of the auditor; the attempt to delegate this power to the auditor is in itself a violation of the charter.

The city attorney and the other learned counsel for the city take the position that the discretion conferred by the city charter confides to the council of fixing the duties of the city auditor cannot be controlled by the courts. The defense of the case was conducted on appeal in the lower court, since the majority councilmen were on the stand to testify regarding what had been the subject of the case, thus cutting off the city auditor to a defense which is manifestly inadequate.

Turning upon the discussion of the case, we deem it proper to say that, the city auditor being an officer created by the charter with certain specific duties prescribed by the charter which must be performed by him and can be performed by no one else, the office is not one of those which the council is authorized by the charter to dispense with when no longer necessary, and that defendants do not dispute that it is. The office cannot possibly cease to be necessary since several of the functions attached to it by the charter are essential to the operation of the city government. The contention that the courts are powerless to interfere with the discretion confided by the charter to the council is not supported by the learned counsel for defendants refer to no authority except the recent decision of ¹⁸⁵ this court in the case of *Village of Dodson*, 123 La. 903, 49 South. 2d 101. That the court held in that case was that, "under the circumstances disclosed by the record" in that particular case the court could not interfere; and the circumstances of the case were stated by the court as follows:

The Village of Dodson contains about one thousand inhabitants and its revenues during the year 1906 from all sources (including fines, \$410) aggregated \$1,711.73; of which \$1,240 was paid out in salaries of the officers, leaving \$471.73 for the improvements of the streets and pavement and other municipal expenses. Of the amount paid for salaries, the mayor (T. G. Payne) received \$240, and the city auditor (R. R. Gentry) received \$1,000, making \$1,240, which is more than half the total amount collected. Among the causes which seems to have been some dissatisfaction flowing from the present condition of affairs, as the campaign in 1907 was based upon a platform of more economic administration of the city affairs, and the party advocating the economy ticket, at least the aldermen and marshal.

"After the installation of this new board of aldermen to their platform, they materially reduced the salaries of village officers. The salaries of the aldermen were altogether, each alderman agreeing to serve with the mayor. The salary of the mayor was reduced from \$240 to \$100; that of the clerk from \$40 to \$25; that of the attorney from \$100 to \$35; and the salary of the marshal was reduced from a guaranteed salary of \$65 per month (in realty \$1,000) to a salary of \$15 per month. This they would leave them about \$600 for the improvement of streets, instead of a small amount (say about \$275) formerly left for both streets and other miscellaneous outside of salaries.

"Mr. Campbell, the newly elected marshal, after the salary of the office had been reduced to \$15 per month, serving several weeks under this salary, became dissatisfied, and, pursuing the only course open to him, resigned.

"The governor, on the seventeenth day of October, appointed the plaintiff, R. R. Gentry, marshal, in the place made vacant by the resignation of Campbell, to which office had been previously fixed at \$15 per month, but, in the meantime, and before he took the oath of office, that office had been divorced from the duties of street commissioner, tax collector, and tax assessor. The salary fixed at \$1 per month, \$1 for each arrest, and 10 per cent of all fines collected."

¹⁸⁶ Very far from being committed to the doctrine that the courts are powerless to interfere in cases of abuse of discretionary power by municipal councils and police boards, this court, after the most mature consideration, has lately committed itself to the very opposite view: *Police Jury*, 114 La. 771, 38 South. 555; *Davis v. Police Jury*, 120 La. 163, 45 South. 47; *State v. Mayor*, 43 La. 100, 38 South. 893.

No doubt, the power which creates may destroy. If the legislature, or a municipal council, has created an office, it may destroy it. Where either has the discretionary power of removal, it may exercise it without let or hindrance. The acceptance of an office does not create a contract between the officer and the political body under which the office is created. An officer has no proprietary interest in the office, but holds it simply in, and subject to, the public interest. On the other hand, it points an abundance of decisions may be found all affirming the right to remove the officer, or to reduce or abolish altogether his salary. But where the constitution creates an office, the legislature cannot abolish or nullify it, by direct or indirect means; and where the legislature

city council cannot abolish or nullify it, either by indirect means. And if either the legislature or a council sought to do by indirection what it thus could do directly, the duty of the courts to interfere is perfectly plain. In the case of the legislature, its power to override the constitution by indirection would be unconstitutional; and in the case of a municipal ordinance would lie: Code Prac., art. 829; State v. La. Ann. 92, 8 South. 892. For instance, the offices of clerk of court, etc., are created by the constitution, and the fixing of the fees of these officers is left to the discretion of the legislature. Would anyone say that the legislature could indirectly abolish these offices, or remove the officers, by assigning their duties to other officers, or by changing the fees of the office that no one would undertake to perform the duties? It stands to reason that a municipal council cannot abolish or nullify an office created by the constitution, and cannot, directly or indirectly, remove without cause an officer whom it is authorized to remove for cause. Instead of merely reducing the salary, the council abolished the office together, no one but would say that such action was void and could be rectified by the courts. It would be a disregard of the charter, and a violation of the duty imposed upon the council to fix the salary. What practical difference is there between such a case and the present, where, as shown by the evidence, the salary is fixed so low that no competent person would accept the office where the ostensible fixing of the salary is a mere pretext for abolishing the office or removing the officer? Is it any more the duty of the council to escape the vision of the courts simply because it is masked? Are the courts to be deceived by a plain subterfuge?

At that point, the decisions in other jurisdictions, so far as we have been able to find, are all one way. Thus: In Reid v. City of Philadelphia, 128 Pa. 324, 18 Atl. 445, 5 L. R. A. 517, the supreme court of Pennsylvania said:

"We do not believe seriously contended that the legislature had no power to pass upon the necessity for the appointment, and that discretion is expressly committed to the clerk, who holds office with the consent and approval of the court. Nor can it be pretended that the assistant clerk might be removed from his office by a simple act of the legislature. There is no power competent to remove him save the tribunal which conferred the appointment.

The legislature may repeal the act adjusting the salary, and make any further or other provision in that behalf, thereby practically abolishing the office. If the assistant

clerk may thus be deprived of the office, the clerk and judge are both liable to the same ¹⁸⁸ fate, and way that might be done by indirection which could be done directly. It is true that the salary is a matter of the constitution, is submitted to the discretion of the legislature. In the exercise of that discretion, by the act (Pub. Laws, 206), the salary was fixed at \$1,500, and of compensation will continue until by some other law is changed. The salary first fixed may perhaps be increased or diminished, subject to the restriction of the third article of the constitution, as the legislature should from time to time see fit to provide; but to remove a provision for a salary altogether is to remove a clerk from his office."

In *White v. Worth*, 126 N. C. 570, 36 S. E. 132, the supreme court of North Carolina said: "The legislature cannot abolish a legislative office, and this is the end of it: *Henderson*, 15 N. C. 1, 25 Am. Dec. 677. When the office is abolished, this ends the term of the officer holding it. There can be no officer without an office, and, of course, no office without an officer. The legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent to starve him out. But if it clearly appears that it is for that purpose, it would be void: *State v. Gale*, 15 N. C. 283; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677. In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere: *v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677. But if the legislature should undertake to deprive the officer of the whole of his salary, while his office still continued, the intent to deprive him of his office plainly appears, and the act would be declared void: *Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *Cotten v. Henderson*, 15 N. C. 545."

In *People v. Burby*, 17 App. Div. 165, 45 N. Y. S. 2d 100, it was held that (quoting syllabus): "The legislature has no power to deprive a constitutional officer of his fees by depriving him of the duties of his office, and providing that when he exercises such duties, he shall be entitled to no compensation."

In this same case the court quoted approvingly the opinion of the supreme court of Pennsylvania, in *Reid v. State*, 128 Pa. 324, 18 Atl. 445, 5 L. R. A. 517, as follows: "It has been held that merely depriving an officer of his salary is equivalent to depriving him of his office, and is unconstitutional."

ate v. Gales, 77 N. C. 283, the court said: "Neither legislature take away the entire salary of an officer";
n v. Ellis, 52 N. C. 545.

v. Common Council, 107 Mich. 149, 64 N. W.
is the decision apparently opposed to the forego-
, the court said: "The petition does not aver that
f the officer continue as they were prior to the
appointment, and does not state what portion of
e has been taken up with the performance of the
office, nor does it allege that the action of the
factions. Bad faith or improper motive cannot
from the facts stated, or presumed in the ab-
statements upon which an inference can be pred-
we must therefore assume that good reasons ex-
reduction of the compensation from the former
the payment of a mere nominal salary. When
r was appointed, he knew that the salary of the
ot been fixed for the term for which he was ap-
is appointment and acceptance was subject, not
right of the council, but to its duty as well, to fix
Fournier v. West Bay City, 94 Mich. 463, 45 N.

is clearly and plainly differentiated from the
on its facts. The allegations which are said not
n made in that case are distinctly made in the
and, what is more, are proved.

f Board etc. v. Westbrook, 64 Miss. 312, 1 South.
by the supreme court of Mississippi, is identical
at bar in all essential particulars. The syllabus
reads as follows: "The board of supervisors of a
ing to abolish the office of chief health officer of
and not having the power to do so directly, sought
h that result by reducing the salary of the officer
ominal sum—\$1 per month. Held, although Re-
of Mississippi of 1880, section 790, imposes upon
the supervisors the duty of fixing the salary of the
officer of their county, yet the laws for the pro-
e public health, being of general application, can-
ied in any county by the board fixing the salary
low that no competent physician will accept the

o the same effect, Morris v. Glover, 121 Ga. 751,
, where the supreme court of Georgia said: "Can
re by indirection accomplish what it is restricted
by the organic law of the land? Among the in-
public office are the discharge of its duties and the
f its emoluments by the individual entitled to the

office. . . . The duties and emoluments are of the of the office; its name but the semblance. . . . created by statute, but not defined in or recognized by constitution may be abrogated by statute. But if an office is created or guarded by express constitutional provision, its scope cannot be enlarged or lessened by statute. . . . can the office be filled in any other manner than prescribed by the constitution. . . . It has been held that the taking away of the salary amounts to the abolition of the office: *Reid v. Smoulter*, 128 Pa. 324, 18 Atl. 445, 517."

For a long list of decisions on the same point, see *American and English Encyclopedia of Law*, 406, in support of the text: "Where the term of office is fixed by the constitution, the legislature cannot extend or abridge the term fixed, either directly or indirectly": See, also, 29 *Encyclopedia of Law*, in support of text: "Though the term and compensation are fixed by statute, the legislature cannot abolish an office of constitutional origin by a reduction of the compensation or by taking it altogether."

Changing "constitution" for "statute," and "council" for "legislature," and the text here quoted would present the case exactly.

It goes without saying that in all such cases the court could interfere only where upon the facts it was plain that the reduction of the salary was resorted to as an indirect or colorable means of abolishing the office of removing the incumbent. Of course, in such a case the council would have to go in favor of the action complained of. For instance, in the case of *Gentry v. Dodson*, 123 La. 903, 49 South. 635, this court refused to interfere, although the ¹⁹¹ circumstances gave rise to a strong suspicion that the sole motive was to get rid of the officer. In order that the court should have ground for interfering, the evidence would have to show as a fact that the action complained of was purely and solely an attempt to do by indirection what could not be done directly, or an attempt on the part of the municipal council to nullify the charter. In the present instance, there was no such showing made in the pleading and in the argument of counsel. Such was the intention, or that such would be the result of the operation of the action complained of; but on the evidence presented, no attempt, or if any, none but the feeblest and most ineffectual, has been made to disguise the plain fact that the intention and such would be the result. This court

judgment upon a denial in the pleading, or upon a
the argument of counsel, but must base it upon the

The evidence shows that the lowest reasonable
the office of city auditor, as the duties of that officer
sent fixed by statute and by ordinance, would be
th. The court will not fix the salary, but will make
amus peremptory to the extent of ordering that it
t not less than the amount of \$75 as long as the
he officer shall remain as at present fixed.

er limit of \$1,200, afterward raised to \$1,500 by
ture, affords some indication of what the salary of
e should approximately be.

gment appealed from is modified so as to read: It
adjudged and decreed that the writ of mandamus
ed to the city of Shreveport and the trustees, mem-
e city council, be and the same is hereby made per-
o the extent of ordering the said council and the in-
members thereof to meet without delay and fix the
he city auditor ¹⁹² of said city at not less than \$75
, to date from February 1, 1909; and that the cost
er court be paid by the city of Shreveport, and those
eal by the relator.

and Monroe, JJ., dissent.

lature may Remove Public Officers, not only by abolishing
ut by act declaring it vacant, and may lodge the power
from statutory offices in boards or other officers, subject
regulations: *Attorney General v. Jochim*, 99 Mich. 358,
Rep. 606. And the removal from public office is said
deprivation of property, for an officer does not have a
ght in his office: *Attorney General v. Jochim*, 99 Mich.
St. Rep. 606; *Taylor v. Beckham*, 108 Ky. 278, 94 Am.
7; *State v. Grant*, 14 Wyo. 41, 116 Am. St. Rep. 982.
one v. Williams, 118 Tenn. 390, 121 Am. St. Rep. 1002,
that an office is a species of property, and the legislature
stitutionally legislate an officer out of that property while
office with its duties unimpaired, for this would be taking
hout due process of law. The legislature, in substituting
of city government for an old one, has power to abolish
office of mayor and substitute therefor the office of re-
d as a municipal office may be abolished by the legis-
change of the charter, the question how great or how
anges by the new charter shall be, and to what particu-
shall apply, is one wholly for legislative consideration:
lth v. Muir, 199 Pa. 534, 85 Am. St. Rep. 801.

empt of a Board of Health to Get Rid of an Employé by
his position, which it purports to do on motives of
ay be inquired into in an action by him to recover for
, and he may recover if the jury finds that the action
d was a mere pretext, not in good faith nor on grounds
, but was taken because of his refusal to render a
vice: *Garvey v. City of Lowell*, 199 Mass. 47, 127 Am.
8.

In the Cities and Towns of Massachusetts There is No Remove Public Officers, such, for instance, as members of of health, except what is given by statute. Therefore to remove is not vested in the voters in a town meeting. *Attorney General v. Stratton*, 194 Mass. 51, 120 Am. St. Re

NAVAILLES v. DIELMANN.

[124 La. 421, 50 South. 449.]

AUTOMOBILE—Negligent or Inexperienced Operator.—A beginner in the management of an automobile is concentrated whole attention in executing a reverse curve, not on what of him, and does not see a pedestrian until right upon her, does not stop, as he should, within a foot or two, but eight feet after striking her, the juridical cause of the is the autoist's inattention to what was ahead of him, in tion with his lack of skill in managing the machine. (p. 51.)

AUTOMOBILE—Negligent or Inexperienced Operator.—A pedestrian, attempting to avoid an automobile, runs ne way across the street before she is struck by the machine, going so slowly that it could be stopped within a foot or juridical cause of the accident is the fault of the autoist in upon the streets without knowing how to make an emerge (p. 511.)

AUTOMOBILE—Injury to Frightened Pedestrian.—V act of an old lady in running in front of an automobile is untary, but simply the result of terror induced by the ap the machine, it does not constitute negligence on her part.

AUTOMOBILE—Doctrine of Last Chance.—Where lady, in terror at the approach of an automobile, runs in fr and the autoist has time to stop the machine before stri the case is covered by the last chance doctrine. (p. 512.)

AUTOMOBILE—Complaint in Action for Damages.—plaint in an action for personal injuries sustained from l over by an automobile, which sets forth the facts surround accident, and alleges that the autoist "was driving or run automobile in a careless and reckless manner and that he neglected to stop said automobile," is sufficiently specific. (p. 513.)

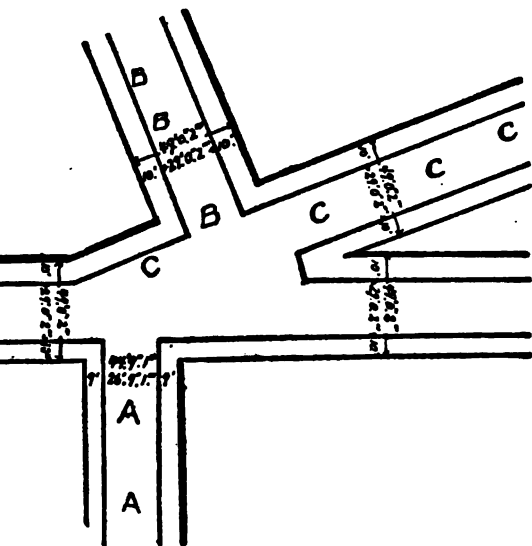
DAMAGES—Measure of for Personal Injuries.—Where sixty years old is run over by an automobile, has her t fractured in two places, suffers excruciatingly for mon hobbled with a stick for the rest of her life, and has bee large expense, a verdict of three thousand two hundred dollars, approved by the trial judge, will not be disturbed (p. 513.)

Robert Legier and Walter Gleason, for the appellants.

Carroll, Henderson & Carroll, for the appellee.

⁴²³ PROVOSTY, J. Plaintiff, an old lady of six run over by an automobile owned and driven by de

es in damages. The following is a diagram of the



ets are asphalted. Street A is twenty-six feet nine
e; the others are twenty-nine feet wide. From this
ubtracted the width of the gutters. For conven-
have changed the names of the streets, and in men-
rections will assume that the diagram has been
maps are; that is, the top north, the bottom south,
accident occurred in broad daylight, when plaintiff
utomobile were the sole occupants of the street.
ibute it to the peculiar combination of the streets
ce where it occurred. This peculiarity could be
ized only if an automobile, drawn to scale, were
ollow on the diagram the same course as defendant
is, out of street A, then to the right, and east,
he open space, then to the left and northwest into

ng this the automobile has to make what is called
se curve"—first to the right, toward the east, and
e ⁴²⁴ left, toward the northwest. An autoist tes-
he travels this course every day, and that this cor-
most dangerous one. He was not allowed to give
of the danger; but it results, we imagine, from
lty of executing this "reverse curve" within the
space. The evidence does not show along what line
traveled in effecting these curves. The diagram
nful, in that it makes the streets appear wider than
y are by the entire width of the gutters, thereby
e curves appear easier.

Plaintiff was on foot, going east across street B. She was on the line of the north sidewalk of street C. She had a car in front of her across—was within about three feet of the iron plate gutter on the east side of street B—when her attention was attracted for the first time attracted to the automobile, she saw the screams of the persons in it. Defendant and those with him deny that there were any screams, but say that the car was being tooted. It will be observed that the car was approaching her from behind. Defendant would not say it appear that the machine was not pointing toward her at the moment she turned her head and saw it, but had not yet completed the turn to his right, toward the east, and had not yet completed the turn to his left, toward the northwest, but was pointing northwest at an angle which would have cleared her by ten feet had she simply stood still where she was. That, instead of doing this, or continuing her way, she turned back, and ran across the path of his machine. As a matter of fact the old lady ran back, and had reached a point further to the west than to the east gutter of street B when she was run over. We are satisfied that the explanation of her sudden turning and running back is that when she looked back the machine had just come out of street A, and was in the act of turning ⁴²⁵ toward the east, and was therefore pointing straight for the path ahead of her; so that she (very foolishly, no doubt) that, if she kept on, she would be run over. Constant practice in steering clear of pedestrians and vehicles coming toward us, or making toward us, at an angle and at a rate that will bring on a collision, if we do not change our course, has so trained the mind of every grown person—especially of those living in cities—that the avoidance of collisions is more constantly practiced. We are all of us—old ladies and all—pretty good judges of what line is being followed by a body moving toward us, so as to intercept, or converge with, our own line of travel. The old lady turned because she saw that the machine was pointing for the path ahead of her, and she instinctively recoiled from this danger, not realizing that she could have avoided it by simply taking a step or two forward, or by shouting, that is what she says. All she knows is that, on seeing the automobile coming upon her, she became frightened. Defendant's statement, that he had completed the turn to the curve and was actually pointing northwest when the plaintiff first became aware of his presence and turned and ran back, does not accord with the fact that the plaintiff's hearing was good and that the street was silent, save for the horn of the machine and the other noises which the machine shows it makes. Indubitably, this automobile startle

moment it emerged from street A, with its tooting noises, just back of her right shoulder.

It was a beginner in the management of an automobile, and his whole attention was concentrated on the "reverse curve" which he was executing—perhaps for the first time in his life in so contracted a space—and not on the old lady ahead of him, and that he never saw the old lady until he was right upon her, and then lost his head. At this difficult corner he had slowed up. At the moment of moving, and with the pavement dry as it was, he had stopped within a foot or two. Instead of this, he had moved eight feet after having knocked the old lady down. He then, even then, succeeded in stopping his machine only a few feet from the curb. He says that for thus running to the curb he restored the power without having stopped at the curb. The instinctive movement of the driver of a vehicle is to stop in as short a space as possible.

As to the foregoing, the juridical cause of the accident was the defendant's inattention to what was ahead of him, and his inattention with his lack of skill in the management of the machine. But the defendant is no better off if his own statement is accepted—that he was attentive all the time to what was ahead of him, and saw the old lady rush toward the path of the machine and nearly get by, so that what struck her was on the left, or west, side of the machine, and that he turned his machine to the right, or east, in the hope of letting her get by in safety, that is to say, of letting her get by in safety, and that he was then west of the median line of the street, and the machine was going as slowly as he could make it go. The question, then, is that, if the old lady had time to run past the machine three feet from the east gutter of the street beyond the middle of the street, and even beyond the middle of the street, which was on the west side of the street, he had ample time in which to stop his machine; for his fault, and that of others, is that an automobile going so slowly may be stopped within a foot or two. The cause of the accident, then, becomes the fault of the defendant in venturing upon the streets in an automobile without knowing how to make an emergency stop.

If the old lady not having been voluntary, but simultaneous of terror, does not constitute negligence on her part, that connection the case is covered by the last doctrine, and is precisely analogous with that which was held in *Ross v. Sibley et al.*, 41 South. 93, of which the syllabus reads: "While the defendant was negligent in attempting to cross the defendant's sharp curve, without stopping to look and listen

at the proper time and place, the company will be liable. The evidence shows that the engineer saw the danger and avoided the accident by sounding the whistle and pulling the brakes."

In the instant case defendant saw the danger and avoided the accident by stopping his machine.

"When an automobile, being driven twenty or thirty miles an hour, came meeting plaintiff, who, when the automobile was fifty feet away and coming directly toward him, pulled the horse he was driving to the left, instead of to the right, it was held that in such circumstances negligence could not be imputed to plaintiff as matter of law, because he was confronted with a sudden danger, and his failure to do what might seem to others the best judgment was not sarily negligence": *McFern v. Gardner*, 121 Mo. A. 100, 10 S. W. 972.

"If an automobile comes upon a boy under circumstances calculated to produce fright or terror, and such fright causes an error in judgment, by which he runs in front of the automobile, he is not guilty of contributory negligence": *Thomas v. Thomas*, 77 N. Y. Supp. 276.

Defendant's negligence does not consist in his having caused the old lady's fright, for, if she had received her fright from having, in her fright, precipitated herself into the path of the defendant would not have been responsible; but in not having stopped his machine when he had a chance to do it.

"It is incumbent upon a person driving an automobile along a highway to take notice that motor cars are to horses usually strange objects, and are likely to frighten the ⁴²⁸ animals when driven up in front of them at a rapid rate."

"Where the driver of an automobile sees, or by the exercise of reasonable caution could see, that the horses drawing a proaching carriage, are unmistakably frightened, and are forcibly crowded off the road, ordinary care requires the driver to slow up, stop his machine, or do whatever is reasonably required to relieve the persons in the carriage from the dangerous situation."

"When it becomes evident to the driver of an automobile that his machine is frightening the horses hitched to a proaching carriage, and that his further progress will expose the peril of the persons in the carriage, it is his duty to slow up or at least check up, irrespective of whether the occupants of the carriage are guilty of negligence": *McIntyre v. McIntyre*, 166 Ind. 57, 117 Am. St. Rep. 359, 76 N. E. 750, 4 N. S., 1130, 8 Ann. Cas. 1087.

of Seaman v. Mott, 127 App. Div. 18, 110 N. Y. D., cited by defendant's learned counsel, is not. In that case the plaintiff, a pedestrian, walked beside the car, which, because of the pedestrians on the street, was barely moving. Said the court: "He was bound to bring his car to a standstill. He had a duty to do so. There is no proof and no inference possible that he had reason to believe that, if he proceeded, it would continue so as to come into contact with the side of the car."

It is fully inapplicable this reasoning is to our case needs to be brought out.

We do not agree with defendant that the allegations of negligence were not sufficiently specific in setting forth what acts and conduct on his part was complained of as negligence or fault. The petition, after having set out the facts as stated in this opinion, went on to allege, among other things, that defendant "was driving or running the automobile in a careless and reckless manner, and that he neglected to stop said automobile." This, we think, is sufficiently specific.

As to the question of damages, we find it difficult to make a distinction between the parties. The old lady was knocked over, and dragged, had her thigh bone fractured in several places, suffered excruciatingly for months, and was unable to hobble with a stick, instead of walk, for the rest of her life, and was put to large expenses. At the same time, it is the mere imprudence to be punished to the point where the jury allowed three thousand two hundred and fifty dollars, and the trial judge approved the verdict. The court affirmed.

The subject of the *Automobile* is the subject of a note to Christy v. City of New York, 127 Am. St. Rep. 212. As to the degree of care toward which one must use in operating an automobile in a high-speed race, see McIntyre v. Orner, 166 Ind. 57, 117 Am. St. Rep. 359. As to the liability of a city for persons injured by automobiles, see City of New York, 186 N. Y. 139, 116 Am. St. Rep. 359. As to the liability of the owner of an automobile for injuries caused by his employé, see Lotz v. Hanlon, 217 Pa. 339, 117 Am. St. Rep. 922. Automobiles operated and propelled in a manner incompatible with the safety of the traveling public have, in the past, been held liable with other vehicles upon the public highway, subject to the same rules and regulations as are prescribed by law: State v. City of New York, 127 Mo. 517, 120 Am. St. Rep. 671. But a person who drives an automobile at a high rate of speed on one of the streets of a city, and is unable to see a street crossing or intersection thereon on account of a street-car being between him and the crossing, and who fails to stop his machine until the car is clear, is guilty of gross negligence: Gregory v. Slaughter, 124 Am. St. Rep. 402.

Am. St. Rep., Vol. 124—33

One Who is Placed in a Position of Sudden Peril by the of another, without contributory negligence on his part, held responsible for error of judgment with respect to escape therefrom: *Walton, Witten & Graham v. Miller*, 10 132 Am. St. Rep. 908; *Di Bari v. J. W. Bishop Co.*, 199 127 Am. St. Rep. 497.

STATE v. TOLMAN.

[124 La. 630, 50 South. 607.]

STATUTE—Title of Amendatory Act.—Act No. 209 of 1908, purporting to amend and re-enact section 5 of Act No. 392, of 1898, imposing a license tax on pawnbrokers unconstitutional, null and void, to the extent that it provides for a tax on money lenders generally. (pp. 514, 517.)

STATUTE—Title of Amendatory Act.—An act purporting to amend a certain section of a general law is limited in its scope. The subject matter of the section proposed to be amended is unconstitutional, and the constitutional provision that "every law shall embrace but one subject, and that shall be expressed in the title." (p. 516.)

(Syllabi by the court.)

Charles Rosen, for the appellant.

Edward Rightor and G. L. Dupre, Jr., for the state.

John J. Reilley, amicus curiae.

⁶³¹ LAND, J. The state tax collector proceeded against the defendant to collect a license tax of \$100 interest, attorney's fees and costs, for the year 1908. The defendant, who is in the business of money lender or purchaser of time was sued pursuant to Act No. 209, page 312, of 1908, entitled "An act to amend and re-enact section 5 of Act No. 171, passed in 1898," the general license revenue law of the state.

The defendant, for answer to the rule, after pleading in general issue, averred that Act 209 of 1908 is null and void because in contravention of articles 31, 32, 225, and 226 of the state constitution, and of the fourteenth amendment to the constitution of the United States.

There was judgment in favor of the plaintiff in the trial court, and the defendant has appealed.

Act 209 of 1908 is entitled: "An act to amend and re-enact section 5 of Act 171 of session of the legislature of Louisiana for the year 1898, entitled 'An act to license and enforce the payment of an annual license tax on all persons, associations of persons or business firms, corporations, pursuing any trade, profession, vocation or business,' " etc.

of Act 171 of 1898 reads as follows: "Sec. 5. Be enacted, etc., that each and every pawnbroker or loan office, where capital in actual use is fifty dollars or more, shall be graded as eighth class, second shall be five hundred dollars (\$500); that when in actual use is less than fifty thousand dollars, graded as ninth class, section fourth, the license shall be three hundred and seventy-five dollars (\$375)."

Act No. 209 of 1908 the above section is amended so as to read as follows:

Be it further enacted, etc., that each and every lender, money lender, or person, firm or corporation, carrying on business as is commonly known as money lending business, whether the same is earned or not, whether the same is earned or not, whether said business is conducted in an office or otherwise, the license shall be graded according to the amount of capital in use in said business as follows:

Class. Where the capital in use is \$250,000 or more, the license shall be \$2,000.00.

Class. Where the capital in use exceeds \$100,000 and is not more than \$200,000.00, the license shall be

Class. Where the capital in use exceeds \$75,000.00 and is not more than \$100,000.00, the license shall be \$1,000.00.

Class. Where the capital in use exceeds \$50,000 and is not more than \$75,000.00, the license shall be

Class. Where the capital in use is less than \$50,000, the license shall be \$600.00. Provided, that if any person or corporation, carrying on the business designated in this section, shall conduct more than one office or business, whether in the same or under different names, persons, firm or corporation shall pay a separate license for each and every office or place of business it shall maintain according to the hereinabove classification.

And further, that this act shall not apply to persons, firms or institutions carrying on a banking business, as provided for by section 2 of Act 171 of 1898, and provided that this act shall not apply to persons, corporations or institutions lending money secured by mortgage upon real estate.

And further, that each and every pawnbroker or loan office where capital in actual use is fifty dollars or more, the license shall be five hundred dollars (\$500), that when the capital in actual use is less than fifty thousand dollars, the license shall be three hundred and seventy-five dollars (\$375)."

Article 31 of the constitution of 1898 reads as follows: "Every law enacted by the General Assembly of the State of Louisiana shall embrace but one object, and that object shall be expressed in its title."

Act 209 of 1908 purports to amend and re-enact section 171 of Act 171 of 1898, which fixes license taxes on the business of "pawnbroker or keeper of a loan office." The title of Act 209 of 1908 does not give ⁶³³ notice of legislative intent to amend any other section of Act 171 of 1898 or to enact additional legislation on the subject of license taxes.

In *State v. Tolman*, 106 La. 662, 31 South. 320, the court held that, as the business of money lending was not taxed in any of the sections of Act 171 of 1898, it was not within the purview of the fourteenth section, providing for the taxation of certain callings "and all other business not provided for." The court in that case necessarily held that the business of money lending was not covered by the general licensing act of 1898.

In the well-considered case of *State v. American Cigar Co.*, 106 La. 553, 31 South. 181, the court held unconstitutional an act of the legislature, which, under the pretext of purporting to amend certain particular sections of the statute, altered the subject matter of a different act, in which no reference was made in the title.

In that case the court, *inter alia*, said that, when the legislature "restricts the title and announces its purpose, it is bound to govern itself accordingly within what it had itself declared would be the limit of the proposed action." The court quoted *Dolese v. Pierce*, 140, 16 N. E. 218, as follows: "An act to amend certain sections of a general law is limited in its scope to the amendment of the section proposed to be amended. An amendment of an act in general or a particular section *act ex vi termini* implies merely a change of its title upon the same subject to which the act or section referred to relates."

The case of *Beary v. Narrau*, 113 La. 1034, 37 S. 103, is not distinguishable in principle from the one in that case, Act No. 49, page 108, of 1904, under the pretext of purporting to amend and re-enact section 12, page 16 of Act No. 103, of 1900, fixing licenses for ⁶³⁴ theaters, places of amusement, etc., and "peddlers or hawkers," provided that the terms should be held to include "all transient mercantile itinerant vendors selling to consumers by sample orders, whether for immediate or future delivery."

This court held that the license taxation of itinerant salesmen or travelers selling by sample, or by taking

delivery, was not germane to the license taxation of peddlers or hawkers, selling and delivering goods carried from place to place, and that, the provisions of Act 209 of 1908 being broader than its title, the act was unconstitutional. The court said, in part, as follows: "If the occupation of selling by sample or by taking orders without a license, it fell within the class of all other occupations specially provided, as set forth in section 14 of Act 209, page 166, of 1900.

The occupation did not fall within the terms of the provisions enacted prior to 1904, it was a distinct subject requiring additional legislation. In either event, the title of the act should have set forth the legislative purpose; but the act in question purports to amend only section 12 of Act 209, page 164, of 1900, and therefore is not broad enough to amend section 14, page 166, of the same act or any new act relating to the matter of license taxation."

The subject matter of section 5 of Act 171 of 1898 is the regulation of the business of "pawnbroker or keeper of a pawnshop," referring to the same business: See Standard Dictionary, verb. "Loan." One of the subject matters of Act 209 of 1908 is the "business commonly known as money lending or purchasing time wages or salary of employees, etc. After providing for the taxation of such money lenders, the statute takes up the business of "pawnbroker or keeper of a loan office" and adopts the license tax provided in section 5 of Act 171 of 1898. The result is that the new act does not amend the particular section mentioned in the title, but, under the guise of its amendment, the legislature imposing a different license tax on a new and distinct business, which never had been provided for as a business not otherwise provided for in the constitution. As the title gave no notice whatever to the public, of the legislative intent to impose a license tax on the business of money lending in the forms, the act necessarily contravenes article 31 of the constitution.

The court therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed; and it is hereby ordered, adjudged and decreed that Act 209 of 1908 be declared unconstitutional, and of no force and effect, in so far as it purports to levy a license tax on money lenders; and it is hereby decreed that the rule filed below in the name of the tax collector be dismissed with costs.

Agency of the Title to Amendatory Statutes, within constitutional limitations, is discussed in the notes to *Howard v. Hulbert*, 100 Rep. 271; *Crookston v. County Commissioners*, 79 Am. Rep. 313. If what is introduced by way of amendment to a

statute might have been incorporated in the statute under title, the statute as amended does not embrace more than what is expressed in its title: *Pratt Food Co. v. Mann*, 411, 113 Am. St. Rep. 602. For other recent cases of this kind, see *Bradley v. County Real Estate etc. Assn.*, 156 Mich. St. Rep. 514; *Malone v. Williams*, 113 Tenn. 390, 121 A. 1103; *Cook v. Marshall County*, 119 Iowa 384, 104 Am. St. Rep. 102; *Pioneer Inv. Dist. v. Bradley*, 3 Idaho 311, 101 Am. St. Rep. 102.

BANK OF MONROE v. OUACHITA VALLEY

[124 La. 798, 50 South. 718.]

GARNISHMENT—Notice of Seizure—Title and Cause.—Where, in an attempted garnishment, under fieri facias, plaintiff resorts to an independent proceeding, bearing a date and number from the suit in which the judgment was rendered, and the fieri facias issued, a notice of seizure, bearing such title, and containing the recital, "by virtue of a writ of fieri facias directed, in the above-entitled suit," means nothing, and takes nothing by it. (pp. 521, 522.)

GARNISHMENT—Citation to Officer of Corporation.—Citation in garnishment addressed to "A B individually and as and to 'C D individually and as cashier," is not effective; the unnamed corporation in which A B and C D may hold stock. Citation in such case may be served upon the officer of the corporation designated to receive it; but it must be addressed to the corporation. (pp. 522, 523.)

GARNISHMENT—Injunction Against Proceedings.—Where, in a garnishment proceeding under a separate title and number, the action against the debtor, an injunction pendente lite is granted, restraining the party sought to be made garnishee from disposing of the property sought to be seized, and the plaintiff takes no action to set aside the attempted garnishment, the whole proceeding collapses, and the injunction, is properly dismissed. (pp. 521, 522.)

(Syllabi by the court.)

Stubbs, Russell & Theus, for the appellant.

Allan Sholars, for the appellee.

799 MONROE, J. The petition in this case (written on the docket of the district court, appears to bear the number 6656), alleges: That in the suit No. 6496 plaintiff obtained judgment against E. C. Drew Investment Company, E. C. Drew, and others for twenty-eight thousand nine hundred and forty-one dollars and ninety-nine cents; that plaintiff caused a writ of fieri facias to issue, which is in the hands of the sheriff; that it believes that the Ouachita Valley Bank and certain individuals, who are named, have been debted to the judgment debtor, E. C. Drew, and that stock of the defendant bank has been issued in the names of said individuals, which was

that it believes that such stock is in the possession of H. L. Gregg, president of said bank, and of G. M. Crook, cashier, and fears that it will be delivered to E. C. Drew during the pendency of the suit. Wherefore it prays that the Ouachita Valley Bank and the individuals named be cited to answer the interrogatories annexed to the petition, and that an injunction "issued to the said Ouachita Valley Bank, H. L. Gregg, and Green M. Crook, enjoining . . . each of them from delivering to the said E. C. Drew certificates of stock, or money or other property, in his possession, belonging to the said E. C. Drew or in his name or the names of the above-named persons or garnishees." There were two sets of interrogatories annexed to the petition. One set, bearing the legend, "Interrogatories to be answered by all of said garnishees," was served on the stock of the Ouachita Bank, supposed to have been in the possession of the individuals named, and which, it was conceded in argument, were not intended to be answered by the bank. The other set bear the legend, "Interrogatories to be answered by H. L. Gregg, individually and as president, and Green M. Crook, individually and as cashier." The injunction, as prayed for, bearing the title and number (in the district court) of this suit, were served on the Ouachita Valley Bank and on H. L. Gregg and G. M. Crook. A notice of seizure was also served on the bank bearing the same title and number, and otherwise reading as

Ouachita Valley Bank:

You are hereby notified that, by virtue of a writ of seizure issued by the Honorable Sixth district court, in and to the effect that I, the undersigned, Sheriff of Ouachita, and to me directed, in the above-entitled suit, I have seized and taken in my possession the property described in the petition, to wit: All property of every kind in your possession or under your control belonging to E. C. Drew, including any and all indebtedness

this 9th day of Aug., 1909.

“(Signed) T. A. GRANT,
“Dy. Sheriff.”

You are further notified to be at my office, in the City of Monroe, on Saturday, the — day of —, 1909, at 10 o'clock, to appoint an appraiser and appraise said property.

A notice was served, also bearing the title and number of this proceeding, and otherwise reading, in part, as follows:

Ouachita Valley Bank, Garnishee:

You are hereby cited to declare, on oath, what property, if any, you have in your possession or under your control belonging to the defendant in this case, you have in your

possession, or in what sum you are indebted to said c
and also to answer the interrogatories annex
petition of which a copy accompanies this citation,"

The return on the back of this notice (signed by t
sheriff) reads:

"Received this citation, together with a certified
same and a certified copy of the original petition, o
interrogatories, in office, on the 18th day of Aug
and on the 18th day of August, 1908, I served not
the seizure on the Ouachita Valley Bank by han
notice of seizure to H. L. Gregg, president of said b

All of the individuals named as garnishees appe
answered and to have been discharged. The Ouach
Bank made no answer, and the minutes of the cou
tember 23, 1908, show the entry: "Interrogatories
and articles taken as confessed, as against the
Valley Bank, and defendant bank excepts to rulin
motion."

On the following day the bank moved to vacate
of September 23d on the grounds: That the fir
interrogatories were not intended to be answered b
that nothing could result if they were taken for
That the second set were not addressed to it, but
dressed to "H. L. Gregg, individually and as presi
to G. M. Crook, individually, and as cashier." T
should be considered that interrogatories so addre
propounded to the bank, then it should be held
answers, made by the parties named, individually
cially, are the answers of the bank. And that the
judgment in the suit in which the garnishment
tempted. The motion so made was sustained by
rendered September 29th, and the judgment ta
answers for confessed was set aside; but the m
October 1st show that the judge, "on objection o
for defendant bank" (meaning, as we take it, the
Monroe, defendant in the rule in which the judg
been rendered), refused to sign the judgment. On
day (October 1st) the defendant bank moved to di
injunction which had been issued against it, on the
That the garnishment proceeding was illegal and i
and had been dismissed; that the attempted sei
illegal, because it purported to have been made und
of fieri facias in the suit of Bank of Monroe v. ⁵⁰²
Valley Bank et al., when, in fact, there was no
rendered or writ issued in that case. On December 1
was judgment dissolving the injunction, as prayed
also dismissing plaintiff's suit, which judgment w
on the date mentioned, and from which plaintiff p
this appeal.

ter of the Ouachita Valley Bank was offered in and was copied in the transcript. It provides for citation on the president and on other designated cases of absence or inability to act; otherwise no duties are assigned to the president, and no duties are assigned to the cashier, save to act as custodian of the corporate powers are vested in the board of directors exercised by said board, or by such committees as it may appoint, except those specially reserved by the (this) charter, to the stockholders."

It is seen from the foregoing statement that the plaintiff, in that, in a certain suit (No. 6496 of the docket of the district court), it had obtained a judgment against E. Drew and others, instituted the present proceeding (No. 6496 of the docket) against certain third persons with a view to obtaining a judgment, or judgments, against them (in the case of its judgment against Drew), by showing, by the answers to interrogatories to be propounded to them, that they were indebted to Drew, or had property in their hands or under their control belonging to him. Plaintiff undertook to levy upon such supposed indebted property by garnishment, and, at the same time, to obtain the writ of injunction to hold matters in abeyance until, i. e., until, by means of the proceedings in the present suit, it could develop the existence of property in the hands of such persons and cause the same to be turned over to the plaintiff. When, however, the court reached the conclusion that nothing had been taken by the attempted garnishment, its effect to that effect left nothing for the injunction to obtain and the whole proceeding, having collapsed, was dismissed by a final judgment, in which was included the unsigned judgment of September 29th, which was then regarded as interlocutory, and which therefore was considered as having been brought up by the plaintiff on appeal. It has been repeatedly decided that, in attachment proceedings, where the sheriff cannot actually lay his hands on the property in the hands of a third person, the only proper procedure is to cite such person as garnishee, and the effect of a mere notice on such person is no more effective than publication in a newspaper would be: *Woodworth v. Manly*, 9 La. Ann. 524; *Ealer v. McAllister*, 14 La. Ann. 58; *Estate of Mille v. Hebert*, 19 La. Ann. 58; *Mechanics' & Traders' Ins. Co.*, 32 La. Ann. 594; *McKlen*, 37 La. Ann. 545. It has also been repeatedly decided that the act of 1839, authorizing garnishment proceedings under writ of fieri facias, did not abolish former mode of seizing incorporeal rights, and that valid seizure of such rights may be effected by service of notice of seizure on the debtors thereof: *Rightor v. Slidell*, 9 La. Ann. 606;

Safford v. Maxwell, 23 La. Ann. 345; McDonough v. Mechanics' & Traders' Co., 32 La. Ann. 594; Levy v. Safford, 37 La. Ann. 545. The law, however, seems to be that the person sought to be made garnishee shall be made a party to, and proceeded against in, the suit in which the plaintiff is seeking to obtain, or has obtained, judgment against his debtor. Thus, Code of Practice, article 642, in part: "If a creditor knows or suspects that a person has in his possession property belonging to a debtor or that he is indebted to such ⁵⁰⁴ debtor, he may make such a person a party to the suit, by having him cited on oath what property, belonging to the defendant, is in his possession. . . . The person thus made a party to the suit is termed the garnishee. And, whenever a plaintiff in a cause, has applied for a writ of fieri facias against the defendant and has reason to believe a third person has property or effects in his possession, or under his control, belonging to defendant, he may cause such third person to be cited to answer, under oath, such interrogatories as shall be propounded to him touching such property and such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in the Code of attachment": See, also, Code Prac., art. 642.

In the instant case, the notice of seizure (through the writ issued from the court in which plaintiff had obtained judgment against Drew, and from which the writ of fieri facias had issued) bore the title and number of this proceeding, in which no judgment had been rendered, and no fieri facias issued, and it contained the recital that "by virtue of a writ of fi. fa. . . . to me directed in the above-entitled suit," etc., which could mean, and nothing, since the sheriff had no such writ as that. We therefore conclude that plaintiff took nothing from the notice in question. If, now, we assume that, in a proceeding of this character, in which it is sought to fasten the liability of a judgment debtor upon a third person, the plaintiff's writ may safely depart from the Code of Practice, which provides that "he may make such a person a party to the suit," and also provides that "the person thus made a party to the suit is termed the garnishee," and that he may proceed against such person in a separate suit, and without notice of seizure, we find that the plaintiff here confronted with the difficulties that the interrogatories sought to have taken as confessed, as against the Valley Bank, were not addressed to that bank, or to an officer of that bank, but were described as ⁵⁰⁵ interrogatories especially to be answered by H. L. Grady individually and as president; and G. M. Crook, in and as cashier."

ver, they had been addressed to Gregg and Crook, at and cashier, respectively, of the Ouachita Bank, so far as the bank is concerned, would be the same, though a citation in such case, or in any case, may be on the officer of a corporation designated for that it must be addressed to the corporation: *State v. Peace*, 48 La. Ann. 1417, 20 South. 911; *State v. 50 La. Ann. 671*, 23 South. 871; *State v. North Land & Timber Co.*, 105 La. 379, 29 South. 910; *Town of Lafayette*, 118 La. 495, 43 South. 63. Before conclude that there is no error in the judgment affirmed from, and it is accordingly affirmed.

's Return Reciting That a Summons of Garnishment was generally on S. C. Hoge, agent in charge of the Central of Georgia Ry. Co., 117 Ga. 521, 97 Am. St. Rep.

STATE v. PRICE.

[124 La. 917, 50 South. 794.]

Costs as Part of Penalty.—Although costs follow sentence are no part of the fine actually imposed. (p. 525.)

Forfeiture of License as Part of Penalty.—The right to conduct a barroom forms no part of the fine or part of the penalty imposed for breach of the Gay-w. (pp. 524, 525.)

Meaning of Term.—The Word "Fine," in its ordinary has the distinct meaning of a pecuniary penalty. (p.

Jurisdiction as Depending on Amount of Fine.—The in a constitution limiting the jurisdiction of the supreme a fine is imposed to cases where the amount does not exceed hundred dollars, is used in the restricted sense of pecuniary. Hence, the costs of a prosecution for violating the law the sale of liquors, and the forfeiture of the privilege of a barroom, form no part of the fine in determining the of an appeal. (p. 525.)

ry, Jr., James R. Parkerson and Emmet Alpha, for ants.

Guion, attorney general, T. M. Milling, district and R. G. Pleasant, for the state.

OVOSTY, J. The state has moved to dismiss the the ground that this court has no jurisdiction of The jurisdiction of this court in criminal cases is

limited to cases where "the punishment of death or imprisonment at hard labor may be inflicted, or a fine of \$300, or imprisonment exceeding six months, is imposed": Const., art. 85. The sentence condemns each of the two defendants to pay a fine of \$150 and the costs, and adds the following: "That the defendants Fielden Price be and they are each permanently deprived of the privilege of conducting a barroom."

The defendants contend that, under the statute upon which the indictment against them is founded, a firm or corporation conducting a barroom may be prosecuted as well as may an individual carrying on the like business, and that the indictment against them is against their firm, and not against them individually; and that, such being the case, the said two fines of \$150 imposed upon them as individuals must be reckoned as one fine of \$300 imposed upon the firm, and that, since the costs and the penalty of permanent deprivation of the right to engage in the business of conducting a barroom must be considered as included in, or part of, this \$300 fine, the case is one where a fine exceeding \$300 has been imposed, and of which, in consequence, the court has jurisdiction.

The statute upon which the indictment is founded is Chapter No. 176, page 236, of 1908, popularly known as the "Shattuck Law." It is entitled, "An act to regulate and license the business of conducting a barroom, coffee-house, cabaret," etc. (naming every possible place where the serving of eating beverages may be kept for the accommodation of the public to be drunk on the premises). Section 6 of the act provides that: "It shall be unlawful for any person or corporation, conducting a barroom, coffee-house, etc. [enumerating the various drinking places], to sell or permit to be sold or give or permit to be given, any intoxicating liquors to women or minors"; and that "any person violating any of the provisions of this section shall be fined in a sum not less than \$50 nor more than \$500, or imprisoned, or both," etc.

It is noteworthy that, while this section makes it unlawful for a firm or corporation to violate the act, it makes no provision for the imposition of a penalty upon a firm or corporation, unless a firm or corporation can come under the designation of the term "any person." Section 7 of the act provides that "any person, firm or corporation" violating the act "shall in addition to the punishment prescribed in section 6 of this act be permanently deprived of the privilege of conducting a barroom, coffee-house, etc. (naming all the various kinds of drinking places), and the revocation of said privilege shall be declared by

isdiction to impose the penalty fixed by section 6
 " ,
 ictment against the two defendants contain three
 rging three separate offenses. As the three counts
 ly alike in verbiage, saving alone in the name of
 charged, we need reproduce here only one of them.
 'That Frank Price and Fielden Price, being the
 of a place where intoxicating liquors are sold in
 of St. Mary, state of Louisiana, said business being
 icensed under the laws of the state of Louisiana,
 ond day of April, A. D. nineteen hundred and
 unlawfully and willfully give or permit to be given
 g liquors, to wit, beer, to a woman, to wit, Mrs.
 rumenthal, on the premises where said intoxicating
 sold."

easy to say whether the defendants are right or
 their contention that this indictment is against
 220 firm and not as individuals. But granting,
 gratia, that they are right, and that the two fines
 mulated, still the case would not come within the
 n of this court, since costs and the forfeiture of
 to conduct a barroom form no part of the fine,
 ming part of the penalty. Costs follow sentence;
 o part of the "fine actually imposed": State v.
 Iowa, 258, 60 N. W. 525; Appeal of Luzerne
 35 Pa. 468, 19 Atl. 1063. If costs constituted a
 e fine, the court in every case would have to take
 account in imposing either the minimum or the
 fine authorized to be imposed. Such has never
 practice or the understanding. In like manner
 ure in question is no part of the fine, since the
 e" in its ordinary acceptation has the distinct
 f a pecuniary penalty: 19 Cyc. 544; 13 Am. &
 v. of Law 53. It has that restricted meaning as
 n the constitution. Otherwise it would be synony-
 "penalty" or "punishment"; and the situation
 hat the jurisdiction of this court, instead of being
 imited, as is done by the use of the word "fine"
 nary meaning of a pecuniary penalty, would de-
 what was the money value of the penalty. In the
 r, for instance, the right of the defendants to keep
 being of greater value than \$300, this court would
 iction even though no fine at all had been imposed.
 connections the word "fine" has been held to be
 us with "penalty" (State v. McConnell, 70 N. H.
 tl. 458; Hanscomb v. Russell, 11 Gray, 373), but
 as too numerous to need to be specially referred to
 a confined to its ordinary meaning; and we think it
 o confined in this case. The framers of the con-

stitution weighed well their words in prescribing of the jurisdiction of this court. It cannot be ⁹²¹ that they would have used the restrictive word if they had meant to express the idea conveyed by word "penalty," or by the still broader word "punishment." Appeal dismissed.

A Fine is Ordinarily Defined as a pecuniary punishment in the sentence or judgment of a court: State v. Missouri Pa. 64 Neb. 679, 90 N. W. 877; State v. Ostwalt, 118 N. C. 120, 660, 32 L. R. A. 396; Southern Ex. Co. v. Commonwealth, 22 S. E. 809, 41 L. R. A. 436; Weidman v. State, 55 Minn. N. W. 688. That costs usually form no part of a fine in State v. Belle, 92 Iowa, 258, 60 N. W. 525.

HINTON v. ROANE.

[124 La. 927, 50 South. 798.]

EXEMPTION.—The Expression "Current Year" in exempting the corn, fodder, provisions, and other supplies for carrying on the plantation to which they are attached current year, means from harvest to harvest, and not a calendar year. (p. 527.)

EXEMPTION.—A Crop That Still Hangs by the roots within a statute exempting the corn, fodder, hay, provisions, and other supplies necessary to carry on the plantation for the current year. (p. 527.)

EXEMPTION.—Crops on Farm.—Where a Man and his family live on land belonging in indivision to his wife and himself and his children cultivate part of the land under an agreement whereby they have the surplus of the cotton after the sale of the other products are paid, and he has the other products for the support of the family, the corn, hay and cane raised on the land belong to him "on a farm," within the meaning of the exemption law. (p. 528.)

EXEMPTION.—Crop on Land not Owned by Debtor.—A statute does not require that the farm on which crops are grown belong to the person claiming their exemption. (p. 528.)

EXEMPTION.—Sugar-cane not Grown as a Money Crop.—Article 645 of the Code of Practice, providing against the seizure of "the corn, fodder, hay, provisions, and other supplies for carrying on the plantation to which they are attached current year," merely prohibits seizing the articles there "separately from the land." Sugar-cane, though not grown as a money crop, but converted into syrup for consumption by the family, may be seized under execution. (p. 528.)

AN ESTOPPEL by Judgment must be Pleaded separately and cannot be available. (p. 528.)

Clayton, Hawthorn & Atkinson, for the appellant.

Barksdale & Barksdale, for the appellee.

VOSTY, J. In November of last year the plaintiff and sons went on a wagon trip to Oklahoma. They were there day or night, as farmers often do, to wish to make an early start. Their creditors, supposing that they had left the state permanently, made attachments against them, and seized their crops in the field. They returned in time for the trial of the attachment suits, and were present at the trials. Judgment was rendered against them, maintaining the attachments. Execution was issued on the judgments; and the constable seized and sold for sale the property which had been attached. The plaintiff brought ⁹²⁹ the present injunction suit, to prevent the sale of the corn, hay and sugar-cane seized, which were exempt under article 244 of the constitution, exempting "the necessary quantity of corn and fodder for the current year," and under article 645 of the Code of Oklahoma, which reads: "Nor can he seize the agricultural implements, and working cattle, separately from the land to which they are attached; nor the corn, fodder, hay, provisions, and supplies necessary for the carrying on the plantation where they are attached, for the current year."

The defendants contend that the current year means the calendar year. If this were true, and the seizure had been made on the 1st of November after dinner, nothing more would have been taken than what would have been enough for supper. The plaintiff says that by "current year" is meant from harvest to harvest. See *Hayes*, 28 La. Ann. 641; *Clark v. Lancaster*, 10 Neb. 717, 96 N. W. 593.

The defendants contend that the exemption does not operate until the crop still hangs by the roots. But it would seem that it ought then to operate doubly, since a seizure at that time despoils the debtor as effectually as a later seizure, and perhaps to nobody's good, as it may bring about the loss of the crop, as has happened with the cane in the present case, according to the statement in plaintiff's brief.

The defendants contend that the property seized does not belong to the plaintiff, but to his two sons, and that, even if it does belong to the plaintiff, still it is not exempt, because it is not "the necessary quantity of corn and fodder for the current year." The facts are that plaintiff and his family, consisting of himself, his wife and several grown sons and daughters, live on a tract of land belonging in indivision to plaintiff's wife and his heirs. Plaintiff's sons and daughters cultivate a portion of the land under an agreement by which the sons are to deliver to plaintiff the surplus of the cotton after the supply bills of the year are paid, and plaintiff is to have the other products for the support of the family. Under these circumstances, ⁹³⁰ the corn, hay and cane in question belong to plaintiff; and they are "the necessary quantity of corn and fodder for the current year" within the meaning of the law. The law

does not require that the farm must belong to the person claiming the exemption.

The sugar-cane in question was not grown as a marketable commodity but to be converted into syrup for consumption by the family. Such being the case, plaintiff contends that it comes within the meaning of the term "provisions" found in the Code of Practice, article 645, Code of Practice, hereinafter referred to. But manifestly that paragraph of article 645 is a law of exemption, but merely a prohibition against the seizure of the articles therein named "separately from land to which they are attached." We think, therefore, that, as to the seizure must be maintained, as no law exempts the seizure.

We do not think the case of the defendants would be affected by their having a privilege on the object seized, as a matter of fact, they have none. Nothing shows that the debts upon which the judgments were rendered were for necessary supplies. The only evidence on that point is a vague statement that the debts arose from purchases made by plaintiff and his sons from the stores of the defendants. Nothing shows that the articles purchased were for necessary supplies.

The question of whether plaintiff is not estopped from claiming judgment in the attachment suit was argued at the trial, there being no plea of estoppel, and estoppel having been specially pleaded, that question need not be considered.

Plaintiff made an agreement with his counsel for a fee of fifty dollars. The lower court allowed twenty-five dollars. Plaintiff joined in the appeal by answer in this case, and asked that the said fee be increased to fifty dollars. Considering the services that have had to be rendered by the counsel in the present appeal, we think the amount ought to be increased to the full fifty dollars, as prayed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be set aside in so far as it relates to the exemption of the sugar-cane from seizure, and that the said sugar-cane, the seizure be maintained and the judgment of the plaintiff's suit dismissed; and it is further ordered, adjudged and decreed that the attorney's fee allowed by the said lower court be increased to fifty dollars, with legal interest from the date of the said additional amount decreed by the present court, and that the said judgment be in all other respects affirmed. The costs of the lower court to be paid by defendants, and the costs of this appeal to be paid one-half by plaintiff and one-half by defendants.

Under a Statute Exempting from Execution grain, meat, and groceries, and other provisions on hand necessary for the support of the debtor and his family for one year, he is entitled to a writ of habeas corpus.

necessary for food for himself and family for that time, entitled to hold as exempt an amount of grain sufficient, in place of other property, to support him and them for a year. *W. v. Hunter*, 48 Kan. 651, 30 Am. St. Rep. 325. And a claim for exemptions to the head of a family the necessary food for the support of his exempt stock does not entitle him to claim an exemption in grain which he does not intend to feed his animals. *W. v. Goss*, 73 Kan. 120, 117 Am. St. Rep. 457.

HARRELSON v. WEBB.

[124 La. 1007, 50 South. 833.]

REPTOY—Suit in State Court.—Plaintiff sued defendant in bankruptcy of a partnership, of which defendant was a partner, and also of the individual members, for \$2,000, part of the price of property sold in the bankruptcy proceedings, on which plaintiff claims a homestead right. The suit was brought in the State court. (p. 530.)

REPTOY—Widow as Head of Family.—After the death of the husband, the mother is the "head of the family," and, if the husband had a homestead, it passes to his wife, as the widow may be considered the head of the family. (p. 531.)

REPTOY—Effect of Marriage of Widow.—The widow loses her homestead by marrying an impecunious man, barely able to support her in his own livelihood, for there may be more necessity for a homestead. Nor does this second marriage destroy the homestead of the decedent's family in his homestead. (p. 532.)

REPTOY—Condition of Debtor, of What Date Considered.—The condition of the debtor, upon which the claim of homestead is based, is considered as of the date of the seizure, or the date the claim is made. (p. 533.)

REPTOY—Property Held in Indivision.—The homestead is not affected by the fact that the property is held in indivision. If the widow in community, the head of the family, may be considered the fractional part which belonged to her husband, the proceeds of the sale of this fractional part are to be divided between the mother and children, and are to be administered and controlled as any other property owned by the mother and children. (p. 532.)

REPTOY—Exemptions Under State Laws.—The bankruptcy court (Act July 1, 1898, c. 541, sec. 6, 30 Stat. 548 [U. S. v. 1901, p. 3424]) recognizes exemptions allowed by state law. When the trustee agrees to submit the question of exemption to the state court, he must be held to waive the rules of the bankruptcy court, and a failure of the bankrupt to make a claim in his schedule will not necessarily be considered as a waiver. He must file his schedule before distribution of his assets to claim exemptions. (p. 531.)

(Syllabi by the court.)

Attorney for Appellant.—Carmouche, for the appellant.

Attorney for Appellee.—Pugh, for the appellee.

¹⁰⁰⁰ BREAU, C. J. Plaintiff sued for \$2,000 the purchase price of property sold in bankruptcy on which she claimed a homestead right as Edgar Barousse.

Edgar Barousse, the husband, departed this opened his succession and qualified as natural tutor of minor children, and had that part of the property her and her minor children adjudicated to her by of court in 1907.

At the beginning of their marriage, the plaintiff husband had no property. Their marriage was blessed with ten children, and they were fairly successful in acquiring property. Of the ten children, four were minors of age, and two were emancipated.

The property was held in common with her children. The plaintiff was the owner of fourteen-twentieths of the property. She soon afterward formed a partnership with her children of age and conducted the business of the partnership in the name of the "Estate of Barousse." The partnership was not fortunate. It and the individual members of the partnership were forced into bankruptcy by their creditors.

¹⁰¹⁰ Rufus C. Webb, the defendant, became the trustee in the bankruptcy of the partnership and of the individual members.

The record informs us that the minor children had a mortgage secured by mortgage amounting, on November 30, 1907, for \$2,201.58, besides a small deposit of about \$200. It does not appear whether they owned that amount at their father's death, nor does it appear by the evidence.

Returning to the property on which plaintiff claimed a homestead: The trustee obtained an order of court to sell it, and on the sixteenth day of November, 1908, sold it at private sale, as authorized by the order, for \$4,300. Prior to this sale—that is, in October, 1908—Mrs. Barousse protested against the sale on the ground that the property was her homestead. She withdrew the protest by agreement with her counsel and renewed her claim to her homestead in the proceeds of the sale of the property. This was done in the hands of the trustee.

About the 15th of January, 1909, she filed a petition in the United States district court claiming her homestead right against said \$2,000 in the hands of the trustee. This petition was filed prior to the date that the petition in the case was filed.

To the present suit of plaintiff, defendant trustee has pleaded estoppel and an exception of no cause of action. At the same time, without asking for a decision on the merits, he filed an answer of general denial, in which he

rights he had under the exception. The case was decided by the state courts in accordance with the agreement between the counsel for the trustee and the counsel for plaintiff. The judgment of the district court rendered ¹⁰¹¹ judgment recognizing plaintiff's right to her homestead. The defendant

proposition submitted by the trustee, appellant, and the plaintiff bankrupt having failed to make her claim for exemption within the time specified by the bankruptcy act, the right of exemption was waived.

It is first mentioned that the bankruptcy act recognizes the right of exemption allowed by state laws.

The trustee, having agreed with the plaintiff to submit the question of exemption involved to the state court, must be held to the waived rules which he now seeks to invoke, which will prevail in the proceedings in bankruptcy.

It is held that the bankrupt failed to claim a homestead on the schedule as required by section 6 of the bankruptcy act, July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. Stat., p. 3424]).

It is not as fatal as the trustee contends. His construction of the bankruptcy act is somewhat narrow. He seeks to get a construction that would cause loss without good

reason. It is that the failure of the bankrupt to make his claim on the schedule will not necessarily be considered as a bar if he may thereafter make claim therefor: *Brandenburg v. Bankruptcy*, 3d ed., 130, citing a number of decisions in support of his text.

Nothing is also as pertinent: A bankrupt can amend his schedule before distribution of his assets to claim his exemption. *In re Moran* (D. C.), 105 Fed. 901. Similar views are expressed in *Re Osborne* (D. C.), 104 Fed. 781.

It is also to a consideration of the right of plaintiff to exempt her share of the state laws. She was the "head of a family" at the time of the sale by the trustee. She became the head of a family immediately after the death of her husband. As head of the family, she opposed the sale of the property. She withdrew the opposition, and by agreement the trustee reserved the right to claim a homestead on the sale of the property, so that the defendant is in a position to say that she did not claim her homestead when the sale was made.

The clause of the constitution allows exemption to the owner who occupies the land on which he claims exemption. "head of a family."

At the death of the husband, the mother is the head of the family. If he had a homestead, it passes to his wife.

After the death of Barousse, the husband, the children remained with the mother. They were under her care and protection and dependent upon her for support in spite of the fact that each had a share of about \$500 per annum by legis. It could not be used for their support. The husband is under the natural obligation of supporting the children.

A widow may be the head of a family: 21 Cyc. 411.

After the property had been sold in the bankruptcy proceedings under the order of court, the mother remained in possession. The contention of defendant is that by the mother's sale she forfeited her right to the homestead.

The proof is that the second husband of the plaintiff earns his own livelihood. The wife (widow) does not lose her homestead by marrying an impecunious man. There may now be more necessity than ever for a homestead.

In a majority of jurisdictions a widow by remarriage does not lose her homestead, nor does she thereby deprive the rights of the decedent's family in his homestead. 21 Cyc. 569.

We may as well state that by the terms of the will it appears that the property ¹⁰¹² of the husband passed as a homestead which passed to the wife.

The homestead right continues in favor of the children as well as in favor of the widow, after the husband's death. The property, or the proceeds of the sale, is owned by the mother and the children, and is to be administered as any other property owned by mother and children: 21 Cyc. 566.

The defendant further urges that the property was sold in indivision.

Although the one hundred and sixty acres of land were owned in indivision with the heirs, that portion was the property of the late E. Barousse, and which was occupied as a homestead, which homestead the wife and children inherited, as before stated, passed to the wife. She is the homesteader of the fractional right inherited.

In *Maxwell v. Roach*, 106 La. 123, 30 South. 251, the court held that the widow in community was the head of the family after the death of the husband, and that the homestead right was not affected by the joint ownership of the property. Besides, the question of the right of the tenant in common to the property is not involved. The other owners are the children of plaintiffs herein. She can maintain a homestead exemption in a contest with the creditors. The homestead is a third person: *Speyrer v. Miller*, 108 La. 204, 524, 61 L. R. A. 781.

In *Lyons v. Andry*, 106 La. 356, 87 Am. St. Rep. 38, 55 L. R. A. 724, that view was reaffirmed.

The court said, in *Maxwell v. Roach*, 106 La. 123, 251: "The fact that the surviving spouse, as widow,

owner of one-half of the property constituting the homestead does not destroy the homestead right.

Secondly, parties owning land in indivision, ¹⁰¹⁴ or, a party owning an undivided interest in land, cannot claim homestead exemption in the land held with others; the special direction of the constitution this does not apply to the surviving spouse."

In the situation as relates to the plaintiff at the time of her husband's death. She held the property as surviving spouse and community.

The court bases some of its contentions on the fact that there has been some change since the bankrupt was forced into bankruptcy; mainly that the wife remarried, as before.

The court states now, upon that subject, that the condition of the property is considered, as to homestead, at the date of the sale, not the date that he claims his homestead.

The court does not disclose that there had been any change in the affairs or the condition of the plaintiff at the time she claimed her homestead in the bankruptcy court, or at the date of the sale.

The homestead right is to be considered at the date of the sale. *Garner v. Freeman*, 118 La. 184, 118 Am. St. Rep. 361, 42 South. 767.

The condition of things existing must be made to appear: *Garner v. Freeman*, 39 La. Ann. 884, 2 South. 797.

In the court's decision it was held that article 244 of the constitution makes a distinction between the head of a family and a person being a father or mother, or person with dependent upon him for support.

The court said that the two classes are different. The head of a family is entitled to exemption whether he supports or not: *Garner v. Freeman*, 118 La. 184, 118 Am. St. Rep. 361, 42 South. 767.

The judgment assigned, the judgment appealed from is affirmed.

What may Exist in Land Held by a Husband and Wife
See *Lininger v. Helpenstell*, 229 Ill. 369, 120 Am. St. Rep. 108, 108 Am. St. Rep. 34. *See* also, *Walden v. Walden*, 156 Cal. 195, ante, p. 118. As to homestead may be had in property held by them as tenants in common, *see* the notes to *Wolf v. Fleischacker*, 63 Am. Dec. 122; *Annals*, 1 Am. St. Rep. 594; and the recent case of *Annals*, 96 Minn. 294, 113 Am. St. Rep. 625.

The Marriage of a Widow and her residence with her homestead previously acquired by her do not affect her homestead nor its devolution to her children: *Grimes v. Luster*, 108 Am. St. Rep. 34. *See* also, *Estate of Harrington*, 98 Am. St. Rep. 51. But if a widow marries and her husband takes her into his homestead, she thereby irrevocably loses her previous homestead: *Kloss v. Wylezalek*, 207 Ill. 323, 100 Am. St. Rep. 220.

CASES
IN THE
SUPREME COURT
OF
MAINE.

LEAVITT v. DOW.

[105 Me. 50, 72 Atl. 735.]

ASSAULT—Inadequate Damages.—A Verdict of an unprovoked assault, perhaps not violent in itself, made and accompanied by insulting language, is inadequate and should be set aside by the court. (p. 536.)

ASSAULT—Damages for Injury to Feelings.—cover not only for injuries to his person, but for mental and humiliation directly resulting from an assault on the public. (p. 536.)

ASSAULT—Inadequate Verdict, Setting Aside.—It is the duty of the court to set aside a verdict for grossly inadequate damages awarded for an assault. (p. 536.)

William Lyons, for the plaintiff.

Frank P. Pride, for the defendant.

⁵¹ **PEABODY, J.** This was a civil action of the person to recover damages for assault and battery. The verdict was for the plaintiff for a nominal sum of damages.

The case comes before the law court on the motion for a new trial on the ground that the damages assessed by the jury are manifestly and grossly inadequate.

There were two meetings of the parties on the day of the alleged trespass. A technical assault and battery was admitted by the defendant's attorney, although the defendant in his own testimony, who also justified the assault on the ground that they were done in self-defense, admitted that there was no actual injury inflicted on the plaintiff.

It is shown by the testimony of the plaintiff and witnesses that on August 16, 1906, he was sitting in the front of the window in his dry-goods store on Main Street.

Westbrook, Maine, talking with another man, defendant came along the street, stopped and making a insulting remark, took off the plaintiff's cap, caught the plaintiff by the vest, tearing off a button, and gave him two or three blows on the head; that in a minute or two ⁵² he went back, soon came back, got hold of the plaintiff by the collar, started shaking him, saying, "Now, you Jew, you show me your face what you said behind my back," and then he hit the plaintiff in the face and pulled him off the box on which he was sitting; that the plaintiff then got hold of the defendant around his body and pushed him over in the defendant's store, which was next to his own, at which time he was struck by the defendant and received a black eye; and that the assailants were separated immediately. The plaintiff immediately afterward felt dizzy and dropped on the floor in his store. He called Dr. Horr, sitting by him, who gave him some medicine. That evening he felt the same pain coming over his head as he had attended by Dr. Woodman, who administered medicine. These pains returned and Dr. Woodman was again called. After he was suffering and as Dr. Woodman could not attend him, Dr. Hall was called to attend him, and he was taken to the hospital, where he remained one night. He still complains before the coming of bad weather, feels the same pain as he had before the alleged assault he had learned from his friends that he had a weak heart. He has paid thirty dollars for the expenses incurred in consequence of the trouble and is now a defendant.

The facts are not controverted except by the defendant's testimony in the first instance; but in this he is contradicted by several witnesses, who were present, called by the plaintiff and also by one called by himself, who was at the opposite side of the street and testified: "I saw the defendant just as any fellow would go along the sidewalk [the plaintiff] on the head and brush his cap off the sidewalk."

The part taken by the plaintiff in the second instance, is somewhat conflicting, but the testimony of the plaintiff and his witnesses tends to prove that the violence was largely due to the desperate resistance of the plaintiff's efforts to push away his assailant, using unnecessary and such unjustifiable means as biting him in the neck, holding him in his grasp until the parties were separated by the bystanders.

The court were perhaps warranted in finding that the injury to the person of the plaintiff not directly due to his provocative acts were trivial, but it is clearly shown by the evidence that two ⁵³ separate unprovoked assaults

accompanied by grossly insulting language were made by the defendant upon the plaintiff.

Under the circumstances of the case we think to be, in addition to some actual injuries to the person of the plaintiff, material damages for injury to his feelings and the humiliation to which he was publicly subjected by the defendant.

The law gives a plaintiff in case of personal trespass compensation for both physical and mental suffering resulting from the wrongful acts of the defendant. Anger and excitement of the plaintiff upon the second verdict indicates that he was keenly conscious of the injury he had received. By the general common-law rule, damages were not granted upon the ground of inadequacy in actions of trespass and perhaps in all actions. *Hackett v. Pratt*, 52 Ill. App. 346. But this rule has been relaxed, and it is now held both in England and in the United States that no reason can be given for setting aside verdicts because of excessive damages, which would apply to setting them aside for inadequacy of damages. *Phillips v. Southwestern R. Co.* (1879), 1 L. R. 406; *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 43; *Welch v. McAllister*, 13 Mo. App. 89.

It is the duty of the court in case of both excessive and inadequate damages to set aside the verdicts if the rendering of them either disregarded the testimony or was from passion or prejudice: *McDonald v. Walter*, 117 Ill. 551; *Richards v. Sanford*, 2 E. D. Smith, 349; *Paulsen v. Berger*, 17 Ill. App. 167; *Cayford v. Wilbur*, 86 Mo. 29 Atl. 1117.

When the smallness of a verdict shows that the plaintiff has made a compromise, a new trial will be granted. *v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. 406; cases cited; *Whitney v. Milwaukee*, 65 Wis. 409, 39.

There is an evident failure of justice to the plaintiff if the damages awarded him are clearly inadequate. We are convinced that the jury were influenced by prejudice in their verdict was a compromise, which is essential to a verdict for the defendant.

Motion sustained.

New trial granted.

A Verdict for an Immoderately Small Sum in an action for personal injuries should be set aside by the court: Fischer v. St. Louis, 189 Mo. 567, 107 Am. St. Rep. 380. Thus if a citizen, without warrant, take a young man suspected of having committed arson, who at the time is in attendance upon a jury, and abuse him for a number of hours, placing a rope around his neck, and threatening to hang, and making a demonstration

the purpose of extorting from him a confession of the dict of five hundred dollars, as damages for mental terror, is insufficient, and will be increased to five thousand on appeal: *Warner v. Talbot*, 112 La. 817, 104 Am. St. a Pinkerton v. Wisconsin Steel Co., 109 Minn. 117, 123 n order granting a new trial on the ground that the arded by the jury were inadequate was held justified d. The verdict in that case was for two thousand dollar of a boy seventeen years old, for injuries sustained as a brakeman. The evidence strongly tended to show was crushed and its usefulness wholly and permanently

ROBINSON v. ROBINSON.

[105 Me. 68, 72 Atl. 883.]

TS—Authority of Trustee—Power of Sale.—Under the ry of a trust, the powers and duties of the trustee were ntially to holding and caring for the property, but of the modern trust are of a much broader character, quiring greater powers on the part of the trustee, in- ver of sale generally given expressly. (p. 539.)

TS.—A Power of Sale may be Implied from the fact ee is charged with a duty that cannot be performed power. (p. 539.)

TS—Power of Sale.—The Words "Invest and Manage," sting a trust, properly import and imply a power of sale, y intention is not found in the will taken as a whole.

B. Mears, for the plaintiffs.

Hamlin, for the defendants.

, J. This bill in equity is brought by the execu- tees under the will of Mary D. Biddle for the a of the will.

comes before this court upon complainant's bill eement of all the defendants wherein the allega- et in the bill of complainants are admitted to be the respondents join in the prayer of the bill for ction of the will. This agreement appears to be ight properly be made by all parties respondent. ef, the bill sets out that Mary D. Biddle, late of a, in the state of Pennsylvania, died on the of December, A. D. 1900, testate; that her will dmitted to probate at said Philadelphia, setting ularly the clause of which construction is re- at the will was duly admitted to probate by the art of Hancock county, in this state, on the fifth ril, A. D. 1904, and that letters testamentary issued to complainants on the twentieth day of and letters of trust on the first day of November,

A. D. 1904; that the testatrix left her surviving four children, who are the complainants, no husband and three children, one of the latter being the daughter of D. Robinson and the others children of Henry J. that all the specific bequests made by the will be paid in full or otherwise provided for in accordance with its terms; that the only persons having any interest in the estate of the testatrix are the complainants and their grandchildren; that there are no debts against the estate and that no personal property of any great value was owned by testatrix in the state of Maine; that she died leaving certain real estate in the county of Hancock forming a part of her residuary estate, part of which is unimproved and unproductive of income and now liable for taxes, the payment of which no express provision is made in the will or afforded by the estate of the testatrix, and that of the income of said lands, whereby the interests of the present beneficiaries under the will are prejudiced, it would be beneficial to all of them if the real estate referred to could be sold by the executors and trustees. We believe that by the true construction of said will the testatrix gave and granted unto them full power and authority to convey all real estate, wheresoever situated, comprising a part of her residuary estate so as aforesaid devised and bequeathed, and that in the event of the sale of any said real estate, purchasers are likely to refuse to accept a deed from the executors and trustees until their powers in the premises have been judicially determined.

The complainants particularly inquire whether the executors and trustees have power to sell and convey the same in simple or otherwise, the real estate in this state.

⁷¹ The will of Mary D. Biddle, after providing for specific bequests, provides for the sale immediately on the termination of life estates of certain improved property in Pennsylvania, with the instruction that the proceeds, when received, become part of her residuary estate. Then follows a clause of which construction is particularly required, and which relating to immaterial portions, is as follows: "I give, devise and bequeath all the residue of my estate to my executors hereinafter named, in trust, however, to invest and manage the same and to pay over the interest and income annually arising therefrom to my four children during their lives, in equal shares, without anticipation and free from any claims or demands of their creditors or of any other persons or person whatsoever. . . . and on the death of any one of my children I direct that the one-fourth of the principal of said residuary estate shall be paid to the children or other direct descendants of said deceased child, such distribution being made per

complainants urge that the words "invest and manage" import in and of themselves a power of sale. While it is true that under the original theory of a trust the powers of the trustee were confined substantially to holding and managing for the property, it is equally true that the powers of the modern trust are of a much broader character, and that ordinarily much greater powers on the part of the trustee are implied, including a power of sale, which is generally expressly

implied where not expressly given will be implied. It is a fact that the trustee is charged with a duty which must be performed without a power of sale: *Putnam Free Church v. Fisher*, 30 Me. 523; *Jones v. Atchison etc. R. R. Co.*, 304, 22 N. E. 43, 5 L. R. A. 538. In both these cases the powers were given the trustee as to the investment or management of the property, yet in the latter case the court says: "The discretion which our laws give to trustees in making investments, when no specific directions are given by the creator of the trust, requires that a somewhat more liberal view be taken of the implied powers of trustees of personal property to make investments than has been taken in England and some jurisdictions": *Id.*, p. 308.

Boston Safe D. & T. Co. v. Mixter, 146 Mass. 100, 15 N. E. 1, a testator, after bequeathing to each of his four children the income of a specified sum to be held in trust, gave to the residue of his estate, real and personal, to be held equally between them share and share alike, to them, their heirs and assigns forever. After the marriage of a daughter, the testator by a codicil directed that all the property of the estate so given the daughter in addition to said income should be paid to a corporation as trustee to be held for her benefit, that after the death of his daughter, the residue left in trust be divided among her children equally, and if he leaves no children, the sum so left in trust with the residue should be paid, one-third to her husband and the balance to be divided among her brothers and sisters.

These provisions he is clearly dealing with the whole estate as a single fund, and they imply that the trustee is to make the division according to his directions. It must do so whether the fund consisted of personal property, and there is nothing to indicate that he intended that there should be a difference as to that part of the fund which at his death was real estate. The whole estate held in trust was 'to be invested in said corporation as shall seem prudent and safe,' which implies that the trustee may find it prudent to change investments. The testator does not directly or by implication vest any legal estate to those who under the codicil are to be the distributees at his daughter's decease. He imposes

upon the trustee the duty of dividing and transferring the fund after her death": *Id.*, p. 104.

The court then says: "Looking at the whole will, it is reasonably clear that he intended to give the trustee the legal title to both the real and the personal estate, and the power to sell and convey the same, and that such a trustee is necessary in order to enable it to carry out the purposes of the testator: *Sears v. Russell*, 8 Gray, 86; *Putnam v. Marshall*, 138 Mass. 301"; *Id.*, p. 104.

In *Harvard College v. Weld*, 159 Mass. 114, 34 N. E. 271, the court says: "The foregoing considerations seem to us to show that the testator did not intend or attempt to create a power of sale in the land in question inalienable when it reached Harvard College; and that the first words of the trust imposed upon the trustee to manage and invest the same to the best advantage and power to sell."

It would seem that the words "invest and manage" import and imply a power of sale, unless a contrary intention on the part of the testator can be found in the will taken as a whole.

There are other considerations, however, which lead to the belief that a power of sale was intended by the testatrix. She directs the sale by her executors of sundry parcels of unproductive real estate and that the proceeds shall become part of her residuary estate. It is hardly supposable that a part of which was unproductive, should be retained by the trustees when it is not expressly or impliedly provided that it shall be enjoyed by the cestui que trust in specie. If she treats the whole trust estate as a single fund in her will, her vision, "I direct that one-fourth of the principal of the residuary estate . . . shall be paid to the children and descendants of my said deceased child." The term "paid" is applicable exclusively to personalty: *Cook v. Cook* (N. J. Eq.), 47 Atl. 732. See, also, *Putnam Free School v. Fisher*, 30 Me. 523.

The trustees could not ascertain the true amount of the estate or pay over the fractional part directed to be paid to the children of a deceased child until the whole estate was converted into money: *Putnam Free School v. Fisher*, 30 Me. 523.

Upon the whole will, therefore, we conclude that it was the intention of the testatrix that the trustees should have the power to sell the real estate devised by the residuary clause, and to convey to the purchaser or purchasers good title in fee simple, as that her will so directs.

Decree in accordance.

Implied Power of Trustees to Sell is the subject of *Rankin v. Rankin*, 87 Am. Dec. 209. As a general rule a power of sale is presumed to hold for administration, and not for sale: *Mitchell v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467.

STATE v. MESSIER.

[105 Me. 210, 74 Atl. 18.]

RECOGNIZANCE.—Where a Complaint is Lodged Against A, who is arrested, recognizes under A's name, and defaults the recognizance, a scire facias upon the recognizance cannot be maintained against A, nor against his sureties, because not joined with the principal. (p. 541.)

scias on a default of recognizance in the matter of a nuisance. When the cause came on for hearing, an statement of facts was filed and the case then reported to the court to determine whether the action was main-

A. Morey, county attorney, for the state.

Brann, for the defendants.

DECISION.—**MR. JUSTICE C. J. ELLERY.** A complaint was made in the Lewiston court against Arthur Messier for maintaining a nuisance and a warrant issued against him. Upon this the officer arrested, not Arthur Messier, but another person named Oscar Messier, and brought him, Oscar, before the court for trial. In the municipal court, Oscar Messier pleaded guilty, waived examination, and recognized with sureties for his appearance at the supreme judicial court to answer to the warrant. He did all this under the name of Arthur Messier, as stated in the complaint. In the supreme judicial court an order was returned against Arthur Messier in the same name as in the same facts. Upon calling Arthur Messier to answer to the indictment and save himself and sureties from arrest, he did not appear, the recognizance was defaulted, and a scire facias issued against Arthur Messier and the sureties to the recognizance, and served upon him and them. It is stated that Arthur Messier at the time of issuing the warrant was not maintaining any nuisance, had no connection with the place described as a nuisance, but was in Massachusetts during all these proceedings.

It is evident that upon the facts admitted by the state there is no judgment against Arthur Messier. He did not recognize into any obligation to appear. Can there be a judgment against the sureties in the recognizance? Not in this case. It was recognized, not with Arthur Messier, but with Oscar Messier and for the latter's appearance only. They are the only cosurers. Oscar was also a cosurer, and is the principal in the recognizance. He should have been served with the suit and served with process, with a recital of his want of such joinder this suit must fail: State v. Messier, 79 Me. 172, 8 Atl. 553.

Oscar Messier may be guilty of the common-law false personation and so not escape punishment, or may be arrested and convicted upon the indictment, assumed the name of Arthur, but this suit against Arthur cannot be maintained, and according to the law there must be judgment for the defendants.

For Authorities Bearing upon the Principal Case, see Nance, 220 Mo. 104, 132 Am. St. Rep. 555; Van Buren v. 45 Colo. 588, 132 Am. St. Rep. 199; Brum v. Ivins, 154 Cal. Am. St. Rep. 137.

STATE v. BARTLETT.

[105 Me. 212, 74 Atl. 18.]

CRIMINAL TRIAL—Attorney Acting for County. The court has power to recognize an unofficial member to conduct a criminal case for the state in place of prosecutor, and the accused has no legal ground for objection. (542, 543.)

Amos K. Butler, special attorney, for the state.

Forrest Goodwin, for the defendant.

212 EMERY, C. J. The respondent was convicted in Skowhegan municipal court of the offense of unlawfully selling intoxicating ²¹³ liquors, and appealed to the superior judicial court for Somerset county. In the appeal Amos K. Butler, not the county attorney, but claiming to be special attorney for the state for Somerset county, appeared to appear and prosecute the case for the state. The respondent objected, but the court ruled that Mr. Butler might appear as counsel for the state. Thereupon the respondent withdrew his plea of not guilty, pleaded guilty, and then filed a motion for an arrest of judgment upon the same ground, viz., that he was not allowed to prosecute for the state. This motion was overruled. To each of the rulings the respondent excepted.

Passing the question whether after a general plea of guilty the respondent, without withdrawing his plea, can be heard in explanation of errors preceding his plea, we consider the question whether the respondent was legally prejudiced by his appearance against him being conducted by Mr. Butler instead of the regular county attorney. We think he was not. Whether he should conduct the case for the state was not a question between the state and the respondent, but solely a question between the state and Mr. Butler, or between the regular county attorney and Mr. Butler.

not appear that the county attorney undertook to, or right to, conduct this case for the state, but it does not appear that the court recognized Mr. Butler as prosecuting this case, and no one but the respondent appears selected. It is difficult to see how the respondent was what difference it could make to him who acted as attorney. He would have the same rights in the matter after the trial, neither more nor less, whoever conducted the case on the other side. The only possible difference would be the difference in the efficiency and faithful prosecution of the attorney, but of course no such difference was assumed or allowed to be shown. If it be suggested that the county attorney might have granted a *con-
a nolle prosequi* or a stay of sentence, the answer is that there is no such suggestion in the case. It does not appear that the county attorney undertook or desired to do any way to interfere.

The court has power to recognize unofficial attorneys of fact to conduct a criminal case for the state as well as in *Commonwealth v. Knapp*, 10 Pick. 477, 20 Am. 181; *Commonwealth v. Connecticut River R. R. Co.*, 15

If the official prosecutor does not object, the respondent has no legal ground for objection. The respondent's objection is overruled.

Power Inherent in the State to Appoint an Attorney, when necessary to prevent a failure of justice, to conduct the prosecution of a criminal case. *Commonwealth v. State*, 11 Ind. 557, 71 Am. Dec. 370.

Power of a Trial Court in Permitting Private Counsel to appear for the prosecution in a murder trial is not ground for reversal of the verdict and judgment: *Commonwealth v. Commonwealth*, 181 Pa. 470, 59 Am. St. Rep. 670.

STATE v. POOLER.

[105 Me. 224, 74 Atl. 119.]

ATTORNEY.—The Signature of the Attorney for the State is not required by law. (p. 545.)

CONSTITUTIONAL LAW—Presumption in Favor of Statute. The legislature are presumed constitutional, and the presumption of great strength. (p. 546.)

CONSTITUTIONAL LAW.—Acts of the Legislature are to be valid until otherwise declared by the courts. Until judicially condemned it is the right and duty of the public officials to act upon and obey them. (p. 546.)

ACT OFFICER.—Validity of Acts as to Third Persons. Those who deal with officers apparently holding under authority, in such manner as to warrant the public in assuming

He also signed the indictment as special attorney, but becomes immaterial, as the law does not require even presence of the attorney for the state. In view of the law acts as above appears, the defendant in his motion states the following reasons why the judgment against him should be arrested: Briefly stated, they are, first, that Mr. Butler was unlawfully present in the grand jury room, and he aided, assisted, counseled and advised the grand jury in receiving and deliberating upon the evidence. Second, the witnesses who testified before the grand jury were not duly sworn. Third, because they were sworn by Amos Butler, who was not authorized by law to administer the oath to the witnesses, and that no other oath was administered to them. Fourth, because, while the grand jury was receiving and considering evidence against the respondent, he returned the indictment upon which he was indicted, Thomas J. Young was the duly elected and qualified attorney for the state for said county, and was in and upon said term of court, willing and able to perform the duties with the grand jury in the matter before them, and was by law, and was unlawfully hindered and prevented from attending upon the grand jury.

Section 8, chapter 92, Laws of 1905, under which Mr. Butler was appointed special attorney, is as follows: "The governor shall give notice to and opportunity for the attorney for the state of any county to show cause why the same should not be continued to continue during his pleasure, the office of attorney for the state in such county and appoint an attorney to perform the duties thereof. Such an appointee shall be under the direction of the governor, have and execute the powers now invested in the attorney for the state for such county in all prosecutions relating to the law against the manufacture and sale of intoxicating liquors, and shall have full control thereof; and shall receive such reasonable compensation for services rendered in vacation and term time as the justice presiding at each criminal term in the county shall allow to be allowed in the bill of costs for that term and for the county."

The purpose of filing the motion in arrest of judgment was to test the constitutionality of the above statute. This question has very recently been decided adversely in *State v. Young*, 15 Me. 91, 73 Atl. 560, 24 L. R. A., N. S., 744.

The decision does not necessarily end the state's case nor does it require a conclusion in favor of the defendant's. Declaring a statute unconstitutional does not necessarily render it void ab initio. It is an axiom of practical jurisprudence, coeval with the development of the common law, that upon necessity, that de facto acts of binding force

may be performed under presumption of law. The other rule so uniform in its application that it, too, a legal maxim, that "all acts of the legislature are presumed to be constitutional": *Lunt's Case*, 6 Me. 412. This was confirmed in *Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 212, a case in which the plaintiff claimed the statute was unconstitutional and void by the Maine Bill of Rights and the constitution of the United States, but the court said: "The presumption the other way, in favor of the validity of the statute, is a presumption of great strength. All the justices of the court agree upon this. Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162, says 'that to overturn the constitution the justices must be convinced and the conviction must be clear and strong.' Judge Washington in *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606, declared 'that if he were to express an opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute.' Chief Justice Mellen in *Case*, 6 Me. 412: 'The court will never pronounce a statute to be otherwise [than constitutional] unless in a case where the point is free from all doubt.' This strong presumption is constantly borne in mind in considering the question presented."

The same rule was reiterated in *Soper v. Lawrence*, 268, 99 Am. St. Rep. 397, 56 Atl. 908, in which the court said: "Power of the judicial department of the government to prevent the enforcement of a legislative enactment which it declares unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to conflict with the organic law. The constitutionality of a statute is presumed until the contrary is shown beyond a reasonable doubt": See, also, cases cited.

It logically follows from the rule enunciated in *Lunt's Case* that an act of the legislature is to be regarded as constitutional unless otherwise declared by the court. Directly in point is *Carroll*, 38 Conn. 449, 9 Am. Rep. 409, a case undoing the effect of a statute by sending the most comprehensive and critical analysis of the question of de facto offices and officers to be founded on the authority of the common law. "Every law of the legislature, however repugnant to the constitution, has not only the sanction and semblance of authority, but the force of law. It may be questioned at the bar of private judgment, and may be declared unconstitutional, resisted, but must be received and obeyed to all intents and purposes of law, until questioned and set aside by the court. This principle is essential to the existence of order in society. It has never been questioned by any jurist to my knowledge."

ctions clearly demonstrate the strength of the pre-
favor of the constitutionality of legislative enact-
under construction. How absolutely, then, must
establishing the right and duty of the public and
to act upon and obey them while in force.

do doctrine is exotic, and was ingrafted upon the
ter of policy and necessity, to protect the interests
e and individuals, where those interests were in-
e official acts of persons exercising the duty of an
t being lawful officers. It would be unreasonable
e public to inquire into the title of an officer, or
to show title, and these have become settled prin-
c. To protect those who deal with officers appar-
g office under color of law, in such manner as to
public in assuming that they are officers and in
them as such, the law validates their acts as to
and third persons, on the ground that as to
though not officers *de jure*, they are officers in fact,
public policy requires to be construed as valid.
t because of any character or quality conferred
cer, or attached to him by reason of any defective
ppointment, but as a name or character given to
the law for the purpose of making them valid.
e is thoroughly established, and, as said in State
3 Conn. 449, 9 Am. Rep. 409: "If you find a man
e duties of an office, under such circumstances of
reputation or otherwise as reasonably authorize
tion that he is the officer he assumes to be, you
to or employ him without taking the trouble to
his title, and the law will hold his acts valid as to
ing him to be, so far forth, an officer *de facto*."
e, if any, judicial conflict as to the existence, scope
g of the *de facto* doctrine. Hence the discussion
oint has been general, and confined to the reasons
duction of the doctrine.

we advance a step and come to the vital issue:
e a *de facto* officer without a *de jure* office? Upon
urts of the highest character differ. The question
is state, but not without precedent elsewhere. It
comes our care to meet the issue, and apply the
erlying the birth of the *de facto* doctrine, in an
uce a rule applicable to the case at bar. Generally
e *de facto* doctrine has been applied to a *de facto*
e *jure* office—that is, an office existing by virtue of
or statute. In this case, however, the statute
the creation of the office and the appointment of a
ney to fill it has been declared unconstitutional,
ot a *de jure* office in the sense here used.

Was, then, the incumbent of this office, who appeared in the grand jury room and administered the oath to the de facto officer so that his executed acts became binding on the state, the public and individual, who had occasion to deal with him in his assumed capacity? Upon this question appear two distinct, well-defined lines of decision, each equally opposed to each other. Follow one or the other. Follow either we may. Our ²³¹ concern is to discover which the better coincides with the reason for, and the basis of, the de facto doctrine.

And we may say here, before proceeding to a discussion of these cases, that we are unable to discover any reason, for declaring an officer to be de facto, whether he occupies a de facto or de jure office, if he has occupied it with the insignia of a de facto officer. The authorities are divided on the point that the de facto doctrine was invented to deal with causes, not with offices. The effects only can be reached. The official acts are accomplished. If the office is the same, alike, it is immaterial that the causes differ. Whether the officer, whether from a de jure or de facto office, are alike, the acts of the officer occupying either position should be declared de facto.

The court is of the opinion that an office created by the legislature should be treated as de jure, unless otherwise declared by a competent tribunal. It is certain that, under the great weight of authority as established by our own court, the presumption in favor of the constitutionality of a statute is so binding that the public and individuals are bound to treat it as valid. Hence, it follows that the public and individuals are compelled, by judicial construction, to assume, toward a legislative enactment, precisely the same attitude, whether it be constitutional or unconstitutional. It also appears that the very object of introducing the de facto doctrine is to protect the public and individual, in dealing with a public officer, who assumes to occupy an office without authority they are bound to respect. These are the circumstances involved in the case before us. To the state and the individual, the special attorney was the representative of the state to the extent of his powers. He was so recognized by the executive and legislative departments of the state, and so recognized by the courts. He compelled the public and individual to acknowledge his authority. The public and individual upon him to enforce the law. Individual liberty to submit to the administration of his office. Judicial records of their own records show that fines have been imposed and imprisonment inflicted by the courts upon persons who refused to submit to his office. If it is possible to find a case presenting reasons for ²³² applying the de facto doctrine, we are unable to discover it. Can it be possible that an

en indicted, under precisely the same conditions in indictment before us was found, if tried, convicted, cannot plead that he has once been put in

The very object of the de facto doctrine is to say and so plead and be protected from any further prosecution on the ground that he had a right to regard the office, and his administration of the office as legal. And it were further observed that the de facto doctrine has been held, on the ground that the public and the individual are to presume the legality of official acts. But here the public and the individual had no choice, but were compelled to recognize the office and the officer. Under the circumstances of this case we do not hesitate to declare that the special attorney should be regarded as de jure until declared, and not as invalid ab initio. Not only so, but upon authority, this should be done. A fair statement of the rule laid down in *Eames v. Savage*, 77 Me. 212, 1881, p. 751, *Soper v. Lawrence*, 98 Me. 268, 99 Am. St. 56 Atl. 908, and *State v. Carroll*, 38 Conn. 449, 9 1909, sustain this conclusion. The weight of authority supports it, as a brief analysis of the two leading opinions referred to will sufficiently show.

On this issue whether there can exist a de facto officer of a de jure office, Justice Field, in *Norton v. Shelby*, 18 U. S. 425, 6 Sup. Ct. Rep. 1121, 30 L. ed. 178, in his majority opinion, adopted without division, seeks to establish the negative of the question, and Chief Justice Gummere in *Lang v. City of Bayonne*, 74 N. J. L. 455, 122 1901, p. 391, 68 Atl. 90, 15 L. R. A., N. S., 93, 12 Ann. 1901, an equally elaborate opinion, also adopted without division, holds the affirmative. Justice Field states the de facto doctrine practically as above defined, and then proceeds to state that the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to say that an officer who holds no office, and a public office which is not an office, but only by force of law. . . . Their [counsels'] position is that a legislative act, though unconstitutional, may in fact create an office, and nothing further than its apparent validity is necessary to give validity to the acts of its assumed officer. . . . ²³³ It is difficult to meet it by any argument. . . . This statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as if it had never been passed."

Justice Gummere declares precisely the opposite: "A law creating an office with prescribed duties has the force of law and is not to be condemned as unconstitutional by the courts, and at the same time the incumbent is an officer de facto, and his

acts are as potent, so far as the public is concerned, as acts of any *de jure* officer."

In attacking the reasoning of Justice Field he notwithstanding the great weight which the opinion distinguished a jurist carries with it, notwithstanding *State v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 178, ed. 178, has been frequently cited with approval in dictations, I am unable to accept as sound the doctrine which it is rested, namely, that an unconstitutional act *ab initio*, and affords no protection for acts done under its sanction."

It is interesting to note in analyzing these two lessons that each eminent jurist seeks to trace the source of the doctrine to the same source—*State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409. Each expresses his regard for the great ability of the opinion, and each cites it as authority. But it seems to me the whole intention of this masterly résumé by Chief Justice Butler is in support of the contention declared in *Lawrence v. Bayonne*, 74 N. J. L. 455, 122 Am. St. Rep. 391, 15 L. R. A., N. S., 93, 12 Ann. Cas. 961. Chief Justice Butler defines an officer *de facto* under four heads, only the first of which is apposite, as follows: "An officer *de facto* is one who acts, though not those of a lawful officer, the law, the principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons. second, where the duties of the officer were exercised, fourth, under a color of election or appointment by or pursuant to a public law, or constitutional law, before the same is adjudged to be such." Chief Justice Field interprets this last definition as follows: "One of the number of cases cited by the chief justice, none recognize anything as a *de facto* office, or speaks of a person as an officer, except when he is the incumbent of a ²³⁴ *de facto* office. The fourth head refers not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to the office legally. That such was the meaning of the chief justice is evident from the cases cited by him in support of the last proposition, some of which reference will be made."

Chief Justice Gummere meets this interpretation of the *Carroll* case is admittedly a leading one upon the question of what is essential to constitute a person an officer. It is referred to by Justice Field as 'a law of the law,' 'an elaborate and admirable statement of the law,' and no one can read it without concurring in this upon it. The chief justice having first declared that an officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and of third persons, where the duties of the officer

er color of an election or appointment by or pursuant to public unconstitutional law before the same is to be such,' refers to numerous cases, the reasoning, in his judgment, supports this proposition. And, perceiving that this statement of what constitutes *de facto*, if accepted as broadly as it is made, against the conclusion which he himself reached, that none of the cases cited by Chief Justice Buttzes such a thing as a *de facto* office, or speak of a *de facto* officer except when he is the incumbent *jure officio*.' Chief Justice Butler did not recases which he cited as decisions upon the very placed in his proposition, but merely for the purviewing that by their reasoning they supported it." clear, unambiguous and comprehensive quotation constitutes an officer *de facto* and the force of his used "according to the common meaning of the seems a sufficient answer to Justice Field's independent of the judgment of so eminent a jurist of Justice of New Jersey. But further analysis of case will conclusively show that Chief Justice in his interpretation of the opinion is accurate. It observed that *Brown v. O'Connell*, 36 Conn. 432, 489, was a case to the effect that a law passed by ure cannot have color of authority unless it appears *facie* to be law, and that it cannot so appear if it is manifestly repugnant to the constitution. This case present the precise point involved in this discussion, whether an act of the legislature is to be regarded as valid until it is otherwise declared, or whether it is inoperative upon the public and the individual to determine its constitutionality; and, if they neglect to do so, or are in error in their conclusion, whether they must act under the law at their peril. Justice Field says that if they improperly interpret such an act, or act under it without attempt to construe it, "it affords no protection; it is not an office; it is, in legal contemplation as inoperative as if it had never been passed." Now, Chief Justice in discussing *Brown v. O'Connell*, 36 Conn. 432, 489, says: "The inferences to be drawn from the assumptions necessarily are that a manifestly unconstitutional law is without any force whatever, and that it is manifestly unconstitutional or not, and whether it has the appearance and force of law or not, are questions for the private judgment of the citizen." This is precisely what Mr. Justice Field claims to be the law. But Chief Justice goes on and absolutely negatives this position: "If these assumptions were true, they would apply to this case; but they are all novel impressions and

fundamentally erroneous." But this is not all. It proceeds to positively enunciate the rule which not only confirms the conclusion of Justice Field, but is precedent for the doctrine asserted in *Lang v. Bayonne*, 74 N. J. L. 455, 122 Am. St. Rep. 391, 68 L. R. A., N. S., 93, 12 Ann. Cas. 961, and for the rule at which we arrive. "Every law of the legislature repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It is to be questioned at the bar of private judgment, and, if unconstitutional, resisted, but must be received and obeyed as to all intents and purposes as law, until questioned and set aside by the courts. This principle is essential to the existence of order in society." Then, to remove any doubt as to his meaning, he specifically applies the principle to the office itself. "If, then, the law of the legislature creates an office ²³⁶ and provides an officer to perform its duties must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an act provided had no color of authority." A casual reading is conclusive that it is the act creating the office "that gives it the force of law." There can be no reasonable doubt that the great authority of the *Carroll* case sustains the conclusion of this opinion that there may exist a *de facto* office as well as a *de facto* officer. The *Lang* case in discussing the question attempted to be made between a *de facto* and *de jure* office fully confirms our view. "But this, it seems to me, is a verbal distinction. The fact remains that the acts of an incumbent of such so-called offices are as potent, so far as the public is concerned, as are the acts of any *de jure* officer who performs a duty of a legally existing office. In my opinion the same public policy which requires obedience from officers to the provisions of the public statute which creates the municipality, and provides for its government, even if unconstitutional, so long as it has not received judicial condemnation, equally justifies obedience to every other officer the legislature has seen fit to enact, until such has been judicially decided to be invalid."

It may be said that the office of special attorney in this case before us was not created by the legislature itself, but the authority conferred by the legislature upon the officer. But we confess our inability to indulge in the hypercritical refinement necessary to make any distinction either way for this reason. As bearing upon the question herein considered, no reference may be had to *Brown v. Lunt*, 37 Me. 423; *Gordwin*, 48 Me. 79; *In re Ah Lee*, 6 Saw. 410, 5 L. R. A.; *Leach v. People*, 122 Ill. 420, 12 N. E. 726; *Gregg v. Jamison*, 55 Pa. 468; *Diggs v. State*, 49 Ala. 31; *State v. Baker*, 8 Paige, 428; Cyc. 29, 1389; and also the

ed in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep.
v. City of Bayonne, 74 N. J. L. 455, 122 Am. St.
 88 Atl. 90, 15 L. R. A., N. S., 93, 12 Ann. Cas. 961.
 measure of reason and the great weight of authority
 ents for applying the *de facto* doctrine to the case

ons overruled.
 nt for the state.

Appointed Under Authority of a Statute to fill an office
 by is at least a *de facto* officer, whose acts, performed
 to a judicial declaration that the statute is unconstitu-
 valid so far as they involve the interests of the public
 persons: *Lang v. Bayonne*, 74 N. J. L. 455, 122 Am. St.
 Compare, however, *King Lumber Co. v. Crow*, 155 Ala.
 n. St. Rep. 65; *Herrington v. State*, 103 Ga. 318, 68 Am.
 ; and see *Ex parte State*, 142 Ala. 87, 110 Am. St. Rep.

be a De Facto Officer, Though No De Jure Office exists,
 to municipal corporations or *de facto* courts: *State v.*
Minn. 138, 130 Am. St. Rep. 592. But see *In re Norton*,
 , 91 Am. St. Rep. 255.

visions of a Solemn Act of the Legislature, so long as it
 eived judicial condemnation, are as binding upon the cit-
 en judgment of a court rendered against him, and remain-
 ed: *Lang v. Bayonne*, 74 N. J. L. 455, 122 Am. St. Rep.
 e *Bonnett v. Vallier*, 136 Wis. 193, 128 Am. St. Rep. 1061.

VERMEULE v. YORK CLIFFS IMPROVEMENT COMPANY.

[105 Me. 350, 74 Atl. 800.]

SURETYSHIP.—In Order for a Surety to Maintain an Action
 principal, it is necessary for him to prove that he has
 bt or discharged the principal for the amount which he
 cover. (p. 555.)

SURETYSHIP.—When a Surety Either Pays the Debt for
 as become liable, or extinguishes it so that it is no longer
 nt the principal, the law implies a promise on the part
 cipal to reimburse the surety for the amount paid. (p.

SURETYSHIP.—A Deposit by a Surety of Money in Court in
 a judgment against him may be regarded as a discharge
 lity of the principal pro tanto so as to entitle the surety
 om the principal. (p. 556.)

F. & Leroy Haley, for the plaintiff.

C. Yeaton, for the defendant.

EAR, J. This is an action brought by Cornelius
 le against the York Cliffs Improvement Company

to recover the sum of \$5,694.01 for so much money by the plaintiff for the use and benefit of the corporation. The plaintiff is a resident of the state of New Jersey and John D. Vermeule is a resident of New Jersey. The defendant is a domestic corporation of the state of New Jersey. The writ contains the common counts for money paid and expended with an account annexed of the following items: "York Cliffs Improvement Company, to Cornelius Vermeule, Dr.

"To money paid August 1, 1906, as surety on bond dated the 24th day of November, 1897. \$5,694.01

The facts upon which this plaintiff seeks to recover are these: The York Cliffs Improvement Company received from its use the sum of \$10,000, for which sum on November 18, 1897, it executed and delivered a demand note payable to the order of John D. Vermeule. Upon the note is the following indorsement: "This note is given to be held by John D. Vermeule as collateral security for moneys to be advanced by him to York Cliffs Improvement Company to pay its outstanding bills payable, accounts payable and other expenses." Then appears the further indorsement: "I, John D. Vermeule, assume liability for all money to become due on this note secured by this note to the extent of 11-27 of the entire sum of \$10,000." C. C. Vermeule." There is another indorsement on the note of similar import, but immaterial in the disposition of this case.

Now, it appears that John D. Vermeule, having made payments upon the note whereby C. C. Vermeule became liable upon his contract, on the twenty-fourth day of September, 1901, brought suit in the supreme court of the state of New Jersey against him for his proportion of the amount of the judgment. On the twelfth day of June, 1906, John D. Vermeule obtained judgment against C. C. Vermeule upon which execution was issued and delivered to the sheriff for levy.

³⁵³ Prior to the date of this judgment, C. C. Vermeule had filed a bill in equity in the court of chancery of the state of New Jersey wherein he claimed, among other things, that John D. Vermeule had been, and was, a copartner with himself; that their final accounts had never been settled, and praying for an accounting and settlement of their copartnership affairs. This bill was pending when the judgment and execution were issued.

Upon the rendition of the judgment at law C. C. Vermeule, the defendant in that suit, filed in the equity suit as plaintiff, a prayer for an injunction to restrain the collection of the judgment and the levying of the execution, whereupon he was required by decree of the court to deposit with it the sum of money due upon the execution, to be held to await the determination of the bill and

the court. The deposit was made by C. C. Vermeule, required, and, at the date of his writ in the present against the defendant corporation, the bill had not been returned and no further order had been made, the deposit still remaining in the custody of the court. Upon the deposit C. C. Vermeule took the following

Upon the said C. C. Vermeule did pay and deposit the sum of \$5,694.01, as appears by the record of the said court, as follows:

“In Chancery of New Jersey.

“Cornelius C. Vermeule, Complainant,
and

“John D. Vermeule et al., Defendants.

etc.

And, this first day of August, one thousand nine hundred and six, of Cornelius C. Vermeule, through McEnglish, his solicitors, the sum of five thousand and ninety-four dollars and one cent (\$5,694.01), amount due at this time from the said Cornelius Vermeule, complainant above named, to John D. Vermeule, defendant, upon a judgment ³⁵⁴ obtained in the supreme court on the twelfth day of June, nineteen hundred and six, in a case therein pending, wherein John D. Vermeule was plaintiff, and the said Cornelius Vermeule was defendant.”

It is stated of facts the plaintiff in the present action that the case shows a complete discharge of the company for that proportion of the defendant's which he became surety. On the other hand, the plaintiff claims that inasmuch as the bill in equity has not been determined and no further order of the court regarding the disposal of the deposit, the defendant's liability upon the note is not discharged, since it says the plaintiff received, and does not have any possession, use or control of, the amount deposited or any part thereof.

It is settled in this state that in an action by a surety principal it is necessary for the plaintiff to prove that the principal paid the debt or discharged the principal for which he seeks to recover, in order to maintain the action. See *Ingalls v. Dennett*, 6 Me. 79; *Emery v. Hobson*, 16 Am. Rep. 513; also, *Davis v. Smith*, 79 Me. 55. When, upon such a contract, in which the plaintiff is liable, the surety either pays the debt for which the plaintiff is liable or extinguishes it so that it no longer is a debt of the principal, the law implies a promise on the part of the principal to reimburse the surety for the amount

• paid. Therefore the sole question in the case at bar is whether the plaintiff paid the debt for which he became surety. His act extinguished it as a liability of the principal.

We are of the opinion that, upon the facts reported, the defendant company is discharged of its liability upon the note to the amount paid into court by the plaintiff. The plaintiff has paid the note pro tanto. The facts clearly show that in the equity court no question whatever is raised as to the validity of the judgment against C. C. Vermeule as surety upon the note of the defendant corporation. No question is made that the amount so paid was counted for in payment of the judgment. C. C. Vermeule's receipt for the deposit unquestionably concedes the validity of the judgment and the amount due upon it. ³⁵⁵ Specifically says, "Being the amount due at the time of the judgment . . . to John D. Vermeule . . . upon a judgment sustained in a New Jersey supreme court," etc.

The defendant, however, upon the effect of the judgment, presents the issue precisely as we understand it. "This necessarily implies that the money thus paid must have been so paid must have passed completely beyond the control of, and the possibility of any return to, the plaintiff, and at the same time must have passed into the hands of the defendant for the use and benefit of, the defendant. What has occurred? Has either the plaintiff or the defendant with his money or defendant thus received it, for the use and benefit? Neither. Non constat yet what would have been the money."

We are unable to agree with the defendant's position. We see no way in which the judgment against John D. Vermeule can be attacked. We regard the payment into court as a deposit for the payment of a judgment which is conclusive upon C. C. Vermeule as if he had paid the judgment upon the execution. The only difference between the deposit and such payment being, that the money paid on the judgment of John D. Vermeule may be distributed according to the decree of the equity court, but as to the effect of the latter. The fact that this money may, by order of the court, be paid to the creditors of John D. Vermeule, or to C. C. Vermeule in the settlement of his partnership affairs, in no way changes the effect of the judgment against C. C. Vermeule, as a payment by him as surety upon the defendant's note. We think it appears, as a matter of law, that the plaintiff has paid the amount of money, for which he seeks to recover, and is fully discharged from liability upon the note to the extent of such payment. The entry, therefore, should be amended for the plaintiff for \$5,694.01 and interest thereon from August 1, 1906.

SURETIES' CAUSE OF ACTION AGAINST THE PRINCIPAL BECOMES PERFECT AND ENFORCEABLE.*

Action of Action at Law in Favor of Surety.

Promise Implied from Payment of Principal Debt by Surety, 557.

Necessity for Surety to be Legally Liable for the Debt, 559.

Whether Suit or Demand is Necessary Before Payment, 561.

Necessity for Payment to have Been Actually Made by the Surety, 561.

Effect Where Debt is Paid by Giving of Note or Other Obligation, 561.

Effect Where Debt is Paid Before Maturity, 563.

Effect Where Debt Barred by Limitations is Paid by Surety, 564.

Effect of Code Remedies on Common-law Remedies, 565.

Action of Action in Equity in Favor of Surety.

Distinction Between Action Based on Implied Promise and Right of Subrogation, 566.

Available Rights of Surety as Against Principal, 566.

Right of Surety to Compel Principal to Pay the Debt, 568.

Accrual of Action at Law in Favor of Surety.

Promise Implied from Payment of Principal Debt by Surety.

Established rule of law that a cause of action based upon a promise on the part of a principal to reimburse his surety for any loss sustained by the latter by reason of his surety in favor of the surety immediately upon his payment of the principal: *Sandoval v. United States Fidelity etc.*, 100 Pac. 816; *Snider v. Greathouse*, 16 Ark. 72, 63 Am. Rep. 109; *Hone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272, 23 Pac. 425; *Ryland v. Commercial etc. Bank*, 127 Cal. 525, 19 Am. St. Rep. 9; *Ritenour v. Mathews*, 42 Ind. 7; *Wilson v. Crawford*, 189; *Johnston v. Belden*, 49 Iowa, 301; *Kimble v. Cummins*, 189; *May v. Ball*, 108 Ky. 180, 56 S. W. 7; *Nally v. Long*, 189; *Appleton v. Bascom*, 3 Met. 169; *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358, 11 N. W. 196; *Kimmel v. Lowe*, 189; *665*, 9 N. W. 764; *Rucks v. Taylor*, 49 Miss. 552; *Hall-Carter*, 55 Mo. 435; *Keys v. Keys' Estate*, 217 Mo. 48, 116 Mo. 48; *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Wood v. Co. Bank*, 9 Cow. 206; *Blanchard v. Blanchard*, 61 N. Y. 497, 113 N. Y. Supp. 882; *Zuellig v. Hemerlie*, 60 Ohio 189; *Am. St. Rep.* 707, 53 N. E. 447; *Peters v. Barnhill*, 1 Hill, 189; *Hall v. Hudson*, 9 Yerg. 57; *Saunders v. Ireland*, 87 Tex. 271; *McGregor v. Hudson (Tex. Civ. App.)*, 30 S. W. 271; *Severance*, 55 Vt. 300; *Cromer v. Cromer's Admr.*, 29 Vt. 300; *Gray v. McDonald*, 19 Wis. 213.

***REFERENCES TO MONOGRAPHIC NOTES.**

by surety to compel principal to discharge his obligation: 117 Am. St. Rep. 35.

Subrogation: 12 Am. St. Rep. 506.

Liability and effect against a surety of a judgment against his principal: 12 Am. St. Rep. 760.

if any, a creditor owes to a surety: 115 Am. St. Rep. 85.

Effect of guaranty: 105 Am. St. Rep. 502.

Distinction between different sets of sureties: 70 Am. St. Rep. 443.

Right of one surety to enforce contribution from another and the remedies available: 10 Am. St. Rep. 639.

Upon such a payment of the principal debt by the becomes a simple contract creditor of the principal: Bailey, 23 Miss. 284; Bledsoe v. Nixon, 68 N. C. 521. making such payment the surety is entitled to maintain the law action of indebitatus assumpsit for money paid: (State, 55 Md. 192; Powell v. Smith, 8 Johns. 249. Or a frequently declared, under such circumstances the surety is maintain an action against the principal for money paid of such principal: Martin v. Ellerbe's Admr., 70 Ala. 3 Wright, 23 Ark. 530; Chipman v. Morrill, 20 Cal. 13 Bishop, 133 Cal. 574, 65 Pac. 1094; Ward v. Henry, 5 Co. Am. Dec. 119; Clerman v. Murphy, 34 Ill. App. 633; Paris, 57 Ind. 151; Rizer v. Callen, 27 Kan. 339; Smith v. 5 Greenl. 504; Gibbs v. Bryant, 1 Pick. 118; Ferguson v. Carson's Admr., 86 Mo. 673; Lord v. Staples, 23 N. H. 4 v. Wilson, 7 Cow. 662, 17 Am. Dec. 532; Bonney v. Seel 481; Hodges v. Armstrong, 14 N. C. 253; Zuellig v. Hemer St. 27, 71 Am. St. Rep. 707, 53 N. E. 447; Poe v. Dixon St. 124, 71 Am. St. Rep. 713, 54 N. E. 86; Hill v. Voorh 68; Lane v. Keith, 2 Baxt. 189; Miller v. Zeigler, 3 Utah 518; Hulett v. Soullard, 26 Vt. 295; Nutter v. Syden W. Va. 535, Lee's Exrs. v. Virginia etc. Bridge Co., 18 V Thus, in the principal case, it was declared that where, u tract of suretyship in which the principal is liable, the su pays the debt for which he has become liable or extingui that it no longer is a debt against the principal, the law promise on the part of the principal to reimburse the sur amount paid: Vermeule v. York Cliffs Imp. Co., 105 Me. p. 553, 74 Atl. 800. The implied promise of a principal to his sureties is regarded as made to them jointly and sev when they jointly pay the money they are entitled to joint action for reimbursement: Appleton v. Bascom, 3 Where a surety is sued alone, he may notify the principal his suit, and upon the failure of the principal to indemnify defend, the surety, upon paying the judgment against him in the absence of fraud, recover the amount paid from the whether the principal was actually liable or not: Dampsk skabet Habil v. United States Fidelity etc. Co., 142 A South. 54. One of several defendants in an action on a note, who is found to be a surety, may take an assignment judgment therein recovered and enforce it by the issuance against his principal, without the necessity of a separate to establish the relation of principal and surety between Nelson v. Webster, 72 Neb. 332, 117 Am. St. Rep. 799, 411, 68 L. R. A. 513. And where there is an agreement entire debt evidenced by notes maturing at different times who pays one of the notes is entitled to maintain an action the principal debtor for the installment so paid without until the whole indebtedness is paid: Nettleton v. Ramsey etc. Co., 54 Minn. 395, 40 Am. St. Rep. 342, 56 N. W. also, where the surety on a note paid a part thereof, he maintain an action against the maker for the amount so paid v. Century Sav. Bank (Iowa), 120 N. W. 308. The fact payment made by the surety was on a judgment obtained

the principal debtor, and that he could, under the statute against the principal by an execution, will not prevent bringing an action for reimbursement: *Kimmel v. Lowe*, 28 9 N. W. 764. The statute of limitations against a suit for reimbursement does not run from the time when it is due, but from the time when the surety paid it: *Blanchard*, 61 Misc. Rep. 497, 113 N. Y. Supp. 882. The creditor of a surety who pays the debt may maintain an action in his own name against the principal: *Mowry v. Adams*, 14

The surety cannot recover from the principal because of his suretyship on a note before it is due and paid by him: *Shores*, 11 La. 416. The cause of action in favor of a surety on a note against his principal is not on the note itself but on the implied promise on the part of the principal to reimburse him. His cause of action arises when he pays the note: *Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115, 67 Pac. 115; *Johnson*, 115 Ind. 308, 17 N. E. 573; *Blake v. Downey*, 14 Nev. 191; *Holliman v. Rogers*, 6 Ind. Ter. 187, 47 S. W. 316; *Stratton v. Heuser*, 19 Ky. 1019, 42 S. W. 1133; *Bay View Brewing Co. v. Tecklenburg*, 469, 53 Pac. 724.

Highlands, 32 Ind. App. 104, 69 N. E. 266, the court held that "While a surety upon a promissory note assumes liability for the payee from the time of executing the note, yet until he is compelled to pay the debt, or has sustained some loss on account of his suretyship, he has no cause of action against his principal on the ground that he is bound as surety, and liable to pay the debt, even though the principal be insolvent, and unable to discharge the debt, or any part of it. His right of action against his principal is not founded upon the note, but upon the implied obligation of the principal to indemnify him for his loss as such, to which his recovery must be limited."

Necessity for Surety to be Legally Liable for the Debt.—The surety, however, is under some legal obligation to pay the debt, and the implication of a request on the part of the principal for him to pay it and an implied promise to reimburse the surety for his payment will not arise: *Kimble v. Cummins*, 3 Met. 327; *Prescott*, 15 Gray, 335. Thus a payment made by a surety on a promissory note, which makes the payment a voluntary one, creates a cause of action against the principal even though the surety mistakenly believed himself liable: *Bancroft v. Abbott*, 3

So, also, where the surety who, knowing facts which would charge him or his principal, nevertheless pays the debt, he cannot recover from the principal: *Noble v. Blount*, 77 Mo. 235. And where the surety is not legally bound at the time the surety makes the payment notified by the principal not to pay, he cannot recover from the principal: *Smith v. McGehee*, 14 Ala. 404. Where the surety pays the debt, he must be legally bound for it, for if not so, or if, having been legally bound, he had been discharged of his obligations, the payment would be a voluntary one, and he cannot recover the money so paid.

any more than one not a surety could recover money voluntarily in the discharge of the debt of another person. And at the payment, it must also appear that the principal himself had a legal obligation to pay, for if not so, or if he then had no obligation to make the payments or to do something else, the surety's payment is a mere voluntary payment vary the rights of the principal upon him any greater or different obligation than that which he was under at the time the payment was made: *Hollinsbee v. Ind.* 261. A surety on a usurious note who voluntarily pays it, changing its character, is not entitled to recover from the principal for such payment: *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 101, 10 W. 534; *Jones v. Joyner*, 8 Ga. 562. But where the surety is the actor of a note paid by a surety thereon was not known to the maker had previously made payments thereon, he is entitled to recover from the principal the payment made: *Moncure v. Dermody*, 103 Mass. 345, 10 L. ed. 193. In an early case in Massachusetts it was held that mere knowledge on the part of the surety of the usurious character of the obligation before payment would not preclude the surety from recovering from the principal, although it was said expressly that the principal to the surety not to pay it would have been the creation of a cause of action in favor of the surety by reason of the payment: *Ford v. Keith*, 1 Mass. 139, 2 Am. Dec. 4.

A judgment against the surety is prima facie evidence of the liability of the principal of the amount which the latter is liable to pay. It is not conclusive: *Knickerbocker v. Wilcox*, 83 Mich. 200, 21 A. 2d 595, 47 N. W. 123. Where a surety pays a judgment against the principal under legal compulsion, he may sue for reimbursement. If the judgment could not have been enforced against the principal, the cause dormant as to him for more than a year: *Reed v. State*, 69 Kan. 155, 76 Pac. 390. In an action brought by a surety against the principal, the latter is estopped from questioning the validity of the undertaking, which was one given upon an appeal, which has been accepted and received as valid by the parties to it: *Bates v. Merrick*, 2 Hun, 568. By requesting the surety to pay the obligation, or assenting thereto, the principal precludes himself from setting up as against the surety defenses which he might have had. Thus, in a Massachusetts case it was said: "It appears that the plaintiff paid the amount of his bond to the bank without the assent of the defendant, and the court instructed the jury that if he made this payment without the assent of the defendant, he must show that he was not liable; but if he procured her assent, and made the payment in good faith upon that assent, she could not put the plaintiff to proof that he was legally liable; to which the defendant excepted. This was a correct, accompanied, as it was, with the further instruction that the plaintiff should inform the defendant of all facts known to him at the time of acting upon his liability. The plaintiff had only a nominal interest in the question of his liability on the bond. The defendant was the real party interested in this question. It was her right to request the judge whether any defense should be made to the claim or not. After she had requested him to pay, or assented to his doing so, he could not properly defend against the claim. If he did so, he would be at his own risk and expense, and he could not recover from the defendant any of the expenses of such unauthorized defense. It was the right of the defendant to act upon her assent, and pay the claim without further proof."

was made at her request, and she is liable for the and cannot defend upon the ground that there was a claim of the bank which she neglected to make before Tapley v. Martin, 116 Mass. 275.

Suit or Demand is Necessary Before Payment.—When of principal and surety exists between the parties, a act to the surety to pay is not necessary to authorize ge the obligation and to give him a right of action for aid. It is not necessary for the surety to wait until a brought against him, or until a judgment has been ob- paying the obligation. He may pay at once when the matured: White v. Miller, 47 Ind. 385; Hollinsbee v. d. 261; Hazleton v. Valentine, 113 Mass. 472; Odlin v. H. 270; Williams' Admrs. v. Williams' Admrs., 5 Ohio, y may maintain his action to recover from the principal y him on the principal debt without showing a previous principal: Collins v. Boyd, 14 Ala. 505; Sikes v. Quick, The right of action which accrues to the surety from of a portion of a judgment recovered against his prin- principal debt commences from the time of the payment: wford, 47 Iowa, 469. A surety whose liability is fixed may pay at once without execution: Stallworth v. a. 505. But in an early case in Louisiana it was held existed in favor of a surety who paid a note without d without informing the principal debtor. The note as originally given without consideration and the facts s making were known to the surety: Gates v. Renfroe, 9.

ay for Payment to have Been Actually Made by the action at law by the surety against his principal for it is, of course, essential that he show that he has eipal debt or discharged the principal for the amount s to recover in order to maintain his action: Vermeule Imp. Co., 105 Me. 350, ante, p. 553, 74 Atl. 800; Bannon La. Ann. 105; Elwood v. Deifendorf, 5 Barb. 398; Ellis rn Land Co., 108 Wis. 313, 81 Am. St. Rep. 909, 84 N. e, this rule follows that before the surety can maintain nst the principal on the implied obligation of the latter im, he must first have paid the debt or suffered a loss his suretyship: Landrum v. Brookshire, 1 Stew. (Ala.) v. Farrow (Ala.), 40 South. 53; Jefferson v. Tunnel, ; Shepard v. Ogden, 3 Ill. 257; Bennett v. Buchanan, nison v. Soper, 33 Iowa, 183; Ingalls v. Dennett, 6 yrt v. Wilkinson, 10 Pick. 31; Hearne v. Keath, 63 Mo. mes, 104 Mo. 91, 15 S. W. 965; Minick v. Huff, 41 Neb. 795; Ponder v. Carter, 34 N. C. 242; Bullard v. Brown, Atl. 422; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100; h, 1 Wash. C. C. 278, Fed. Cas. No. 11,161. And where action against the principal is based on a count for will not be sufficient to show a discharge of the obli- e other manner: Butterworth v. Ellis' Admr., 6 Leigh,

There Debt is Paid by Giving of Note or Other Obliga- weight of authority the rule is declared that where a Rep., Vol. 134—36

surety gives to the creditor his own negotiable note in payment of the principal debt and the note is so received by the creditor, it is regarded as a payment in money and the surety may sue the principal for the amount as money paid: *Neal v. Smith*, 4 Ark. 506, 38 Am. Dec. 42; *Bray v. Cohn*, 7 Cal. App. 893; *Flannagan v. Forrest*, 94 Ga. 685, 21 S. E. 712; *Hansen v. Sapp*, 25 Iowa, 364; *Sapp v. Aiken*, 68 Iowa, 699, 28 N. W. 100; *Stickney*, 14 Allen, 255; *Lord v. Staples*, 23 N. H. 44; *Deifendorf*, 5 Barb. 398; *Enos v. Leach*, 18 Hun, 13; *Patton*, 2 Baxt. 436; *Boulware v. Robinson*, 8 Tex. 327, 117; *Whipple v. Briggs*, 28 Vt. 65; *Prescott v. Newell*, 3

But in *Pitzer v. Harmon*, 8 Blackf. 112, 44 Am. Dec. 112, the court said: "We think it somewhat unsafe to establish the rule that a surety who has discharged the debt of his principal by giving him a negotiable note in payment of his principal debt, and the surety may turn round and sue him for money which he has paid, and perhaps may never pay." So, also, in *Romine v. Smith*, 59 Ind. 351, it was held that the surety could not maintain an action against his principal by reason of a discharge of the debt by a promissory note until he had actually paid the same. Another case that same court said: "The correct doctrine seems to be that an action, like the present, for money paid will not lie, unless there has been an actual payment of money, or that which is equivalent to payment. In this case there was no payment of money, but there was there anything equivalent to such payment. There were given a note and mortgage given and received in satisfaction of the debt, but that was not sufficient. Had the plaintiff shown that the note thus given and received was negotiable by the law, the case would have required more consideration": *Bennett v. Smith*, 3 Ind. 47.

A distinction is made in cases where the surety gives his own note in payment of the principal debt and where he gives a negotiable note. Thus, in *Stone v. Hammell*, 83 Cal. 541, 52 Rep. 272, 23 Pac. 703, 8 L. R. A. 425, the court in advancing the distinction said: "There is authority, however, and, upon consideration of authority, to the point that if a surety, by giving a negotiable promissory note, satisfies the claim of the creditor and extinguishes the debt of the principal to the creditor, he is discharged from the principal the amount of the debt, without showing that he has paid his promissory note: *Brandt on Suretyship* at sec. 181, and cases cited. But the authorities are not uniform on the subject. In Indiana and North Carolina, and some other States, it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not a payment: *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, 59 Ind. 351, and cases there cited. In other cases hold that if the surety discharges the debt by a note, he can maintain an action against the principal, while in other cases by means of a bond or any non-negotiable instrument. The rule is founded upon the theory that a negotiable note is analogous to a payment, and the distinction which is founded upon no apparent good reason: *v. Robinson*, 8 Tex. 327, 58 Am. Dec. 117; *Peters v. Baughman*, 237 (S. C.). The rule is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had actually paying the money; its weakness lies in the fact that

recovering the whole amount of the principal, and never on note, thus violating the cardinal rule that the surety exonerate out of the principal. But if we assume the rule above stated, it is not so clearly commendable as to go further than adjudicated cases have already carried. Cases to which our attention has been called, the rule forced against the principal in favor only of the surety extinguished the debt to the original creditor."

Boulware v. Robinson, 8 Tex. 327, 58 Am. Dec. 117, and on the subject, the court said: "This distinction between the plaintiff of a bill of exchange or negotiable note, when accepted by a creditor in satisfaction of the defendant's giving of a bond or other security, not negotiable, when in like manner accepted, seems to have been maintained by English and American courts, and must be received as law: 2 Greenleaf on Evidence, sec. 113, and cases cited in 1 on Contracts, 5th Am. ed., 592; 2 Starkie on Evidence, pt. 2, 1060; *Maxwell v. Jameson*, 2 Barn. & Ald. 51; *Scherer*, 10 Barn. & C. 329, 346; *Cumming v. Hackley*, 8 Cornwall v. Gould, 4 Pick. 447; *Morrison v. Berkey*, 7 8. While a discharge of the debt by the surety, in the will enable him to maintain the action for money paid, in the latter will not."

words, where the creditor by express agreement accepts a payment of the principal debt, the original debt is extinguished. It is for the creditor to say when he has received a satisfaction in satisfaction of his debt. The liability of the surety is founded upon a payment or satisfaction by the surety, and the liability of the principal is limited and sustained by reason of his suretyship. If the surety pays depreciated currency or in property, the real value of the debt would be the extent of his loss and consequently of the debt the principal owes to him, unless by express contract the creditor he is subrogated to all of the rights of the latter: *Pay*, 16 Ark. 83.

ly in order to make a note or other like obligation on payment of the principal debt as to give rise to a cause in favor of the surety against the principal, it is necessary to be taken as a satisfaction of the debt by the creditor. "The surety may recover what he has paid to extinguish the debt, and the creditor pays the debt for which he is security, his demand is satisfied. The principal does not become a debtor of the creditor. When the latter pays the debt for which he is liable as soon as the payment is made, then the liability for the first time is fixed in such a manner as to make the principal a debtor for which an attachment may issue must possess a certain character and not be merely possible, and dependent upon an event which may never happen. Therefore, a surety upon a note may institute the proceeding till he has paid the note, or until it is deemed equivalent thereto": *Hearne v. Keath*, 63

Where Debt is Paid Before Maturity.—The mere liability of a surety for another on a note not yet due will not create a cause of action against the principal in favor of the surety: *v. Crocker*, 21 Pick. 241. But the rule appears to be

that a surety may protect himself by settling at any time for the indebtedness for which he was liable. Thus in *Barber v. Gilchrist*, 89, 1 Pac. 452, it was said: "Upon this subject Chief Justice Miller said: 'As to the position taken, that payment before maturity would be essentially voluntary, it is proper to remark that the principle was ruled differently in *Armstrong v. Gilchrist*, 429, where it was held that a guarantee of a note, when the surety promised and paid it for his own indemnity before maturity, the surety was entitled to recover. That a surety is to wait until maturity is extorted of him is not pretended; but it is said that the payment before maturity is necessarily voluntary, and that eventuality is not equivalent to a precedent request. There is no authority to that effect, and it seems not to be defensible on principle. Voluntary payment by a surety take measure of precaution against loss from the circumstances of his principal, and accept terms of payment before the day which may not be obtainable after it. The surety must ultimately have to bear the burden of the debt, and may therefore provide for the contingency by reducing the weight of it by paying before maturity, bound to subject himself to the risk of an action by the creditor has a cause of action. He may, in short, for his own safety, and resort to any measure calculated to assure recovery, which does not involve a wanton sacrifice of the interest of his principal.' *Craig v. Craig*, 5 Rawle, 98; *Williams' Admrs.*, 5 Ohio, 444; *Odlin v. Greenleaf*, 3 N. H. 270; *Wentworth*, 20 Me. 322; *Brandt on Suretyship and Guaranty*, 176, 177. The instructions allowed were in accordance with these views. At the trial, the court overruled an offer of evidence to show that at the time of the assumption of the firm indebtedness by Gillson, neither of the parties contemplated that he should pay the debts immediately. Under the authority of the foregoing cases and other cases to which we have been referred, it was held that whether the indebtedness, as between the parties themselves, was due or not."

In Indiana the surety, if he pays the principal debt before maturity, is not allowed to maintain his action until after its maturity. In *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545, the court held that it is contended by the appellants that, if a surety pays the debt of his principal before maturity, it is a voluntary payment, and he cannot recover from his principal; but this court has decided otherwise. In *White v. Miller*, 47 Ind. 385; *Jackson v. Adamson*, 7 Ind. 177. It is true that if the surety pays the debt of the principal before maturity he cannot maintain an action until the time has expired; but if he is not repaid at that time, there is no reason why he may not sue to recover the amount which he has paid in discharge of the debt."

But where the payee of a note before maturity indorses the note, the surety, whose name appears thereon, the latter becomes a creditor of the rights of the payee, and where the payee could have made an attachment under the code authorizing such procedure, the claim before due under certain circumstances, the surety is entitled to the same remedies: *Danker v. Jacobs*, 79 Neb. 435, 11 Neb. 435.

g. Effect Where Debt Barred by Limitations is Paid.
 "Although the debt may be barred by limitation as against the principal, yet judgment may be entered against the surety if he has paid thereon—in cases where suit may be maintained against

the principal—and if the surety pay the debt which is barred by limitation as against the principal, but is a debt against the surety, such surety may recover against the principal or against his estate in case of his death. The right of recovery of the surety arises when he pays the debt, and not against the original debt itself, but upon the implied contract created by law between the principal and surety in such cases. *Cockrell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; *Pullian*, 7 Baxt. 119; *Maxey v. Carter*, 10 Yerg. 521; *Edson*, 9 Yerg. 57; *Peaslee v. Breed*, 10 N. H. 489, 34 Me. 489; *Crosby v. Wyatt*, 23 Me. 156; *Wood v. Leland*, 1 Met.

If a contrary proposition the defendant in error cites the following authorities: *State v. Blake*, 2 Ohio St. 147; *Dorsey v. State*, 59, and *Anchampanough v. Schmidt*, 70 Iowa, 642, 59 N. W. 805. The authorities cited fairly support the proposition of the defendant in error upon this question, but the weight of authority, as well as sound reasoning, are in favor of the proposition that the surety is discharged if his action is barred as against the principal rests upon the fact that the surety's action is based upon the right to the claim of the payee in the contract, against which this court has held, in the case of *Faires v. Cockerell*, 88 Tex. 190, 639, 28 L. R. A. 528, after a careful review of the authorities on the question: *Willis v. Chowning*, 90 Tex. 617, 28 L. R. A. 842, 40 S. W. 395.

It has also been held that money paid by a surety on behalf of his principal which had become barred by limitation is recoverable from the principal: *Elder v. Elder*, 43 Tex. 600. And likewise where a surety discharged an obligation on which he could have defeated by pleading the statute of limitations, it has been held that he could not, as a creditor of property upon which the principal had executed a mortgage to indemnify him, enforce the mortgage, since the surety has the right to make any defense which the principal could make: *May v. Ball*, 108 Ky. 180, 56 S. W. 7. The principal is held liable in Massachusetts for a payment made on a debt which had become barred by limitations: *Mass. 447*. Where the statute of limitations had run against the surety on a joint note but had not barred the principal, who had made payments on it, a cause of action in favor of the surety against the principal upon the note, even though it be barred as against him, since the principal is liable on the note cannot complain that the surety himself of the plea of limitations: *McClatchie v. Durbin*, 435, 7 N. W. 76.

Code Remedies on Common-law Remedies.—The remedy in the code in favor of a surety against his principal is cumulative and does not exclude him from availing himself of the statute for his indemnification as are given him by the common law. *Stallworth*, 56 Ala. 481; *Harris v. Harris*, 92 Ill. 481; *Glidewell*, 23 Ind. 219; *Joyce v. Joyce's Admr.*, 56 Mo. App. 388; *Merchants' Trust Co. v. Opera House Co.*, 23 Mont. 33, 75 Am. St. 445, 45 L. R. A. 285; *Drexel v. Pusey*, 57 Neb. 30,

77 N. W. 351; Peebles v. Gay, 115 N. C. 38, 44 Am. S. 20 S. E. 173; Hill v. King, 48 Ohio St. 75, 26 N. E. 98; Sayward, 10 Wash. 422, 39 Pac. 119.

II. Accrual of Action in Equity in Favor of Surety

a. Distinction Between Action Based on Implied Right of Subrogation.—On the payment of the principal surety a new and distinct debt is created as between principal and surety for money paid: *Townsend v. Sullivan*, 3 Cal. 84 Pac. 435. The action at law by a surety to recover from principal the amount of money which he has been compelled to pay on account of the debt is not based on the doctrine of subrogation and hence the principles applying to the latter class of actions are not applicable to such an action: *Denny v. Sayward*, 10 W. Va. 119 Pac. 119. The right of the surety to recover from the principal the amount paid by him on the principal debt arises at once, whether he obtains possession of the bill, note or other instrument evidencing the debt: *Saunders v. Ireland*, 87 Tex. 316, 21 S. W. 2d 119. A surety upon paying the debt of the principal has a right to be subrogated to the place of the creditor in respect to the debt by the latter, and assert the same benefits which he could assert if he were the principal: *Dunphy v. Gorman*, 29 Ill. App. 132. The right of the surety to be subrogated to all securities, funds, liens and interests in favor of the creditor can only be established in a court of law, but his right to recover from the principal the amount of money paid may be established in a court of law: *Miller v. Miller*, 10 Mo. 169.

b. Equitable Rights of Surety as Against Principal.—The right may apply to a court of equity for the protection of the surety as soon as they are endangered: *Taylor v. Heriot*, 4 Desaus. 119. As soon as the surety becomes liable for the principal at his request, there is an implied promise on the part of the latter to repay the principal the money which he may be compelled to pay for the principal. The amount of such liability. For the recovery of the money which he has paid, the surety has his remedy by action at law, and in some circumstances, by bill in equity. Among his equitable remedies is that of subrogation to the securities of the creditor. As soon as he has paid the debt. These, though extinguished at law, are not destroyed, but are generally revived in equity. The rights of the surety, and may there, by him, be enforced for his indemnity.

"But it is not every security which may be thus revived. A bond upon which principal and surety are jointly liable, once paid by the surety in the lifetime of the principal, is not assigned by the creditor, or agreement to assign, is not a security as well in equity as at law. There can be no assignment in such a case": *Cromer v. Cromer's Admr.*, 29 Gratt. 28. The surety is liable for the immediate payment of a debt of the principal, he may pay it and resort at once to any funds of the principal which he holds as an indemnity without waiting for it to be collected by a resort to an action at law: *Constantine v. Smith*, 22 Ill. 546. And after the maturity of the principal debt, the surety may replevy goods mortgaged to secure him by reason of the debt, and foreclose such mortgage, even though he has paid the debt: *Bates v. Wiggin*, 37 Kan. 44, 1 Am. St. Rep. 442 Pac. 442. On the insolvency of the principal the surety

the principal, or the amount of his own indebtedness to
as a fund for his indemnity: *Craighead v. Swartz*, 219
Ill. 1003.

the rule that a creditor before instituting a creditor's bill
against his legal remedies applies to the surety of a part-
pays a debt of the partnership: *McConnel v. Dickson*,
surety who pays a judgment against himself and his
de in the position of a contract creditor in respect to
claim in equity: *Mugge v. Ewing*, 54 Ill. 236. Where
and is joint only, and not joint and several, an equity
proper forum in which the sureties who have been com-
money on account of the bond should seek relief after
the officer who was principal therein: *Mountjoy v.*
6 Munf. 387.

provisions a surety may maintain an action against
to obtain indemnification against a debt or obligation
is bound before it is due, and without having first
ed the same, whenever any of the grounds exist upon
er of attachment may issue: *Walton v. Williams*, 5
Pac. 1022. A surety on a note given for the purchase
l cannot enforce the vendor's lien in his favor or main-
equity to indemnify himself by a sale of the land until
id the note: *McConnell v. Beattie*, 34 Ark. 113; *Gilliam*
5 Sneed, 86.

a replevin has no remedy either at law or in equity
act to indemnify him against loss on account of his
til such loss occurs, and the defendant in replevin who
ment against the plaintiff therein is in the same posi-
the surety and the judgment creditor are insolvent
ment is uncollectible: *Henderson-Aschut L. Co. v. John*
4 Ohio St. 236, 83 Am. St. Rep. 745, 60 N. E. 295.

the liability of a surety may be contingent at the time
principal has fraudulently conveyed his property, and al-
y has been considered a creditor from the date of his con-
yship, his right of action in the absence of statute to
conveyances as in fraud of creditors does not accrue
been compelled to pay the principal debt: *Bragg v.*
Ala. 233, 4 South. 716; *Ellis v. Southwestern Land Co.*,
81 Am. St. Rep. 909, 84 N. W. 417. In the case last
rt said: "His rights as surety in such a case are no
those of creditors. A creditor could not proceed until
sted his legal remedies. The conveyance being good as
parties, it can only be attacked by creditors of the
antor who have been defrauded, and then only under
nces already pointed out. The rule that a surety who
the debt cannot bring a suit to have a fraudulent con-
property made by his principal set aside is laid down in
cases: *Barnes v. Sammons*, 128 Ind. 596, 27 N. E. 747;
Tipton, 5 Humph. 66, 42 Am. Dec. 420. See *Mugge v.*
236; *Nash v. Burchard*, 87 Mich. 85, 49 N. W. 492.
under a statute passed since *Williams v. Tipton*, 5
2 Am. Dec. 420, was decided, a surety may now main-
action: *Greene v. Starnes*, 1 Heisk. 582.

case plaintiff's counsel was able to find which is claimed
position is a memorandum decision found in *Stump v.*

Rogers, 1 Ohio (*533), 262, the syllabus of which reads: 'Security may proceed against principal in equity to have subjected to the payment of the debt without making himself before commencing his suit.' The statement of the fact that the action was brought by a surety to set aside fraudulent conveyance, but there is no discussion of the opinion, and the decision, tested by the syllabus, is of little value.

Where sureties bring an action in which they seek to recover property of the principal, which he had conveyed to subject it to the satisfaction of the principal debt, they are not liable in their petition that they are liable on the debt now and then that they may be so: *Jones v. Perkins*, 8 Tex. 337. But in provisions in Kentucky, a surety who is liable upon a contract to bring an equitable action against his principal to assail a fraudulent conveyance before the debt or liability has become matured: *Walters v. Akers*, 31 Ky. Law Rep. 259, 101 Ky. 101. In an early case in North Carolina it was held that a surety who has paid the debt of the principal should establish his claim against the principal before proceeding in equity to reach property transferred by the principal: *Peebles v. Tatum*, 36 N. C. 414.

Nor will a surety be allowed to maintain a suit to enjoin the removal of property from the jurisdiction of the state, or to set aside the conveyance of property as being in fraud of the creditor of the surety before he has obtained a judgment or other lien on the principal debt: *Buford v. Francisco*, 3 Dana, 688; *Ambaum*, 47 Wash. 684, 92 Pac. 421, 15 L. R. A., N. S., 100.

c. Right of Surety to Compel Principal to Pay the Debt. A surety can have no relief at law against his principal until he has made some payment on account of the principal debt, or until he has proceeded in equity to compel his principal to make payment to the creditor to receive it: *Hannay v. Pell*, 3 E. D. Smith, 40 L. J. 100. It is a well-settled rule that a surety can proceed in equity to compel the principal any time after the principal debt has become due, or after the principal to pay it, and thereby exempt him from liability, though he has not paid the debt or been called upon by the creditor to pay it: *Cooper v. National Fertilizer Co.*, 132 Ga. 531, 650; *Ritenour v. Mathews*, 42 Ind. 7; *Whitridge v. Dunn*, 2 Md. Ch. 442; *Huss v. Rice*, 92 Ky. 362, 17 S. W. 869; *Thornton (Miss.)*, 9 South. 292; *Irick v. Black*, 17 N. H. 100; *Taylor v. Miller*, 62 N. C. 365; *Stump v. Rogers*, 1 Ohio, 100; *Head v. Swartz*, 219 Pa. 149, 67 Atl. 1003; *Norton v. Bland*, 593; *Croone v. Bivens*, 2 Head, 339; *Greene v. Starnes*, 582; *Bishop v. Day*, 13 Vt. 81, 37 Am. Dec. 582; *Dobie v. Co.*, 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 400; *Davis*, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A., N. S., 588.

And in order to maintain such a suit it is not necessary that the surety show any fraudulent disposition of property of the principal or any special reason for fearing a loss: *W. Grocer Co. v. Brand*, 79 Kan. 340, 99 Pac. 592; *Irick v. Black*, 17 N. J. Eq. 189. Nor will the insolvency of the surety deprive him his right to maintain such a suit against his principal to obtain exoneration: *Ferrer v. Barrett*, 57 N. C. 455.

H v. BANGOR AND AROOSTOOK RAILROAD COMPANY.

[105 Me. 379, 74 Atl. 918.]

CONNECTING CARRIERS—Liability of One for Acts of the absence of a partnership or other contract between lines, or a special contract with the shipper or consignee, succession of connecting carriers is relieved of further by safe carriage over its own line and prompt delivery preceding carrier. (p. 571.)

CONNECTING CARRIERS—Presumption of Negligence.—s are delivered to an initial carrier in good condition, ivered by the terminal carrier in a damaged condition, it d that they were injured on the line of the latter, upon posed the burden of exoneration. This presumption arises n the goods are contained in a package locked, sealed or losed, and although they are delivered to the terminal sealed car. (pp. 571, 572.)

CARRIER—Disobedience of Shipper's Directions.—A carrier is amages to goods resulting from disobedience of directions he owner and assented to by the carrier, respecting the onveyance. And if a carrier accepts a package having ctions as to carriage, he is liable for loss arising from bserve them. (p. 572.)

CONNECTING CARRIERS—Apportionment of Damages.—In or injury to freight, brought against the last of a suc- carriers, where from the evidence it is impossible to say t of the injury occurred after delivery to the defendant, for the entire damages, and there will be no apportion- en it and preceding carriers. (p. 572.)

for injury to goods while being transported by the railroad company.

e & Talbot and Madigan & Madigan, for the plain-

Appleton, Hugh R. Chaplin, Louis C. Stearns and Archibald, for the defendant.

ED, J. "The plaintiffs bring this action to recover from defendant for injuries to twenty crates of roofing, in all one hundred and twenty squares or rried by defendant, as a common carrier, from Old Easton, their place of destination. The roofing of sheets of asbestos, with a layer of asphalt be- jected when hot to the action of rolls. The sheets uced were about eight feet long by about thirty de and about one-eighth of an inch thick. The h which the roofing was packed had solid ends and the tops and bottoms were formed of slats of inches in width. All the crates were plainly 'Lay Flat' on either side and also on each end. of the goods at invoice price was three hundred y-nine dollars and sixty cents.

"Thus crated and in good order the roofing was July 6, 1904, at New York by the manufacturers to Steamship Company to be forwarded, via defendant's road, to plaintiffs at Easton, Maine. The steamship company, upon delivery to it, gave to the consignor a loading or shipping receipt of substantially the order, the weight being given as seven thousand pounds. Subsequently a car containing fifteen of the crates was taken upon the premises of the consignees at Easton. The car was promptly opened and the crates found to be standing on their sides or edges, not laid flat as directed, and the roofing to ^{and} have sagged from two to five inches on the upper sides of the crates and to be badly buckled and wrinkled. The remaining five crates arrived at Easton at the same time or shortly after and were found to be similarly damaged. The plaintiffs refused acceptance of the crates. Defendant later sold the roofing under the statute and on July 21, 1904, paid to the plaintiffs seventy-six dollars and five cents, being the proceeds of the sale, less freight and advances.

"On the part of defendant the undisputed evidence is to the effect that on the ninth day of July, 1904, the Steamship Company delivered the twenty crates of roofing to the Maine Central Railroad at Portland to be forwarded and delivered to defendant's carrier. Upon the evening of July 11, 1904, between 8 and 9 o'clock, defendant's car arrived at Old Town from the Maine Central Railroad in M. C. R. R. car No. 1158 and B. & A. car No. 7430, fully sealed with Maine Central Railroad Company's seals at its Portland station. These seals were intact and showed that the cars had come through from Portland to Old Town unopened. These cars left Old Town the same evening between 9 and 10 o'clock, and were hauled by defendant to Houlton, where they arrived on the morning of the following day, July 12th, the seals remaining unbroken. At Houlton both cars were opened by the servants of defendant and each crate was found to be standing on edge. B. & A. car No. 7430 was resealed with defendant's seals without change in the position of the fifteen crates. The five crates were transferred from car No. 1158, and on July 13, they arrived at Houlton, to B. & A. car No. 7075, and were being again loaded on edge. The same day these crates were carried onward by defendant and reached Easton on July 15 and 6 o'clock on the evening of that day. Car No. 7075, containing the fifteen crates, was opened at Fort Junction, a short distance from Easton, and two crates of granite placed in the car.

"After the roofing was refused by plaintiffs the remaining crates remained on edge for several days, when t

and there is evidence tending to show that the five
er some delay, were also laid flat.”
consequence of the rule prevailing in most of the
the United States, that, in the absence of partner-
ther contract between connecting lines or special
with shipper or consignee, each of a succession of
common carriers is relieved of further obligation
carriage over its own line and prompt delivery to
ding carrier: *Perkins v. Portland etc. R. R. Co.*,
3, 74 Am. Dec. 507; see, also, *Grindle v. Eastern*
Co., 67 Me. 317, 24 Am. Rep. 31; the presumption
established that, when goods are delivered to the
rier in good condition and are delivered by the
rminal carrier in a damaged condition, they were
the line of the latter, upon whom is imposed the
exonerating himself: *Moore v. New York etc.*
Co., 173 Mass. 335, 73 Am. St. Rep. 298, 53 N. E.
v. New York etc. R. R. Co., 182 Mass. 290, 94
Rep. 656, 85 N. E. 400; *Bullock v. Haverhill & B.*
Co., 187 Mass. 91, 72 N. E. 256. This presump-
een declared to be one of convenience and necessity,
based upon the presumption that goods shown to
delivered in good condition remain so until shown
ad condition: *Moore v. New York etc. R. R. Co.*,
335, 73 Am. St. Rep. 298, 53 N. E. 816.
ase of *Philadelphia etc. Co. v. Diffendal*, 109 Md.
tl. 193, 458, recently decided by the court of ap-
Maryland, in considering this presumption, it is
ne reason of the rule, or rather the reason for the
to the general rule, is that, when a shipper con-
goods to a line of connecting carriers to be car-
e point of destination, he of course loses all sight
rol over them. From that time forward they are
to the custody and management of the initial and
carriers, and these latter may each in turn, by
se of reasonable caution, ascertain the condition
ds at the time of accepting them from the ³³³ last
carrier, and thus in case of loss be able to prove
loss occurred; whereas, the shipper has no means
of obtaining the necessary information or witnesses
is case, except by summoning the employes of the
whose own negligence has caused the loss. One
culty that he would encounter in pursuing this
uld be to discover which of the defendant's em-
d knowledge of the facts. Should he be able to
hese, it would still be dangerous for the shipper
s case upon their testimony, since the natural im-
nankind would be likely to sway them, in narrat-
circumstances, to state the occurrence in the light

most favorable to themselves, in order to palliate fault."

The presumption arises even though the goods are in a package locked, sealed or otherwise closed: New York etc. R. R. Co., 173 Mass. 335, 73 Am. 298, 53 N. E. 816; Bullock v. Haverhill & B. Co., 187 Mass. 91, 72 N. E. 256; Leo v. St. Paul etc. 30 Minn. 438, 15 N. W. 872; and also although the goods were delivered to the terminal carrier in a sealed car: Leo v. St. Paul etc. Ry. Co., 30 Minn. 438, 15 N. W. 872; Cotnam v. Portland etc. R. R. Co., 182 Mass. 290, 94 Am. St. Rep. 400, 15 N. E. 400.

A carrier is liable for damage to goods resulting from disobedience of directions given by the owner and to by the carrier respecting the mode of conveyance: v. Portsmouth etc. R. R. Co., 31 Me. 228, 1 Am. 11; Hastings v. Pepper, 11 Pick. 41; and if a carrier delivers a package having legible directions as to carriage, he is liable for loss arising from failure to observe them: Hastings v. Pepper, 11 Pick. 41.

Applying these principles of law, which are amply supported by authority and are consonant to reason, the court was unable to find that defendant has exonerated itself. It is true that the plaintiffs, confessedly not very familiar with the character of the goods, testify that if the crates were packed with the roofing were shipped on edge, the weight of the sheets would cause them to sag so that they would buckle and bulge, and especially so in warm weather, and the employé of the manufacturers states that the marking on the crates "Lay Flat" was, that if they were packed on end for any length of time they would buckle and injure the goods. Whether an appreciable length of time or a considerable length of ³⁸⁴ time is meant is uncertain. But there is an entire lack of evidence as to the location of the goods at Old Town or at Houlton or Fort Houlton Junction. It is impossible, therefore, for us to find that the part of the injury occurred subsequent to their delivery by defendant at Old Town.

For an apportionment of the damages between defendant and the carrier immediately preceding it, earnestly sought by defendant, we find no authority: Lake v. Milliken, 124 Mo. 240, 16 Am. Rep. 456; St. Louis etc. Ry. Co. v. 73 Ark. 112, 108 Am. St. Rep. 21, 83 S. W. 333, 67 Mo. 555, 3 Ann. Cas. 582.

In accordance with the agreement of the parties, judgment must be for the plaintiffs for \$324.68, with

The Burden of Proof as Between Connecting Carriers to Determine Who is at Fault for Loss or Injury is the subject of a note to Wisconsin Cent. Ry. Co., 101 Am. St. Rep. 392. See, also,

Witnack v. Chicago etc. Ry. Co., 82 Neb. 464, 130 Am. Merchants' etc. Transf. Co. v. Eichberg, 109 Md. 211, Rep. 524; Charles v. Atlantic Coast Line R. R. Co., 78 Am. St. Rep. 762; Orem etc. Co. v. Northern Cent. Ry. Co., 1, 124 Am. St. Rep. 462. In an action against an owner of two or more connecting lines, the burden of proof is on the plaintiff to show that the damages occurred on its line; if against the last or delivering carrier, the burden is on the carrier to show that the damage was not done on its line: St. Louis etc. Ry. Co. v. Pearce, 82 Ark. 353, 118 Am. St. Rep. 75. Compare, Lake Shore etc. Ry. Co., 144 Mich. 169, 115 Am.

Liability of an Initial Carrier for the torts and negligence of the carrier is the subject of a note to Pennsylvania Co. v. Erie Ry. Co., 100 Am. St. Rep. 604.

Initial Carrier Receives Freight in Good Order, the Law presumes that each successive carrier between the first and last received the freight in good order; and this presumption, working through to the last carrier, who delivers it in bad order, leaves the responsibility on the last carrier unless he can show that the damage occurred prior to his receipt of the freight: St. Louis etc. Ry. Co. v. Coolidge, 73 Ark. 1, 118 Am. St. Rep. 21.

ROY v. POULIN.

[105 Me. 411, 74 Atl. 923.]

WARDY PROCEEDINGS—Nonresident Mother.—The residence of a bastard child, begotten and born out of the state and not then nor now a resident of the state, is subject to the jurisdiction of the county of his residence to compel him to contribute to the support of the child. (p. 574.)

Wardy Proceedings by a nonresident mother against the child of the state.

Lausier, for the plaintiff.

Wardy, for the defendant.

WARDY, C. J. The question is this: Assuming the father of a resident of this state, to be the father of a bastard child, begotten and born out of the state of a woman who is now a resident of this state, can the mother be compelled by our statutes and courts to compel him to contribute to the support of the child?

There are two views of this question, each well supported by authority. One is that the purpose of the statute is to make the maintenance of illegitimate children liable to be enforced against the father in the state, and hence the statute does not apply to the illegitimate children of nonresident mothers. The other view is that the statute converts an existing moral obligation of the father into a legal obligation, enforceable

like any other legal obligation upon the obligation of jurisdiction. We think this latter view the correct one. The father of an illegitimate child is certainly under an obligation to assist the mother in its maintenance. The statute which makes the obligation legal and enforceable makes the duty a legal one, and we see no good reason why the courts may not enforce it, if the father is subject to its jurisdiction and the mother submits herself to it.

The statute is general and comprehensive. It applies to a mother who is authorized to invoke the statute of the poor cannot invoke it, except in her behalf. If of her death pending the suit, her executor or administrator is to prosecute it to final judgment. It is her duty to do so. The statute does not limit the remedy. It opens the door of the court to any unfettered jurisdiction over the father, it should not turn away from him willing to submit herself to it. It should embrace all persons subject to its jurisdiction at the suit of the mother, persons, resident or nonresident, whatever the law of the state declare to be a legal duty.

In *Hodge v. Sawyer*, 85 Me. 285, 27 Atl. 285, the plaintiff was a nonresident and the child was born in another state, yet the suit was sustained. True, the child was begotten in this state while the mother was a nonresident, but that circumstance was immaterial. It was immaterial where the child was begotten or born; the duty of the father to its maintenance is the same. In this case the father is a resident of this state and is subject to its jurisdiction of which is that the father of a bastard child is liable to its maintenance at the suit of the mother.

As to the venue, the suit was rightly entered in the county of the defendant's residence, the plaintiff not being a resident in any county in the state.

Exceptions overruled.

Notes.—The *Holding of the Principal Case* is supported by *Moore v. Bevington*, 41 Ohio St. 280; *Moore v. State*, 100 Ill. 27; *L. R. A.* 714; *Kolbe v. People*, 100 Ill. 98. A stricter view of the law is taken in *People v. People*, 43 Mich. 37, 4 N. W. 509; *People v. People*, 100 Ill. 27.

COBURN v. PAGE.

[105 Me. 458, 74 Atl. 1026.]

NANCY—Acquisition of Adverse Title by Tenant.—Common stand in such confidential relation in respect to that it is generally inequitable to permit one, without of the others, to buy in an adverse outstanding claim and for his exclusive benefit to undermine the common title. Case the purchasing tenant is regarded as holding his trust for the benefit of all his co-owners, in proportion to their respective interests in the common property, who seasonably their share of his necessary expenditures. (p. 576.)

NANCY—Acquisition of Outstanding Equity by Tenant.—Tenant in common as to a one-fourth interest in lands dis- outstanding equity against the whole interest and purchases thereof, he holds his purchase in trust for himself and tenants who hold the three-fourths interest in common with their pro rata contribution toward his purchase; and he is to retain one-fourth of the whole equity and give the rest, but only three-twentieths, which is the one-fourth part of the whole. (pp. 579, 581.)

Butler and Charles F. Johnson, for the plaintiffs.

& Walton, E. E. Danforth and Foster & Foster, for the defendants.

G. J. Bill in equity before this court on defendant's bill. On February 19, 1902, the defendant, Edward P. Page, and the original plaintiffs were tenants in common in a township of land in Somerset county known as the Page township. Page owned one-fourth and the plaintiffs three-fourths. About that time Page, and some, at least, of the plaintiffs, learned that their common title to the township was derived through a chain of conveyances beginning with a mortgage title as far back as 1835 and 1836, and that the right of redemption thereof had never been foreclosed or was apparently still outstanding.

On Edward P. Page, without any arrangement or agreement with his cotenants, purchased at his own expense one-fifths in common and undivided of such outstanding equity of redemption of the common property and had the same conveyed to his wife, Lizzie M. Page, the other defendant, dated February 19, 1902. Mrs. Page paid no consideration, and no question is raised but that the same was so conveyed to her is subject to the same trusts, which would have been if Edward P. Page had taken the same in his own name.

It is brought to obtain a decree that each of the defendants holds all title in any way acquired by either of them under the said deed to Mrs. Page in trust for, and must convey the same to, all the plaintiffs as tenants in common

with Edward P. Page to the extent and in proportion to their respective ownerships therein. The presiding justice so decreed, and this appeal is from that decree.

It is the well-settled doctrine that tenants in common stand in such confidential relation to one another in respect to their interests in the common property and the common title under which they hold it, that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim and assert it for his exclusive benefit to undermine the common title and thereby injure and prejudice the interests of his cotenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the benefit of all his ⁴⁶³ cotenants, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures.

This subject has been much discussed in the decisions and text-books, with varying statements of the principles upon which the doctrine rests and the reasons to be considered in its application to particular cases, but nowhere is the general principle seriously questioned, and we think it stands supported by almost universal authority: *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74, and note; *Booker v. Crocker*, 132 Fed. 7, 65 C. C. A. 627; *Bracken v. Cooper*, 80 Ill. 221; *Barnes v. Boardman*, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; *Freeman on Cotenancy and Partition*, sec. 154 et seq.; 17 Am. & Eng. Ency. of Law, 2d ed., p. 674, and cases cited in notes.

The leading case upon the subject in this country is *Van Horne v. Fonda*, 5 Johns. Ch. 407, where Chancellor Kent thus stated the doctrine: "I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interest, that one of them should not affect the claim, to the prejudice of the other. It is like an expense laid out on a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each

other's equal claim which the relationship of the parties, as joint devisees, created. Community of interest produces community of duty, and there is no real difference, on the ground of policy and ⁴⁶³ justice, whether one cotenant buys up an outstanding encumbrance or an adverse title to disseize and expel his cotenant."

Judge Story fully approved the doctrine as laid down by Kent, saying: "It stands approved equally by ancient and modern authority, by the positive rule of the Roman law, the general recognition of continental Europe, and the actual jurisprudence of England and America": *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4847.

There are some cases, however, in which the suggestion is made that the rule is applicable to tenants in common only when their interest accrues under the same instrument, or act of the parties, or of the law, or where there is some understanding among them which creates such a trust. The suggestion seems not to be much regarded. In *Rothwell v. Dewees*, 2 Black, 613, 17 L. ed. 309, the supreme court of the United States applies the principle to the husband of a tenant in common who had bought in an outstanding title or encumbrance, and Mr. Justice Miller there said: "In this connection much stress is laid by counsel upon the language of the court in *Van Horne v. Fonda*, 5 Johns. Ch. 407, to the effect that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated."

In *Bracken v. Cooper*, 80 Ill. 221, in speaking of this suggested qualification of the doctrine as applied to tenants in common, the court said: "We do not find sufficient authority or reason to induce us to adopt the qualification of the doctrine, as applied to tenants in common, that their interest should accrue under the same instrument or act of the law. We regard the rule as founded upon the duty which the connection of the parties as claimants of a common subject creates, and not as dependent upon the accidental circumstance whether the relationship of the parties be constituted by the same instrument or act of the parties or of the law or not."

⁴⁶⁴ In *Hunter v. Bosworth*, 43 Wis. 583, Chief Justice Ryan said: "The rule rests, not upon the strict relation of joint tenants or tenants in common, but upon community of interests in a common title creating such a relation of trust and confidence between the parties that it would be inequitable

with Edward P. Page to the extent and in proportion to their respective ownerships therein. The presiding justice so decreed, and this appeal is from that decree.

It is the well-settled doctrine that tenants in common stand in such confidential relation to one another in respect to their interests in the common property and the common title under which they hold it, that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim and assert it for his exclusive benefit to undermine the common title and thereby injure and prejudice the interests of his cotenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the benefit of all his ⁴⁶³ cotenants, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures.

This subject has been much discussed in the decisions and text-books, with varying statements of the principles upon which the doctrine rests and the reasons to be considered in its application to particular cases, but nowhere is the general principle seriously questioned, and we think it stands supported by almost universal authority: *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74, and note; *Booker v. Crocker*, 132 Fed. 7, 65 C. C. A. 627; *Bracken v. Cooper*, 80 Ill. 221; *Barnes v. Boardman*, 152 Mass. 391, 25 N. E. 623, 9 L. R. A. 571; *Freeman on Cotenancy and Partition*, sec. 154 et seq.; 17 Am. & Eng. Ency. of Law, 2d ed., p. 674, and cases cited in notes.

The leading case upon the subject in this country is *Van Horne v. Fonda*, 5 Johns. Ch. 407, where Chancellor Kent thus stated the doctrine: "I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interest, that one of them should not affect the claim, to the prejudice of the other. It is like an expense laid out on a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each

other's equal claim which the relationship of the parties, as joint devisees, created. Community of interest produces community of duty, and there is no real difference, on the ground of policy and ⁴⁶³ justice, whether one cotenant buys up an outstanding encumbrance or an adverse title to disseize and expel his cotenant."

Judge Story fully approved the doctrine as laid down by Kent, saying: "It stands approved equally by ancient and modern authority, by the positive rule of the Roman law, the general recognition of continental Europe, and the actual jurisprudence of England and America": *Flagg v. Mann*, 2 Sum. 486, Fed. Cas. No. 4847.

There are some cases, however, in which the suggestion is made that the rule is applicable to tenants in common only when their interest accrues under the same instrument, or act of the parties, or of the law, or where there is some understanding among them which creates such a trust. The suggestion seems not to be much regarded. In *Rothwell v. Dewees*, 2 Black, 613, 17 L. ed. 309, the supreme court of the United States applies the principle to the husband of a tenant in common who had bought in an outstanding title or encumbrance, and Mr. Justice Miller there said: "In this connection much stress is laid by counsel upon the language of the court in *Van Horne v. Fonda*, 5 Johns. Ch. 407, to the effect that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated."

In *Bracken v. Cooper*, 80 Ill. 221, in speaking of this suggested qualification of the doctrine as applied to tenants in common, the court said: "We do not find sufficient authority or reason to induce us to adopt the qualification of the doctrine, as applied to tenants in common, that their interest should accrue under the same instrument or act of the law. We regard the rule as founded upon the duty which the connection of the parties as claimants of a common subject creates, and not as dependent upon the accidental circumstance whether the relationship of the parties be constituted by the same instrument or act of the parties or of the law or not."

⁴⁶⁴ In *Hunter v. Bosworth*, 43 Wis. 583, Chief Justice Ryan said: "The rule rests, not upon the strict relation of joint tenants or tenants in common, but upon community of interests in a common title creating such a relation of trust and confidence between the parties that it would be inequitable

ual claim which the relationship of the parties, as created. Community of interest produces community of duty, and there is no real difference, on the ground and ⁴⁶³ justice, whether one cotenant buys up an encumbrance or an adverse title to disseize and dispossess the other cotenant."

The court fully approved the doctrine as laid down by the court in *Flagg v. Mann*, 13, Fed. Cas. No. 4847.

In some cases, however, in which the suggestion is made that the rule is applicable to tenants in common only where the interest accrues under the same instrument, or act of the parties, or of the law, or where there is some understanding among them which creates such a trust. The suggestion is not to be much regarded. In *Rothwell v. Dewees*, 2, 17 L. ed. 309, the supreme court of the United States applied the principle to the husband of a tenant in common who had bought in an outstanding title or encumbrance. Mr. Justice Miller there said: "In this connection it is laid by counsel upon the language of the court in *Turner v. Fonda*, 5 Johns. Ch. 407, to the effect that in that case there was an equality of estate between the co-tenants. It does not appear to us, however, that any principle was given to that fact by the learned judge, but that the rule was based on a community of interest in the title, which created such a relation of trust and confidence between the parties that it would be inequitable to permit them to do anything to the prejudice of the other, as to the property so situated."

In *Turner v. Cooper*, 80 Ill. 221, in speaking of this suggestion of the doctrine as applied to tenants in common, the court said: "We do not find sufficient authority to induce us to adopt the qualification of the doctrine as applied to tenants in common, that their interest must accrue under the same instrument or act of the law. The rule as founded upon the duty which the community of the parties as claimants of a common subject creates, is dependent upon the accidental circumstance of the relationship of the parties be constituted by the instrument or act of the parties or of the law or not."

In *Hunter v. Bosworth*, 43 Wis. 583, Chief Justice Shaw said: "The rule rests, not upon the strict relation of co-tenants or tenants in common, but upon community of interest in a common title creating such a relation of trust and confidence between the parties that it would be inequitable

to permit one of them to do anything to the prejudice of the others." Mr. Freeman in his work on Cotenancy, cited, says: "As the rule forbidding the acquisition of adverse titles by a cotenant from being asserted against his coparceners is always said to be based upon confidence and mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are wanting. Joint tenants, tenants by entirety, and coparceners are all under the same title. Their union of interest and title is so complete that beyond a doubt such a relation of confidence and trust unavoidably results therefrom that no tenant is permitted to act in hostility to the interests of the other tenants in relation to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances from different grantors; their only unity is that of right in the possession of the common subject of ownership. A close examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting title. If their interests accrue at different times, or are acquired by different instruments, and neither has superior title, then he who employs his cotenancy to secure an advantage, and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises, cannot be noted that the author does not approve the suggestion of the doctrine that tenants in common are bound to it unless they have acquired title under the same instrument, or act of the parties, or of the law. The distinction which he points out between joint tenants and tenants in common respecting the application of this rule appears clearly. That in the case of the former the essential relation of confidence and trust necessarily exists as the result of the union of interest and title; while in the case of the latter the essential relation does not necessarily exist in the relation of the cotenants, but it may be, and often is, developed out of the cotenancy. And when such a relation of trust and confidence does exist between tenants in common in respect to the common property and title, so that it is inequitable for one to procure and assert for his benefit an adverse title against his cotenants, the rule is applicable, and should be enforced. We think this is a clear and conservative statement of the rule as applicable to tenants in common.

But the defendants do not contend here against the doctrine. They admit that they hold some of the property in trust for the plaintiffs, but they say it is only one-fourth of the three-fifths over what is required to give Page's undivided quarter in the common property.

adversary claim. Or, in other words, that Page, one-fourth or five-twentieths of the common property, having purchased only three-fifths or twelve-twentieths of the common property, is entitled to retain five-twentieths of the common property, and therefore should be compelled to convey to the plaintiffs but seven-twentieths interest in the common property, as they claim. The learned counsel for the defendants in their brief say: "But it is equitable, and it is the duty of the court to protect his one-fourth interest, which would be lost if he should be compelled to relinquish his claim to the seven-twelfths interest, because it is not necessary for his own protection. It is inured to the benefit of the plaintiffs in this case." And, as the defendants do, and, as we think, in accordance with reason and authority, that the general doctrine for a tenant in common to procure and assert against himself an outstanding adverse claim applies in this case, that the defendants hold some part of their property in common with the plaintiffs, we do not perceive on what grounds the defendants can maintain the position which they here contend for. We have cited the authorities liberally to show that the rule is firmly established by precedent, but to indicate the principles and the underlying doctrine, and their application to cases involving cotenants, which principles and reasons must control in the determination of the defendants' contention here.

Previous to 1871 Abner and Philander Coburn claimed the common ownership of this township. The title of all the common property derived from them—most of them as heirs and some through mesne conveyances, including Page, was confirmed by the court in 1890.

It does not so appear, we assume, from the circumstances that the possession of the property was in all the common, and that they had been and were receiving rents and profits in stumpage as the property yielded from time to time.

The property was acquired by the deed to Mrs. Page of February 1871, as an outstanding right to redeem three-fifths of the common property from mortgages. It is no doubt true that a single one tenant in common of a mortgage title may exercise the equity of redemption thereof and hold it for his own benefit, if in so doing he does not injure or prejudice the interest of his cotenant in the debt thereby secured. But it may be said that the right to redeem is not a claim to the mortgagees' title. But that is not the case here. Here the cotenants supposed that they were the owners of the common property. They had possessed and used it for many years, using it as they saw fit as

owners. They may have materially decreased hard cutting of timber, or they may have increased by improving the facilities for getting the lumber. Under such facts and conditions these discovered rights of redemption must be regarded as advancing the common interests and title.

In *Bracken v. Cooper*, 80 Ill. 221, it is held that a mortgagee in possession died, claiming to own the property and by his will devised it to his sons, a grantee, sons, and tenant in common of the others, could not claim the equity of redemption of the mortgage for the exclusive benefit as against his cotenants, but that it would inure to the common benefit of himself and his tenants, at their option.

Was the relation between Page and his cotenants such that it would be inequitable for him to enforce title to his share of the common property from these old mortgages? I think it was. The right of redemption may be claimed by any tenant in common who would be entitled to sue against the others to extinguish ⁴⁶⁷ the mortgages. The mortgages have been standing a very long time, during which the plaintiffs and defendant jointly, and not the defendant alone, whom they claim, have had the possession. Much difficulty and conflict of interest would necessarily attend ascertaining the rents and profits and the amount due on the mortgages. Indeed, in such a case, because of the joint possession and the relation of trust and confidence naturally existing as the result of that possession, a tenant prosecuting redemption proceedings against the common property might have the sole knowledge of the facts, the essential evidence for his cotenants' defense.

It would be inequitable to permit Page, by asserting his equity of redemption, to undermine and destroy the title under which he and his cotenants have been in joint possession of the property, for, in the words of Chancellor Kent above quoted: "It is not consistent with good faith, nor with the duty which the court owes to the parties, as claimants of a common subject, created by the relation of trust and confidence to him."

If this be so, and Edward P. Page, at the time of his purchase, chased in this interest in the adversary claim, and the relation of trust and confidence to his cotenants, was not permitted to assert the whole of that interest in himself, then, how may he be permitted to assert a proportionate share of it against them? Because of the relation of trust and confidence his purchase inured to the benefit of all. The whole purchase must be impressed upon the title, or none. If he is permitted to assert against his cotenants a title any greater share of these three-fifths than his proportionate part, which would be one-fourth thereof,

to that extent he will have an advantage over his and to that extent there will be the same breach of trust and confidence, and to that extent evils and inequities will arise, as if he were assertible purchase. The argument that it is equitable to retain enough of his purchase to protect his claims at first plausible and reasonable, but it is in all founded. It cannot be harmonized with the principles of the general doctrine.

The doctrine here invoked by the plaintiffs is founded in principles. It is to enforce that good faith and equity required ⁴⁶⁸ between those who stand in close relations as to their property ownerships. A failure to enforce it may result in great injustice, while under the present substantial justice is always obtained, for the cotenant is to be fully reimbursed for all his expenditures for the benefit of the common prop-

erty. The doctrine is especially applicable to the case where it should be enforced so that each cotenant, upon a contribution, will receive his pro rata share of the fifths of the equity of redemptions purchased by the plaintiff conveyed to his wife, Lizzie M. Page.

The defendants can take nothing by their objection that no contribution was made upon Mrs. Page. The presiding justice granted the plaintiffs seasonably made request upon Mrs. Page for their share of his purchase and offered to reimburse him proportionally for his expenses incurred, and granted their request. Mrs. Page was the holder of the interest purchased by her husband, either as a purchaser or his voluntary donee. The presiding justice granted the want of demand on Mrs. Page was of "no importance except as to the awarding of costs against her."

The ruling was correct.

The opinion of the court that the entry must be, decree of justice affirmed.

Use of an Outstanding Title to the Common Property by a Tenant. The doctrine of contribution is by law deemed to be for the benefit of all. A contribution cannot be set up by one tenant against another: *Manly v. Manly*, 61 W. Va. 452, 123 Am. St. Rep. 996; note to *Hoyt v. Hoyt*, 116 Am. St. Rep. 367; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169; *Mills v. Hart*, 24 Colo. 505, 65 Am. St. Rep. 241.

Tenant Pays Off a Lien on the Common Property, or pays a share thereof, or if he pays more than his share of the purchase, he is entitled to contribution from his cotenants for his proportion, and has a lien on the property to secure the payment. *Rippe v. Badger*, 125 Iowa, 725, 106 Am. St. Rep. 336.

PANCOAST v. DINSMORE.

[105 Me. 471, 75 Atl. 43.]

AGENCY—Recovering Money That has Been Paid

Where money has been paid to an agent for his principal under circumstances that it may be recovered back from the agent is liable as a principal so long as he stands in the position and until there has been a change of circumstances by paying over the money to his principal or doing something to it. (p. 583.)

AGENCY—Undisclosed Principal—Rights of Vendor

One who has contracted to take a deed with covenants of warranty from the ostensible owner of land, who is really only an agent, is obliged to accept a deed from the principal when disclosed, or he may do so. (p. 584.)

VENDOR AND VENDEE—Consideration for Contract

One who contracts for a deed from the ostensible owner, but who agrees to accept a deed from the real owner in place of the latter agreement is a new contract, for which a consideration is necessary. (pp. 584, 585.)

J. B. and F. C. Peaks, for the plaintiff.

C. W. Hayes, for the defendant.

472 SAVAGE, J. This case comes up on demurrer to the exceptions to the exclusion of evidence, and to the verdict for the plaintiff. The evidence in the case shows that the plaintiff negotiated with the defendant for the purchase of a farm. The negotiations ended in a contract signed by the defendant as agent for one Hilton. The terms of the contract, Hilton was to execute a deed to the plaintiff, at a time and place certain, a warranty of the farm, with the usual covenants, and the plaintiff to pay four hundred dollars down, that is, at the time of the contract, and to pay or secure the balance of the purchase price at the delivery of the deed. The plaintiff paid the four hundred dollars to the defendant and he received the money; and it is not claimed by Hilton. At the time the contract Hilton did not own the farm, nor did he own it at the time fixed for the delivery of the deed. He did not own it at any time since, and he has never tendered any deed of it. He might have put himself in a position so that he could perform the contract by seasonably procuring title in his own name, but he did not. After the time specified for the delivery of the deed had passed, and after demand for the repayment of the money, the plaintiff brought this suit to recover from the defendant the four hundred dollars advanced toward the purchase of the farm.

Under these circumstances, it is not questioned that the defendant, though only an agent,

tion for the money received by him, unless some of
es tendered by him, and to be referred to later,
and effective. The rule is that where money has
to an agent for his principal under such circum-
at it may be recovered back from the latter, the
liable as a principal so long as he stands in his
osition and until there has been a change of cir-
a by his having paid over the money to his prin-
one something equivalent to it: 1 Am. & Eng. Ency.
e. 1129. In this case, Hilton, the principal, had
iled to perform his contract. He could neither
ymment of the unpaid part of the purchase price
ully retain that part which had been paid: Richards
7 Me. 296; *Jellison v. Jordan*, 68 Me. 373. There-
r as the case has yet been stated, the plaintiff has
ht to recover in this action.

defendant, not controverting the facts thus far out-
med and offered evidence to show that Hilton
as acting as the authorized agent of the real owner
to sell it, and that the plaintiff's husband knew
before the time fixed for the delivery of the deed,
new who was the true owner. But it is not claimed
r the plaintiff or her husband knew these facts
e the contract was made, except from the clause in
et describing the farm as "belonging to the estate
a S. Perkins."

endant further offered to show that the plaintiff's
acting as her agent (and we assume with authority
, after the time specified in the contract for the
f the deed, and waiving strict performance as to
ed, first with the authorized attorney of the owner,
with another agent of the ⁴⁷⁴ owner, upon a later
ne delivery of a deed; that a deed from the owner
he plaintiff, and a mortgage back, were exhibited
ancoast, and that they were satisfactory; that in
of an arrangement made with Mr. Pancoast the
e owner and the mortgage were brought to Dover,
rpose of transferring the title to the plaintiff; that
was seasonably tendered to the plaintiff; that the
efused to pay or secure the unpaid balance of the
price, as stipulated in the contract; and that the
ered would have conveyed a complete title to the

endant also offered to show that the contract be-
plaintiff and Hilton was ratified by the real owner.
evidence was excluded, and no other being offered,
was ordered for the plaintiff.

ition of the defendant is that the real owner, a
hlan, was an undisclosed principal, of whom Hil-

ton was the agent, and that a tender of a deed Coughlan was as effectual to hold the plaintiff. If there had been a tender of a deed by Hilton had the title been his. But this conclusion does not follow. The contract was with Hilton as a principal. She dealt with no one else. Doubtless, if the owner had conveyed title in Hilton for sale as agent, and he had performed the contract by the execution and delivery of a deed, by the principles of the law of agency the undisclosed owner would have held the plaintiff for the price. Doubtless the plaintiff might have held the owner, as undisclosed owner, to the performance of the contract made by her agent. This rule is well settled, and is the doctrine of Kingsland v. Brecht, 92 Me. 23, 69 Am. St. Rep. 486, 42 Atl. 221. In this case does not fall within these rules. Here the plaintiff, instead of seeking to bind an undisclosed principal, seeks to bind a third party who contracted with the agent, seeks to bind a third party to an undisclosed principal, in the case of an unperformed contract.

It is good sense, as well as sound law, that in the case of a purely executory contract, a party dealing with an agent as principal, though in fact he is agent, is not compelled, in all events, to accept performance from the undisclosed principal, when discovered, though ⁴⁷⁵ he may do so. It is well said: "This is not the contract I made." In the case of an agent, in making a contract with a third party, as a principal, in his own name, and does not disclose the name of his principal, or the existence of an agency, the agent becomes, in the eyes of the third party, the contracting party: 1 Am. & Eng. Law, p. 1164. And the third party may stand on the contract which he has made. It was well said in *Baker v. Potter*, 123 Mass. 28, 25 Am. Rep. 9: "A party has the right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who he contracts with; . . . he may contract with whom he chooses, and the sufficiency of his reasons for so doing is not to be inquired into." And were such reasons open to inquiry, it is easy to see that one might be willing to take the contract of one person in a deed when he would not take the contract of another. At any rate, he is only obliged to take the contract which he contracted to take. It follows that the plaintiff is not bound in law to accept Mrs. Coughlan's deed if it is discovered.

But the defendant says further that the plaintiff, by the agent, waived the contract in respect to who should perform the deed, and agreed to accept a deed from the owner in lieu of one from Hilton. If so, this constitutes a new contract. It made, as to the plaintiff, a new contract.

or this contract, no consideration has been shown

It was nudum pactum, and not binding upon the
She still had the right to stand upon her original

as seen that the evidence offered, if true, presented
e. It was immaterial, and was rightfully excluded.
verdict for the plaintiff was properly ordered.
ons overruled.

Contracting in His Own Name cannot escape liability
y that he acted as the agent of another: *Stewart-More-*
Postal Tel. C. Co., 131 Ga. 31, 127 Am. St. Rep. 205;
Campbell, 70 Minn. 493, 68 Am. St. Rep. 547; *Shuey v.*
Wash. 188, 63 Am. St. Rep. 879; *Morris & Co. v. Malone*,
93 Am. St. Rep. 180. As to the right of the undisclosed
o sue on the contract, see *Western Union Tel. Co. v.*
158 Ala. 539, 132 Am. St. Rep. 38; *Frazier v. Poindexter*,
, 115 Am. St. Rep. 33. In *Gay v. Kelley*, 109 Minn. 101,
1895, it is decided that where one party to a contract deals
er as principal, but afterward discovers that such person
t an agent for an undisclosed principal, he may enforce
t against such agent or against the principal; but where
osed principal denies that he is the principal, the person
to enforce the contract may commence an action against
ler to ascertain the facts.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

DOWNS v. SWANN.

[111 Md. 53, 73 Atl. 653.]

CRIMINAL LAW—Right to Photograph Prisoners.—Violation of constitutional rights for police authorities to take and photograph, according to the Bertillon system, a person charged with felony but not yet tried. But they may not place them in the rogues' gallery or distribute copies of it before trial, unless he becomes a fugitive. (pp. 588, 592.)

CONSTITUTIONAL LAW—Liberty is not Unreasonable Restraint.—Liberty is not Unreasonable Restraint to act according to one's own will. It is only freedom of action under conditions essential to equal enjoyment of the right by others. (p. 589.)

POLICE POWER—Delegation to Subordinate Authorities.—A state may delegate police power to subordinate boards of police, and the reasonable and just exercise by them of that power will be upheld. (p. 589.)

ARREST—A Person Suspected of the Commission of a Crime.—A person may lawfully be arrested by the sheriff or police, held in custody until a preliminary hearing of the charge against him is held, and then be committed to jail or held to bail for the trial by grand jury. (p. 590.)

Harry B. Wolf, for the appellant.

Luther Eugene Mackall and Alonzo L. Miles,
appellees.

57 SCHMUCKER, J. The appeal in this case is from an order of the circuit court of Baltimore dissolving a preliminary injunction theretofore issued. The injunction had been issued upon the filing of a complaint to restrain the police authorities of Baltimore from photographing and measuring the appellant. He had been arrested and was detained by them upon a charge of embezzlement of public funds of the city. The

(586)

answered the bill made a motion to dissolve the in-

The motion was heard upon bill and answer and dissolving the injunction was passed and the appeal therefrom.

Substantial allegations of the bill are as follows: On May 1, 1909, the plaintiff, William F. Downs, who had for many years theretofore been a clerk in the office of the city treasurer, was arrested by a city detective upon complaint of embezzling one thousand dollars of the money of the city. The police authorities were about to put Downs through the "Bertillon System," consisting in part of having a photograph taken, the measurement of his head, height, weight and pedigree, together with his finger prints, in order that the record thereof might be preserved for the use of the police department, and it was their intention to take the photograph immediately after his preliminary hearing before the city magistrate and before his trial upon the charge of embezzlement.

It is also alleged that there is a "rogues' gallery" in connection with the police department of the city, where are kept pictures and photographs of criminals and notorious men, who have been tried and convicted of various crimes in different jurisdictions, and that it was the custom of the police authorities to take the photograph of persons for any violations of law, but it does not allege the existence of a custom to put the photographs of unconvicted persons in the "rogues' gallery" or charge the defendants with a crime or to put Downs' picture there, but only with an intent to preserve it for the use of the department.

It is further alleged that Downs, up until his arrest, enjoyed the confidence and esteem of his employer and associates, and that he will be irreparably injured if the police authorities are permitted to carry out their contemplated course, which it is charged would constitute a violation of his constitutional rights, and that he is without adequate remedy at law.

The defendants, as defendants below, answered the bill, admitting the facts of the arrest and detention of Downs upon the charge of embezzling the public moneys, and that prior to the granting of the injunction it had been their purpose to take a photograph in order to enable them to identify him if it became necessary in any criminal proceeding then pending against him or that might thereafter be instituted against him. They also admit the conducting by them of a bureau of identification under the superintendence of a lieutenant of the Bertillon system, in connection with which they take photographs of persons arrested for felony or other crimes of the kind charged against the plaintiff. And they further

say that the practice of photographing and measuring so charged prevails in every large city of the country, that proper police regulations are well established and enforced, and that when a prisoner is arrested charged with a crime of the character charged against the plaintiff, who is released ⁵⁹ upon bail, it is necessary to the proper enforcement of police regulations and the securing of the defendant for trial that a full description of him should be had, and that, if he should undertake to become a fugitive from justice, the police and detective department may be in possession of such information as will enable them to have him wherever he may be found; that the defendants are acting in the proper discharge of their duties to run down and capture offenders who may escape after having been released upon bail, and that if they are not permitted to provide efficient means of identification of persons charged with offenses, that in that direction will become ineffectual and unavailing. In their answering, they say that it is not their practice to publish the photograph of a prisoner who has been arrested for the first offense or to place it among the photographs of known and established criminals, until and unless the prisoner whose photograph has been taken has either been convicted or has undertaken to escape and avoid the payment of his bail, and that such was not their purpose with respect to the plaintiff.

It is also averred in the answer that since the filing of the bill Downs had been admitted to bail in the sum of five thousand dollars, but that subsequently upon investigation it was discovered that his alleged embezzlements were of much larger proportions than were disclosed by the testimony given at the hearing on the first charge and his crime was of a greater magnitude than he was rearrested, and was committed after the filing of the answer confined in a cell at the police station.

The issue presented for our consideration is the propriety of the dissolution of the injunction upon the case made by the bill and answer. Without stopping to consider whether the appellant had an adequate remedy at law for any wrong done, if such there should be, of his personal rights, we direct the court to call our attention to the substantial issue presented by the bill. The precise question there presented for our determination is whether the police authorities of Baltimore City may or ⁶⁰ provide themselves, for the use of their department, with the means of identifying a person arrested by them upon a charge of felony, before he is tried or convicted, by photographing and measuring him, and placing his photograph in the Bertillon system. It is not directly charged in the bill that the police intend to put his photograph in the rogues' gallery or distribute copies of it to the police.

ther cities, unless he is convicted or becomes a fugitive from justice, or that they propose to apply his Bertillon system to any other uses than those of their own department in New York City. Furthermore, the answer denies the existence of any purpose to apply the photograph or record of the defendant to any other purpose than that of his identification, if necessary, in criminal proceedings now pending or to be instituted against him, unless he is convicted and becomes a fugitive from justice.

In its opinion, the photographing and measuring of the defendant in the manner and for the purposes mentioned and the use of his photograph and the record of his measurement are consistent with the intent set forth in the answer by the police authorities of New York City would not constitute a violation of the liberty secured to him by the constitution of the United States or of this state. As was said by the United States Supreme court in *Crowley v. Christenson*, 137 U. S. 201, 10 Sup. Ct. Rep. 13, 34 L. ed. 620: "The possession and enjoyment of all rights are subject to such reasonable restraints as may be deemed by the governing authority of the state to be essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from constraint under conditions which are essential to the equal enjoyment of the same right by all citizens. It is then liberty regulated by law." In *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. 1103, 33 Ann. Cas. 765, the same high court, in discussing the extent of the police power of the state, declared that it has more than once recognized it as a fundamental principle of government that 'persons and property are subjected to all kinds of restraints and burdens to secure the general comfort, health, and prosperity of the state,' and many cases are in support of the statement. Similar views upon the extent of the police power have been expressed by this court in a number of cases from *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 37, 37 Atl. 172, 41 L. R. A. 551, down to *Watson v. State*, 105 Md. 650, 66 Atl. 635.

It has also been settled by numerous decisions that the state may delegate the police power to subordinate boards of police commissions, and that the reasonable and just exercise of the delegated power will be upheld: *Reetz v. Michigan*, 197 U. S. 505, 23 Sup. Ct. Rep. 390, 47 L. ed. 563; *State v. Broadbelt*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; *State v. Knowles*, 90 Md. 646, 45 Atl. 326, 41 L. R. A. 695; *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 41 L. R. A. 411; *Watson v. State*, 105 Md. 650, 66 Atl. 635.

A person suspected of the commission of a crime fully be arrested by the sheriff or police and held until a preliminary hearing of the charge against him be had before a magistrate, and he may then be committed to jail, or held to bail, for the action of the grand jury. *Edgar v. Bur*, 98 Md. 445, 57 Atl. 210; *Edgar v. Bur*, 715, 54 Atl. 936. He may be exhibited for identification to the person injured by the commission of the crime, or one of violence, and we see no good reason why the authorities may not be furnished with the furthermost efficient means of his identification provided by the process. The populous communities which now exist, and modern facilities for swift and frequent communication, rapid transit afford hitherto unknown facilities for arrest or fleeing from justice, which should be of great public interest by providing the agencies charged with the duty of preserving the public peace and arresting persons reasonably suspected of the commission of crime with the most efficient means of detecting and identifying persons consistent with the protection of the accused persons, and enjoyment of that "liberty regulated by law" to which every citizen is entitled. Section 744 of the Baltimore City charter vests upon the police many of the duties which at common law are incident to the office of sheriff. It makes it the duty of the police commissioners of the city, among other things, "to preserve the public peace, prevent crime, arrest and protect the rights of persons and property"; and it provides that no person whom the board have reason to believe intends leaving the city for the purpose of evading any laws of the state. The burden of those duties is placed clearly within the category of the public agencies, and should be furnished with the most approved means of identification of probable wrongdoers, and it may be argued that the legislature in the imposition of the duties has also to confer the incidental powers necessary to the discharge of the charge.

The right of the police authorities to employ the process for the identification of convicted criminals is recognized in most, if not all, of the jurisdictions. The subject has received consideration, although several cases and text-writers have either questioned or denied the right of the subject to that process persons accused of crimes before trial or conviction: *Molineaux v. Collins*, 177 N. E. 727, 65 L. R. A. 104; *Schulman v. Whitaker*, 704, 42 South. 227, 7 L. R. A., N. S., 274, 8 Ann. 17; *Itzkovitch v. Whitaker*, 115 La. 479, 112 Am. St. 39 South. 499, 1 L. R. A., N. S., 1147; *People v. Whitaker*, 57 Misc. Rep. 66, 107 N. Y. Supp. 1011; *People v. Whitaker*, Misc. Rep. 658, 59 N. Y. Supp. 418; *Owen v. P.*

tion in the form in which it is now presented to the subject of recent review in the case of State v. Shaffer, 154 Ind. 599, 77 Am. St. Rep. 511, 57 N. E. R. A. 73, where it was held that a sheriff may lawfully take the photograph, measurement, weight, name, residence of birth, occupation and personal characteristics of a person committed to his custody for safekeeping. In this discretion it is necessary to prevent the escape of the prisoner or to facilitate his recapture if he should do so. In *Shaffer v. United States*, 24 D. C. App. 417, the court of the District of Columbia, speaking through Chief Justice, made a clear and forcible statement of the principles and considerations which led them to the same conclusion, which we have arrived in the ⁶³ present case, in that the constitutional privilege alleged to be involved in that case Shaffer had been arrested by the police officer of the District upon a charge of murder, and upon his trial the government offered in evidence his photograph taken for identification by the police officer who had him in custody after his arrest. The evidence was objected to on the ground that it was the property of the prisoner, and in passing upon the objection, on the ground that the court in their opinion say:

objection is founded upon the theory that the use of a photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, and that such evidence to be so used. But we think there is no objection to this objection.

one of the usual means employed in the public service of this country, and it would be a matter of regret to have it unduly restricted upon any fanciful theory of constitutional privilege.

and as well be contended that a prisoner could law-
fully allow himself to be seen while in prison by a
witness, or that he could rightfully
uncover himself, or to remove a mark in court, to
enable to identify him as the party accused, as that
rightfully refuse to allow an officer, in whose custody

he remained, to set an instrument and take his oaths for the purposes of identification."

⁶⁴ For the reasons mentioned in this opinion we reverse the order appealed from, but we must not be understood as doing so to countenance the placing in the "rogues' gallery" of the photograph of any person, not a habit criminal, who has been arrested but not convicted on a crime, or the publication under those circumstances of such photograph on record. Police officers have no right to needlessly injure in any respect persons whom they are authorized upon in the course of their duty to arrest or detain, and the infliction of any such injury they would be liable to the injured person in the same manner and to the same extent that private individuals would be.

Order affirmed, with costs.

A Sheriff may Lawfully Take the Photograph of a Prisoner.—A certain sheriff's height, weight, name, residence, place of birth and the color of his eyes, hair and beard, without the aid thereof on his official bond, where no force or violence is used, the officer deems it necessary to secure the prisoner's compliance to retake him more readily should he escape: State 154 Ind. 599, 77 Am. St. Rep. 511. But in *Itzkovitch*, 117 La. 708, 116 Am. St. Rep. 215, it is held that an officer is liable to prevent the taking of a photograph of a prisoner for crime and placing it in the rogues' gallery, until after conviction, unless it is clearly shown that it should be taken before for either for identification or the detection of crime.

McGAW v. ACKER, MERRALL & CONDIT

[111 Md. 153, 73 Atl. 731.]

CORPORATION—Manager Taking Lease in

Where the managing director of a corporation, instead of a renewal of its lease as requested and as is possible in his own name, but afterward, on request, assigns the lease to the corporation, which assignment is invalid because not made by the lessor, he is answerable to the corporation for the lease, it is compelled to pay in order to obtain another lease, together with the reasonable costs and expenses incurred by it. (pp. 594, 597.)

COSTS—When Recoverable in Action for Damages

The general rule is that costs and expenses of litigation, other than usual court costs, are not recoverable in an action for damages, even in a subsequent action. But where the wrongdoer, defendant has involved the plaintiff in litigation which has placed him in such relations with others as make it necessary for him to incur expense to protect his interest, such costs and expenses may be treated as the legal consequences of the original wrong. (p. 598.)

—Attorney Fees and Expense of Litigation.—Where one loses possession of premises by the wrongful act of another, he is obliged to employ professional aid and incur expense in the possession of the premises to which, as between himself and the defendant, he is entitled, the necessary expense incurred to obtain possession is an element of the injury. (p. 598.)

INSTRUCTIONS.—**Error in Granting an Instruction** is not reversible where no harm results. (p. 598.)

Plaintiff's Case.—The action is based upon an alleged breach of duty by the defendant, McGaw, as managing director of the plaintiff company, which, it is alleged, that it has been compelled to pay increased rental for the premises where it conducted its business. The alleged breach of duty consisted in the defendant leasing a lease of the property in his own name, incurring a renewal thereof for the plaintiff.

The facts referred to in the opinion of the court are as follows:

Plaintiff's First Prayer: That if the court sitting as a jury find that the defendant was, during the month of October, 1905, in the employ of the plaintiff as the general manager of the Baltimore branch, and was a director of the plaintiff corporation, and that the plaintiff corporation occupied premises known as Nos. 220-222 North Charles street under the terms of a lease which expired on the thirty-first day of January, 1906; and the jury further find that on or about the twenty-fourth day of October, 1905, a notice was given by the plaintiff to the effect that said lease would expire on the thirty-first day of January, 1906, and that thereupon the plaintiff communicated the aforesaid, and that thereupon the plaintiff communicated upon the defendant to take up the matter of procuring a new lease, and it further find that the defendant, after receiving notice of said communication, but had prior to the twenty-fourth day of October, 1905, negotiated in his own name a lease for the premises aforesaid, which lease was executed on the twenty-sixth day of October, 1905, to run for a term of one year, to wit, as of February 1, 1906; and the jury further find that the defendant, when requested to assign the said lease, refused to do so, but under advice of counsel on or about the sixteenth day of December, 1905, assigned the said lease to the plaintiff; and the jury further find that the said lease contained a provision that the assignment of the same by the lessee should be valid without the written consent of the lessors; and the jury further find that the lessors declined to give their consent to said assignment, and required the plaintiff to pay the same rent, which rent if the jury find the plaintiff liable to pay in order to retain possession of the said premises, then in that event the plaintiff is entitled to recover the same; and the jury further find that the defendant procured the said lease in the name of the plaintiff.

tiff at the time when he procured the same in his name as aforesaid.

"Plaintiff's Second Prayer: If the jury find upon the prayer that the plaintiff is entitled to recover, the measure of damages is the amount of increased rent, together with such costs as the plaintiff was put to in procuring a new lease as aforesaid, provided said costs were reasonable and necessary.

"Plaintiff's Third Prayer: That if it find that the defendant, George K. McGaw, occupied the position of local manager in the city of Baltimore of the plaintiff, and if it further find that the plaintiff occupied the premises at 220-222 North Charles street under lease to the defendant, which terminated on the first day of January, 1905, and on or about the twenty-fourth day of October, 1905, the plaintiff received notice that the said term would expire as aforesaid, and that thereupon it notified said McGaw that the said McGaw, without notice to the plaintiff, had put out applying to the said trustees for renewal of the lease or a new lease in the name of the plaintiff, and that the said trustees for a new lease for three years from the expiration of the old lease in his own name, and obtained the consent of the said trustees on or about the twenty-fourth day of October 26, 1905, offered in evidence, at the year 1905, eight thousand dollars (\$8,000), and that when the plaintiff assigned the same he at first declined, and subsequently, after being advised by counsel, assigned the same to the plaintiff. And the plaintiff subsequently the plaintiff notified said McGaw that the said trustees had refused to consent to said assignment, and that the plaintiff made a demand for a greater rent, and that the plaintiff notified the said McGaw of said demand and requested the said McGaw to aid it in procuring the consent of the said trustees to the assignment of the lease made by McGaw to it, and that the said McGaw declined to do so and made no effort; and that the plaintiff, acting as a jury, further find that if said McGaw had made such effort he could have procured the consent of the said trustees to said assignment, and that the plaintiff is to be held in faith and in order to save itself from the danger of being dispossessed of said property, agreed to pay an additional rent of one thousand dollars (\$1,000) per annum in excess of the rent demanded in the lease to McGaw, then and in that event the plaintiff is entitled to recover from the said McGaw the excess of rent so agreed to be paid, together with such reasonable costs and expenses as the jury may find that the plaintiff incurred in procuring a new lease of the said premises.

"Plaintiff's Fourth Prayer: The plaintiff prays that the court, sitting as a jury, that if it find that the defendant, George K. McGaw, occupied the position of local manager in the city of Baltimore of the plaintiff, and if it find that the defendant was at the time he procured the same the director of the company at the time he procured the same

name on the twenty-fifth day of October, 1905, as in the first prayer, if it so find; and it further find the facts as recited in said prayer said McGaw lease to the plaintiff, and after the said assignment said McGaw failed to make any effort whatever to procure the consent of the lessors to said assignment, on the contrary, authorized Messrs. Warden and to use his name as a guarantor of an offer of a lease made by the said Warden and Hopper to the trustees, if the jury so find, and that by reason of the lease on the part of the said McGaw the trustees, having made higher offer guaranteed as aforesaid, declined to accept the said assignment, but required the plaintiff to pay higher rent, then in that event the plaintiff is entitled to recover."

Defendant's Twelfth Prayer: That unless the court, sitting as a jury, shall find from the evidence that damage was done to the plaintiff corporation by the defendant's taking the lease of the premises known as No. 220-222 North Charles Street in his own name, or by his failure to promptly assign the lease (if the court, sitting as a jury, shall find such to be the verdict of the court sitting as a jury should be found in favor of the defendant."

Gosnell and George Weems Williams, for the appellant.

Samuel Semmes, for the appellee.

MR. JUSTICE RKE, J. By this appeal the pending case is brought before us for the second time. The first case is reported in 106 Md. 536, 68 Atl. 17. The declaration in that case set out two causes of action incorporated in one count. It alleged that the defendant had committed two breaches of contract which he owed to the plaintiff whereby in each instance he suffered loss. This defect in the declaration was pointed out in the opinion of this court, and as the judgment was reversed and the case remanded, it was said that the declaration could be amended before the retrial of the case. Accordingly amended. The narratio in the present case sets out three counts. The first and second counts declare the two causes of action contained in the declaration in the former case, and the third count assigns a new cause of action. Briefly stated, the causes of action relied upon in the respective counts of the narratio in this case are, that the defendant committed an actionable breach of contract in taking the lease in his own name when he could and should have taken it in the name of the plaintiff; second, that he refused to make any effort to procure the consent of the lessors to the assignment of the lease to the

plaintiff, but permitted himself to be used as a guaranty for an increased offer of rent for the premises made by the defendant and Warden; thirdly, that it was the duty of the defendant to aid the plaintiff in procuring the assent of the Warden to the assignment of the lease, and that he refused to do so, whereby loss accrued to the plaintiff. The first three counts set out causes of action identical with those set out in the declaration which appeared in the record on appeal.

In the trial of that case the lower court directed a verdict for the defendant upon the ground that there was no evidence ¹⁵⁸ offered legally sufficient to entitle the plaintiff to recover. We held that there was legally sufficient evidence to support both causes of action upon which the plaintiff relied in that case, which, as we have stated, were set out in the first and second counts in the declaration in this record. Upon the new trial the plaintiff obtained a judgment, and the defendant has brought this appeal. The record contains no exceptions to the ruling of the court on the questions of evidence.

At the close of the whole case the plaintiff offered thirteen prayers and the defendant fourteen for instructions. The defendant filed special exceptions to the plaintiff's first, second, third, and fourth prayers. The court overruled the special exceptions and granted the plaintiff's first, second, third, fourth prayers, and rejected its fifth, sixth and seventh. The defendant's twelfth prayer was conceded, and all the other prayers were refused. He excepted to the ruling of the court upon his prayers and special exceptions, and assigns as error the only exception before us.

The reporter will set out the plaintiff's grant of the twelfth prayer and also the defendant's twelfth prayer. The first, second, third, fourth, sixth, eighth, ninth, tenth, eleventh, thirteenth, and fourteenth prayers concluded in some instances that the plaintiff had a right of the plaintiff to recover and in others that the plaintiff had a right to recover upon certain counts of the declaration. They all raised practically the same questions presented by the special exceptions to the plaintiff's prayers.

The court was asked by the defendant's fifth prayer to direct a verdict for the defendant. The court told the jury that inasmuch as the uncontradicted evidence showed that all relationship between the plaintiff and defendant terminated on the 8th of December, 1905, the defendant was not liable for anything he did or omitted to do after that date. This prayer was not supported by the evidence, and was properly refused. Mr. McGaw directed a verdict for the plaintiff on his relation as a director of the plaintiff corporation from January 13, 1906, and for any actionable breach of duty committed by him as such director he was liable. The defendant ¹⁵⁹ by his seventh prayer asked the court

law that there was no evidence legally sufficient when the defendant secured the lease in his own name. He could have secured a similar lease for the plaintiff at the same rental. This prayer was properly rejected for reasons which will be presently stated. His second prayer asserts, but states no legal conclusion, that the evidence shows that the defendant was authorized to take the lease of the premises in the name of the plaintiff corporation. While it is true the defendant was not expressly told to rent the premises and take them in the plaintiff's name, there is ample evidence that a jury might have found that he had authority to do so. The prayer was not only indefinite and inconclusive, but also misleading, and it tended to divert attention from the legal issues made by the pleadings. The evidence in support of the plaintiff's case is substantially the same as that contained in the record on the former appeal, and is in no essential particular different. Assuming the court was right in rejecting the defendant's ninth prayer, a reference to the statement of facts contained in the opinion in the former case and to the conclusion reached by the court is sufficient to show that the trial judge was in no error in granting the plaintiff's first and second prayers. Those prayers are based upon the first and second causes of action of the amended declaration which set up the causes of action alleged in the narrative in the former case. It is there said that the evidence was legally sufficient to take the case to a jury in support of both causes of action. The court holds that the decision in the former case is controlling on the legal questions raised by the special exceptions and that the defendant is entitled to take the case from the jury for the lack of legally sufficient evidence to support either of these

causes of action produced on behalf of the defendant on the former appeal. The case consisted of that of Mr. McGaw, Frank W. McGaw, and certain extracts from the minute-book of the plaintiff corporation. We find nothing in this evidence to justify the court in holding that the principles announced in the former case should not be applied to this. It is fair to say that Mr. McGaw was not conscious of any intentional wrongdoing, but that he believed he had a perfect right to do as he did; but if the facts stated either in the first or second causes of action of the plaintiff be true, he must be held liable for the same as the plaintiff thereby incurred.

The plaintiff's second prayer is said to be objectionable, and it allows the recovery of such reasonable and necessary costs as the plaintiff was put to in procuring the new trial. The costs consisted of a counsel fee of two hundred dollars paid Mr. Steele, and certain expenses in-

curring by officials of the plaintiff company in passing the leasehold title to the premises. The counsel fees, which the court allowed the plaintiff to recover, were counsel fees and costs involved in this litigation only as were incurred in securing the new lease after the defendant had, as alleged, wrongfully secured in his own name a lease of the property. These expenses were incurred by the plaintiff and proven at the trial, and it is not shown that they were reasonable, and there seems to be no doubt that they were necessarily incurred.

The general rule is that costs and expenses other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs recoverable in a subsequent action; but where the wrongful act of the defendant has involved the plaintiff in such relations with others, or placed him in such relations with others, as to make it necessary to incur expense to protect himself against the consequences of the original wrongful act. If the plaintiff's defence be true, it was about to lose possession of the premises by the wrongful act of the defendant, and it was necessary to employ professional aid and incur expense to regain possession of the premises to which, as between itself and the defendant, it was entitled, and the necessary expenses incurred to regain the possession is an element of damages. ¹⁶¹ Hadley v. Baxendale, 9 Ex. 341; Furstenburg v. City of Baltimore, 61 Md. 184; Baltimore City Passenger v. Kemp, 61 Md. 74; Webster v. Woolford, 81 Md. 319; 1 Sutherland on Damages, 2d ed., sec. 58.

The other objection to this prayer is disposed of by what we have said in passing on the first prayer of the plaintiff.

It clearly appears that the defendant was not entitled to the granting of the plaintiff's third prayer. The court was based upon the third count of the declaration, and that the verdict and judgment were entered upon the third count, and that the court would not have found for the plaintiff under either of the other counts. If, therefore, there were error in granting that prayer—and we are not understood as so deciding—it was not reversible error, and no harm whatever was done to the defendant, and this is true of the asserted inconsistency between the twelfth prayer, which, being conceded, became the basis of the case (Gans Salvage Co. v. Byrnes, 102 Md. 230, 1 L. R. A., N. S., 272), and the third and fourth prayers of the plaintiff.

The defendant's ninth prayer asked the court to grant that upon the uncontradicted evidence in the case the trustees of the estate of John and James Gregg paid the defendant's wrongful act in securing the lease

is argued that as the trustees, with full knowledge, and in the defendant's violation of duty, a resulting thereby created in favor of the plaintiff which it enforced against the trustees and Mr. McGaw, and, there was no necessity for the payment of the interest. The defendant's tenth prayer rests upon the position. It may well be conceded that Mr. McGaw, lease of October 26, 1905, as trustee for the plaintiff, that it could have compelled him to assign it; but contradicted evidence does not show that the trustees the defendant was violating his duty to the plaintiff time they executed the lease, or that they pardon any breach of duty which may have been committed by the defendant. On the contrary, it tends to show their conduct was in all respects fair and proper. Certainly nothing in the conduct of the trustees that authorize the court to hold, as a matter of law, that the defendant was thereby relieved of liability in this suit. No reversible error in any of the rulings of the trial or the judgment appealed from will be affirmed. Judgment affirmed, with costs.

Officers of a Corporation are under the same restraints and duties as trustees. They have no right to use their official position for their own benefit or for the benefit of anyone except the corporation. *Memphis etc. R. R. Co. v. Woods*, 88 Ala. 630, 16 So. 81; *Hoffman v. Reichert*, 147 Ill. 274, 37 Am. St. Rep. 173; *Hinkley v. Harris*, 69 Kan. 498, 105 Am. St. Rep. 173; *Hinkley v. Line Co.*, 132 Iowa, 396, 119 Am. St. Rep. 564.

BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY.

[111 Md. 260, 73 Atl. 885.]

CONNECTING CARRIERS—Liability to Passenger.—A complainant alleges that the plaintiff purchased from the defendant a ticket for transportation to a certain point and return, and on the same route he purchased another ticket for transportation on the same line from the first terminus to another point and return; and that he purchased from a person whom he believed to be an agent of the first carrier, but averring no facts warranting such belief, and that by reason of the negligence of the latter carrier he was not returned to the first terminus in time to connect with the first carrier, states no cause of action. (pp. 600, 602.)

I. Walton and Toadvin & Bell, for the appellant.

P. Graham, for the appellee.

²⁰⁰ PEARCE, J. This is a suit brought Mills, the appellant, against the appellee, the Chesapeake and Atlantic Railway Company, engaged in the business of a common carrier between more and Ocean City, Maryland, ²⁰¹ its route by steamer from Baltimore to Claiborne, in Talbot County, thence by rail to Ocean City. The defendant moved for the declaration, and the demurrer being overruled, the plaintiff moved to plead over, and judgment was entered for the plaintiff on the demurrer.

The declaration alleged that on August 17, 1891, the defendant advertised and ran an excursion from Baltimore to Chesapeake Beach, in Calvert county, and back to Baltimore and Washington City; that on that day the plaintiff bought a ticket from the defendant at a station on defendant's line, a ticket from Salisbury to Chesapeake Beach and return; that relying on the advertisement of said excursion, he bought a uniform in uniform on the defendant's steamer between Baltimore and Chesapeake Beach, whom he believed to be an agent for the defendant, a ticket entitling him to transportation from Chesapeake Beach to Washington and return, both said tickets being good for that day. On the morning of the excursion, after reaching Chesapeake Beach he entered one of the cars of the Chesapeake Beach Railway Company, a corporation doing business as a common carrier over its own line between Chesapeake Beach and Washington, D. C., and on that day he went to Washington on said last-mentioned ticket; that on the following day, and upon the return coupon of said last-mentioned ticket, he was carried from Washington to Chesapeake Beach by the cars of the Chesapeake Beach Railway Company; that by reason of the negligence of that company he was not carried back to Chesapeake Beach until after 7 o'clock P. M. On the morning of the hour advertised for the steamer to leave Chesapeake Beach on the return to Claiborne, and when the steamer had then left the wharf, though still in uniform, and hearing, but that the officers of the steamer did not return for him and others who held tickets similar to his. There can be no difficulty upon this state of facts in sustaining the ruling upon the demurrer.

The declaration expressly states that the ticket at Salisbury only entitled the plaintiff to transportation to Chesapeake Beach and return from that point. ²⁰² On that day, and that after making that contract of carriage, and while en route from Claiborne to Chesapeake Beach, he entered into another contract of carriage with the Chesapeake Beach Railway Company, through an agent he believed to be an agent of the defendant, for transportation from Chesapeake Beach to Washington and return on that day, and that b

e of the Chesapeake Beach Railway Company, he connect with the steamer of the defendant, and suffer and damage thereby.

Declaration does not show what the statements of the agents were upon which he relied in purchasing the ticket; what were its stipulations or form; from the person from whom the ticket was purchased, or any fact which warranted him in believing that the person was agent for defendant. All this is left to the imagination. The bare proposition is that he purchased a ticket from the corporation for transportation to one point and returned that he purchased another ticket from another corporation for transportation from the first terminus to another point, and that by reason of the negligence of the corporation he has sustained an injury, and it is attempted to make out this statement of a cause of action by the belief merely that the person from whom he purchased the second ticket sold the same as agent of the defendant. Section 2 of article 75 of the code declares that in all cases "facts only shall be stated, and not arguments or conclusions," and this rule, which is only declaratory of the law, is founded on the necessity "of informing the jury of what is meant to be proved, in order to give them an opportunity to answer or traverse it." But if there is a direct allegation that the person from whom the ticket was purchased was a servant or agent of the defendant, it would not alter the case. The declaration alleges that this ticket was a ticket issued by the Chesapeake Beach Railway Company, and it was the contract of that company, and not ²⁶³ of the defendant company, even if it was sold by someone in the service of the latter.

Section 571, the law applicable to the facts as gathered from the declaration, is the most liberal construction of the declaration is stated in the absence of any arrangement between carriers of connecting lines, there is no right on the part of one carrier to bind the other by the sale of a ticket for through transportation over the two lines. But joint arrangements have been made by which tickets issued by one of such carriers are accepted by the other. The usual arrangement is that each of the connecting carriers sells tickets for through transportation, acting as principal with reference to its own line and as agent for the connecting carrier in connection with transportation over the connecting line. A ticket issued by one carrier is not a through contract, and the rights of the purchaser and the responsibility of the different companies are determined as though separate tickets had been purchased by each, and each is responsible for injury suffered on its own line, and not otherwise." Of course, a carrier may be liable in its own behalf for through transportation over

a connecting line, and where this clearly appears, would be liable to the ticket-holder for any injury by the negligence of the connecting carrier.

On page 584 of 6 Cyc. it is also said: "Where a carrier's route is over connecting lines of independent carriers, the first carrier discharges his duty when he delivers the passenger at the end of his own line ready to continue his transportation on the connecting line, and he will not be liable for any failure of the connecting carrier to perform his independent contract." It is obviously the duty of each carrier to inform themselves as to the train which should be taken to enable them to make necessary connections, and this was declared in *Duling v. Philadelphia etc. R. R. Co.*, 6 Atl. 592. There is no allegation in this decision that the train the plaintiff took was scheduled to leave for the steamer at Chesapeake Beach, or that the train was there before the advertised hour of 7 P. M. But the express averment ²⁸⁴ that the train did not leave for Chesapeake Beach until after 7 P. M., and as the steamer was not far distant from the pier, the necessary inference is that it did not leave before the appointed hour, and the defendant is therefore not chargeable with any breach of contract with the plaintiff. No cause of action against the defendant is shown by any or all the averments of the complaint. If any can be shown to exist, it must be against the Chesapeake Beach Railway Company.

This judgment, therefore, must be affirmed.

Judgment affirmed, with costs to the appellee.
below.

A Common Carrier may, by Express Contract, confine its liability for negligence to a passenger to its own line, and make the agent of the connecting carrier so as to exempt itself from liability for the negligence of the operator of the connecting line. *Harris v. Howe*, 74 Tex. 534, 15 Am. St. Rep. 862. When connecting carriers use one station and jointly employ a ticket agent, the fact that he sells a ticket for transportation over one line does not render the other road liable for the safe transportation of the passenger over the road on which he bought the ticket. *etc. B. R. Co. v. Cochran*, 43 Kan. 225, 19 Am. St. Rep. 100. If a railroad company issues a through ticket contracting to carry a passenger beyond its own terminus, it is liable for the negligence of the connecting carrier, through whose agency the contract of transportation is being performed: *Omaha etc. R. R. Co. v. Nebraska*, 54 Neb. 747, 69 Am. St. Rep. 741.

If an Agent of an Initial Carrier, in accordance with the custom previously observed by connecting lines, sells a special ticket, good for return within a time therein limited, and the agent has to have authority to represent each of such lines in the sale of the ticket, whether he is a special or general agent: Chesapeake Beach etc. R. R. Co., 191 Mo. 489, 109 Am. St. Rep. 830.

City of a Railway Company for the Act of Its Ticket Agent
 a passenger over a less direct route than he should have
 not extend to injuries received on other lines through
 trains to run on time: St. Louis etc. Ry. Co. v. White,
 122 Am. St. Rep. 631.

CADWALADER v. PRICE.

[111 Md. 310, 73 Atl. 273.]

Sufficiency of Description of Land.—A deed conveying
 part of a tract of land called 'King's Hill' situate in
 Neck in Hartford county, known as the landing on
 "x," contains by reference a sufficient description, if the
 be proved, and is admissible in evidence in an action
 t. (p. 606.)

BOUNDARIES.—The Declarations of Persons Since Deceased
 ble to prove private boundaries. (p. 607.)

BOUNDARIES.—Traditional Evidence is Admissible to prove
 ndaries. (p. 607.)

BOUNDARIES.—The Declarations of a Former Owner of a
 landing, as to the boundaries of the latter, made at a
 he had no interest and before any controversy had arisen,
 ble in evidence in an action of ejectment, he being dead
 of the trial. (p. 608.)

ADVERSE POSSESSION.—Presumption of Grant.—When one
 session of property in such a way and for such a time
 it adverse, a deed will be presumed, and the presumption
 although the jury may disbelieve the actual execution of
 t. (p. 610.)

EJECTMENT.—Adverse Possession.—Survey.—Where the de-
 ejectment claims title by adverse possession to a part
 land, the proper practice is to have a survey made under
 ssued by the court. (p. 610.)

S. Whitman and Thomas F. Cadwalader, for the

Young and S. S. Field, for the appellee.

YD, C. J. This is an appeal from a judgment
 in favor of the defendant (appellee) in an action
 ent instituted in Harford county and removed for
 e superior court of Baltimore City. The land sued
 ribered in the declaration by courses and distances,
 ns one-half acre, more or less. A plea of not guilty
 d short on the docket, but defense on warrant was

Dorney, by his last will and testament, which was
 February 6, 1844, devised to Jackson Dorney, his
 ntation called "King's Hill," and a tract called
 Farm." By deed dated September 10, 1852, Jack-

son Dorney and wife conveyed to George Hartman a tract known by the name of "King's Hill," and reserving to him the said Jackson Dorney and assigns forever the landing and the free use of the same situated at the head of King's creek, right of way to and from the same through, along the ³¹² said land hereby conveyed at and along a convenient road or way as may be deemed reasonable to approach the said landing." On March 24, 1881, Hartman conveyed to Thomas J. Cochran all the tract or parcel of land called "King's Hill" containing the metes and bounds, courses and distances thereof "being the same lands described in a deed from Jackson Dorney and wife to George Hartman . . . and the exceptions and reservations therein made." Cochran and wife conveyed by deed dated December 1, 1881, to General George Cadwalader two tracts, including the said land, conveyed by the last-mentioned deed, "except and reserving the landing and right of way reserved in and by the same lands from Jackson Dorney to George Hartman, dated," etc. It is admitted that the plaintiff bears the burden of proof to all the property conveyed to George Cadwalader in the deeds in evidence.

The real controversy in the case arises from the deed from Jackson Dorney and wife to George Hartman above set out, but involving the deed from Jackson Dorney and wife to John Price, the defendant, and Salathiel Legoe, dated September 1, 1881, which was admitted by the court below. That deed contains the following language: "all that part of a tract of land called 'King's Hill' in Gunpowder Neck in Harford county, known as the landing on King's creek, which was excepted and reserved to us, the said Jackson Dorney and Hannah J., by the deed from us . . . to George Hartman . . . with the right of way to and from said landing and the rights, privileges and immunities reserved by us in the deed on record shows that four-sixths interest in whatever was thereby conveyed was in the defendant, the remaining two-sixths were vested in one of the said Salathiel Legoe, and in William T. Price. The appellant claims under the deed to Hartman, and the appellee under the deed to Price and Legoe, and also by adverse possession as through the deed to John Price and Salathiel Legoe."

Although a number of prayers were granted, and objections were taken on both sides, no exceptions were taken to the rulings of the court on the prayers, but there are ten bills of exception presented to the court as to the evidence. The first and third can be sustained together. The first was to the admission of the deed from Jackson Dorney to Price and Legoe above referred to, and

ruling a motion to exclude that deed, which was the end of the case. Without discussing other facts as to its admissibility, we are of the opinion that it is not admissible to show color of title. It grants "all that tract of land called 'King's Hill' situate in Gunpowder in Harford county, known as the landing on King's creek," etc. There is abundant evidence to show that the defendant owned a parcel of land known as "King's creek landing" and as the "landing on King's creek" by other names. William F. Stevens testified he had known King's creek landing thirty or thirty-five years, although he did not know the boundaries until Jackson Dorney pointed them out, the effect of which we will consider later. Martin Dorney was fifty-one years of age, testified he had known King's creek landing since he was about fifteen, but did not know the boundaries until 1883. Boyd Preston testified he had known King's creek landing for many years, but did not seem to know the boundaries until Mr. Dorney pointed them out. John S. Price, who was forty-five years of age, testified he had known "the landing on King's creek" since he was a boy. He spoke of two stones on the western boundary, but the record is not clear that he knew the boundaries until 1883. Daniel Sullivan, who lived on the Savory from 1861 to 1882 and then moved on King's Hill where he lived for three years, spoke of it as King's creek landing. Joseph A. Price, a brother of the defendant, testified he was seventy-one years of age and had lived near seven miles from King's creek landing nearly thirty years; that he had known the landing at the head of King's creek, since 1850, had been on it before his father died, and it was called King's creek landing; that he had no other place, so far as he knew, that went by the name of King's creek landing or the landing on King's creek. He knew the stones referred to by the witnesses as being the western boundary long before his father died, and the property; remembers having seen them as early as 1852 and saw them from time to time until 1888; that the first time he went there Jackson Dorney was in possession of King's creek landing, and that his father paid taxes on King's creek landing while he was tax collector from 1885, 1886, 1887 and 1888. He also said that the landing was not in the same place that it now is, but was changed about 1864, when Mr. Cochran owned King's creek landing and had been in the same place ever since. Somerville, county surveyor of Harford county, testified that he made the survey of King's creek landing and the plat filed in this case; that he fixed the western boundary by drawing a line from a point at the head of a branch of King's creek, pointed out as the place

where a boundary stone formerly stood, near through another point near the bank of the branch of King's creek, pointed out as the spot where formerly stood a boundary stone under a white oak tree. The remaining boundaries of King's creek land followed King's creek around to the marsh first, and up to the point of beginning. This is the description of King's creek landing as claimed by the defendant.

The parcel of land claimed by defendant as being less than half an acre, and while most of the witnesses know the boundaries of it except as pointed out by Jackson Dorney, there was unquestionable evidence to show that there was a parcel of land known as King's creek landing, or landing on King's creek. If the land could be proved, the reference to it in this deed would be definite as the description of land in the deed of ³¹⁵ Dorney to Hartman, under which the plaintiff claims "King's Hill." By section 22 of article 75 of the constitution it is provided that: "It shall not be necessary to state in a deed by which land may have been patented in default of actions of ejectment, dower, trespass or case, the name of the land, but it may be described by abutments, course and distance, and the name it may have acquired by reputation, or by a description certain enough to identify the same." See *Jay v. Michael*, 82 Md. 1, 33 Atl. 322; *Wint v. Huddleson*, 70 Md. 305, 17 Atl. 84, and *Huddleson v. Reynolds*, 8 Gill, 332, 50 Am. Dec. 702. In the latter case the tract patented as "Western Route" was sometimes called "The Route." The court said: "The conclusion seems warranted that the tract which, when taken up, was called by the name of 'Western Route' was in the late years sometimes called West, and sometimes Western Route. The conveyance by the name which it had acquired by reputation would have passed the title to the patented tract. The facts seem clear, therefore, that the deed on its face is sufficient, and it only remains in that connection to consider whether the evidence sufficiently shows that the tract was a tract capable of definite location. In addition to the evidence we have already referred to, we will now consider the fourth bill of exceptions, which presents for review the action of the lower court in overruling the motion to set aside the testimony of the witnesses in reference to the deed of Jackson Dorney.

He went upon the land in 1883 and pointed out a number of persons, who were witnesses in this case, to the King's creek landing, telling them that a line of boundary stones which were then there (and the places where they were located on the plat by the surveyor) was the boundary, and a marsh from the north stone to

northern boundary and King's creek was the eastern boundary. There ought no longer to be any question in Maryland about the right to prove private boundaries by the declarations of deceased persons, subject, of course, to certain well-recognized limitations. If such ³¹⁶ evidence is excluded on the ground that it was hearsay, it is impossible, in portions of the state where there is much controversy over boundary lines, to establish the corners of ancient tracts. It is said in *Dorsey on Ejectment*, 58: "It may be asked, how can a witness be called to prove a boundary made in 1680? The law does not require it. It is generally true that hearsay is not evidence. From necessity there are certain exceptions. The rules of law of a jury are directed to identify a boundary, and to be proved by traditional evidence. The rules of evidence do not permit a witness to refer to the declarations of a deceased person who was on the survey. As in consanguinity, hearsay may be proved by hearsay evidence; but the declarations of living witnesses cannot be received, nor the declarations of a person interested in establishing the fact." This was held by the provincial court in *Howell's Lessee v. Har. & McH.* 84, that: "Traditional evidence of the declarations of an ancestor of the plaintiff, who was seised of the lands in question fifty years ago, at that time did say concerning the boundaries of those lands might be given in evidence to the jury, but the weight of it left to the jury." *Redding's Lessee v. McCubbin*, 1 Har. & McH. 368, is to same effect. *Wright's Lessee v. Ogle*, 4 Har. & McH. 123, it was held that a plat returned in an ancient ejectment is admissible in evidence upon the same principle that hearsay evidence is admissible to prove boundaries": See, also, *Scott's Lessee v. Har.*, 3 Har. & McH. 511, and *Snively v. McPherson*, 1 Har. & McH. 150. In *Hall v. Gittings' Lessee*, 2 Har. & McH. 150, the declarations of a former holder of the adjoining land to the bounds of the land in dispute were held admissible in evidence, it not appearing to the court that the plat that he was interested in establishing the boundaries of the facts related by him to the witnesses: See, also, *Lessee v. Cockey*, 1 Har. & McH. 230; *Weems' Lessee v. Disney*, 4 Har. & McH. 156. Other cases might be cited in which they can be found either in the notes in *Dorsey on Ejectment* or in Mr. Brantly's Annotated Edition of the early editions of the law, though in the later decisions of this court the question has not been ³¹⁷ passed on, it is because the rule is too generally recognized to admit of controversy. The examination of the records in some of the later cases will show that such testimony has been received, and the court of this opinion knows that in the many actions of trespass and trespass quare clausum fregit which have

arisen in western Maryland it has been the unquestioned practice to prove boundaries by traditional evidence.

The general rule in this country is thus stated in the American and English Encyclopedia of Law, 851: "Declarations of deceased persons are admissible in evidence in cases relating both to public and private boundary lines, although they were made ante litem motam and by a person of peculiar means of information, and who had no interest in the matter at issue at the time they were made." In 1895, it said: "Hearsay evidence as to boundaries is admissible when there has been so great a lapse of time that it is difficult to prove the original boundary lines by the existence of the primitive landmarks"; and on page 852: "Reputation or tradition is very generally held to be admissible evidence to prove an ancient boundary, whether public or private, although in England and a few of the United States its admissibility to prove a private boundary is restricted to cases where it is shown that such boundary is coexistent with a public or quasi-public one. Such reputation, however, must, however, be ascertained as to the subject-matter by direct evidence would be, and is not admissible to prove evidence of record; and in all cases proof of ancient boundaries by common reputation must have reference to the time ante litem motam."

In this case the declarations of Jackson Dorney, made at a time he had no interest in making them, in the controversy about the land in question had arisen, was pointing out the boundaries, and he had died before the trial. He was the former owner and had been on the farm and landing, and hence was familiar with the boundaries. It is said, however, by the appellant that the evidence of Dorney's declarations and acts comes within the prohibition that a vendor of land cannot impair the title of the vendee after he has parted with the property. Dorney was not only vendor of the farm but also of the landing. He had been still living at the time of the trial, there had been no question about the right of the defendant to use the landing as a witness to show that the landing on King's creek was a well-defined tract of land, and to point out the boundaries. It is not an attempt to impeach the deed to H. D. H. that deed itself expressly excepted from its effect the land situated at the head of King's creek, and the question became material at the trial, as is well shown by the plaintiff's prayer A, as modified, and by the defendant's answer, as modified, was whether there was a parcel answering that description, "with boundaries either well known or capable of definite location by natural objects." The construction of the deed was for the plaintiff and the lower court did construe it. If that construction

not satisfactory to the appellant, he should have brought the rulings of the lower court here for review, but, as we have seen, there are no exceptions to the prayers in the record. If the court was right in its construction of the deed, then it was necessary to submit to the jury the question of fact whether there was such a definite tract. In order to determine that, it was admissible to prove the boundaries, and in doing so it was competent to prove that Dorney had pointed them out to the witnesses who were called at the trial.

It is not necessary to determine whether it was admissible to offer such statements as "that is what he reserved," and similar declarations which some of the witnesses testified he used, for the motion to exclude was not confined to them, but we can see no reason why Jackson Dorney could not, at the time he did, point out the corners and lines of the parcel of land known as the landing. According to the evidence of Joseph A. Price the stones were there at least as early as October or November, 1852—only a month or two after the deed from Dorney to Hartman—and he had known the landing ³¹⁹ at the head of King's creek since 1850. That there was some kind of landing there is shown by the deed to Hartman.

With this and other testimony in the record, there was ample evidence tending to show that there was a well-defined parcel of land known as the landing on King's creek, or as King's creek landing, as most of the witnesses spoke of it, which was not only capable of being located but was in fact located by the county surveyor. The defendant testified that his father claimed to these lines and always paid the taxes on the landing until his death in 1893, and that he (the defendant) had paid them ever since. It might be said, parenthetically, it is not probable that he was paying taxes on a mere easement.

The evidence is also ample to show adverse possession—under a deed which we have already said gave color of title. The father of the defendant and his cotenant used the land for the purposes it was capable of being used and best adapted to. As early as 1870 Mr. Price built a shanty on it, he paid taxes on it, rented it for some time, and did all that could be required to show such acts of ownership as could be exercised over property of that character and locality. Then the record states: "Besides all the testimony set out in both the foregoing bills of exception, which is by reference made a part hereof, further testimony was taken, and the defendant offered testimony tending to prove adverse possession of the land in controversy by defendant and those in privity with him, and under whom he claims from the date of the deed from Dorney to Price and Legoe, in 1860, down to the death of John Price, and down to the institution of this suit." In

that connection we might add as a further argument of appellant that there was no evidence of deed ever having been in existence, which had station as that relied on to show that the land in creek was a parcel of land known by that name. If a party has had possession of property in such a manner as to make it adverse, within the meaning of the law, a deed is presumed, and "the presumption is an inference ³²⁰ of law arising out of a preponderance of facts, and may exist although the jury in the case may disbelieve the actual execution of such a grant." *Lessee v. Inloes*, 1 Gill, 430, 39 Am. Dec. 658. There had been any necessity for a deed prior to the time when the deed described the parcel of land, it could be proved by the adverse possession.

We will not prolong this opinion by discussing the questions raised. The brief of the appellant presents a theory of the case with marked ability, and contains an interesting review of the law on easements and covenants, but the salient points in the case are those we have already mentioned.

We would add that in a case of this character it is always to be a survey made under a warrant of the court. No question was raised about the right of the appellant to prove adverse possession because he had not been on warrant, and we are therefore not called upon to decide it. But when adverse possession is claimed of the lands sued for, that is unquestionably the proper rule. *Hackett v. Webster*, 97 Md. 404, 55 Atl. 480, is cited. The record does not satisfactorily show that proper entry was made for the land for which the appellant have been a disclaimer, but that is not included in the exceptions before us. So far as we can determine from the exceptions in the record there is no ground for reversing the judgment must be affirmed.

Judgment affirmed, the appellant to pay the costs as below.

DECLARATIONS OF FORMER OWNERS OF LANDS IN DISSENCE AGAINST THEIR SUCCESSORS IN TITLE

- I. Limitation of Grounds of Declaration, 611.
- II. Declarations in Disparagement of Title.
 - a. Made Before Former Owner has Parted With Possession.
 - b. Made After Former Owner has Parted With Possession.
- III. Declaration as to Boundaries.
 - a. Breadth of American Contrasted With English.

*REFERENCES TO MONOGRAPHIC NOTES.

- Hearsay evidence regarding boundaries: 15 Am. Dec. 628; 60 Am. Rep. 589.
 Declarations of deceased owners respecting their boundaries: 681.

Declarant must be Disinterested and Declarations must be Made *Ante Litem Motam*, 620.

Declarations must be Made While Declarant is on the Land and in the Act of Pointing Out the Boundaries,

Declarations Made After Parting With the Land, 623.
Declarations of Declarant, 625.

Limitation of Grounds of Declaration.

This note will be confined, as far as possible, to ascertaining the declarations of a former owner of land can be made against his successors in title, merely because he was the owner. In other words, we shall not consider, external to the question named, the competency generally of the declarant, his reputation, which would of course apply to others; nor shall we consider the declarations of former owners; nor shall we consider the declarations of former owners of third persons who are strangers in estate to the questions thus eliminated, however, will be found in former notes of this series referred to below.

The particular question involved in our topic, it was decided by the supreme court of West Virginia in *High's Heirs v. High*, 104 Va. 602, 26 S. E. 536, that: "Upon the admissibility of declarations of deceased persons as evidence in land controversies, a large volume of law, and it is somewhat needless to say, we examine it with an eye open to the purpose for which they are designed, we shall misunderstand and misapply it." It is undoubtedly true, but on examination of the cases where the question has been involved as to the right to give in evidence the declarations of deceased owners of land against their successors in title, because they were such former owners, it will be found that the confusion of which the West Virginia court speaks is not a very serious conflict of judicial opinion as to the question which should be followed, but in its application to the question which the declarations are to be used.

Accordingly, the only declarations of deceased former owners of land that are to be used as evidence in land controversies against their successors in title are declarations made in disparagement of their title or touching upon their boundaries, and are considered in the order named.

Declarations in Disparagement of Title.

Where Former Owner has Parted With Possession.—

A number of cases in which may be found the general rule that the declarations of a former owner of land made while he was in possession of his title are admissible against his successors in title under him: *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 116; *Hawley v. Conn.* 467; *Norton v. Pettibone*, 7 Conn. 116; *McLeod v. Swain*, 89 Ga. 156, 27 Am. St. Rep. 15; *Dorsey v. Dorsey's Heirs*, 3 Har. & J. 410, 6 Am. St. Rep. 116; *County of Middlesex v. Gray*, 2 Gray, 267; *Osgood v. Blake*, 1 Allen, 248; *Noyes v. Morrill*, 119 Mass. 111; *Pickering v. Reynolds*, 119 Mass. 111; *Simpson v. Horner*, 35 N. J. L. 307; *Jackson v. Padgett*, 10 Paige 232, and note; *Vrooman v. King*, 36 N. Y. 477; *Shaffer v. Gaynor*, 49 N. C. 157, 67 Am. Dec. 269; *Shaffer v. Gaynor*,

117 N. C. 15, 23 S. E. 154; *Tipton's Lessee v. Ross*, *Heister v. Laird*, 1 Watts & S. 245.

But since to admit parol disclaimers to destroy or take title would be in direct hostility to the statute of 1847, it is presumed that the broad general statement appearing in the cases was made because the circumstances of the particular cases did not require a more concise statement of the rule. A careful examination of these cases show that with possibly one exception the declarations were not received for the purpose of taking title but to explain the nature, character or extent of the declarant's possession.

And as thus qualified, the statement found in the cases is in harmony with the rule which is supported by the weight of current authority, namely, that the declarations of a deceased former owner against interest and made while he was in possession are admissible against those who subsequently derive title from him for the purpose of showing the character or extent of the title or to show any matter which must be, from the nature of the case, proved by parol, but that they are not competent to take away a vested title: *Knight v. Hunter*, 155 Ala. 238, 20 S. E. 253; *Davidson v. Thomas* (Iowa), 86 N. W. 291; *McGuire v. Commonwealth* (Ky.), 128 S. W. 309; *Phillips v. Laughlin*, 99 Me. 219, 66 Atl. Rep. 253, 58 Atl. 64, 2 Ann. Cas. 1; *Hyde v. County of York*, 2 Gray, 267; *Osgood v. Coates*, 1 Allen, 77; *Blake v. Edwards*, 248; *Jackson v. Shearman*, 6 Johns. 19; *Jackson v. Vosper*, 186; *Jackson v. Kisselbrack*, 10 Johns. 336, 6 Am. Dec. 186; *Cary v. Cary*, 16 Johns. 302; *Jackson v. Davis*, 5 Cow. 124, 15 N. Y. 451; *Cook v. Harris*, 61 N. Y. 448; *Gilmartin v. Bucher*, 13 Div. 587, 119 N. Y. Supp. 489; *Ratcliff v. Ratcliff*, 13 S. E. 887, 63 L. R. A. 963; *Sumner v. Murphy*, 2 Hill 397, 31 Am. Dec. 397; *Beecher v. Parmelee*, 9 Vt. 352, 31 Am. Dec. 397; *Hollister*, 13 Vt. 552, 37 Am. Dec. 612; *Suttle v. Little*, 1 P. R. Co., 76 Va. 284; *Dooley v. Baynes*, 86 Va. 644; *High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 91; *Freedman's Savings etc. Co.*, 93 U. S. 379, 23 L. ed. 91.

Thus, in *Davidson v. Thomas* (Iowa), 86 N. W. 291, the plaintiff claimed title by adverse possession, it was held that the declarations of a deceased former owner made before he conveyed the land to the defendant were admissible as showing that defendant's possession had been under color of title.

In *Walter v. Brown*, 115 Iowa, 360, 88 N. W. 832, the plaintiff sought to foreclose a mortgage against land in possession of the defendant to which he claimed title. The mortgage had been executed by one A. who was a former owner of the land, but B. had come into possession long before the mortgage was recorded. Defendant claimed title from M. It was held that declarations of M. while in possession of the land and before he conveyed it to defendant that he had a prior unrecorded mortgage at the time that he purchased the land from B. were admissible against his grantee (defendant) for the purpose of showing that as M. and the defendant were privies in law, the declarations of M. made while in possession of the land in disparagement of his title, not in contradiction of his title, were clearly admissible.

Upon a question whether a deceased person had a declaration that he had no deed, but a writing to give

was admissible to rebut the presumption arising from the fact that he was seised of an estate in fee simple. *Inhabitants of West Cambridge v. Inhabitants of Cambridge*, 10 Pick. 536.

Upon an issue as to whether complainants owned an interest in the land of a decedent, testimony of a witness that she had heard the decedent state that his property was divided into three parts, two parts "belonged to" or "would belong to" complainants, was admissible in a suit against those claiming under a deed from the decedent. *Wafford v. Horne*, 72 Miss. 470, 18 South. 433.

Declarations of a husband since deceased, made while he was in possession of land, that it belonged to his wife, are original evidence, and competent against those claiming the land under him: *Miller*, 144 Mo. 681, 46 S. W. 754.

Pick v. Fonner, 69 N. Y. 404, where plaintiff claimed that the former owner of the land, since deceased, under whom defendants claimed, had sold the land to plaintiff by parol, and sought to prevent defendants from conveying the land to plaintiff, it was held that the declarations of such former owner that he had sold the land to plaintiff were admissible. The court, speaking through Earl, J., said: "There is no doubt that the admissions of Locke while he held the land were competent evidence against his heirs, and against him claiming title under or through him. If he had been a defendant in this action, they would have been competent."

And whenever the admissions of one having or claiming an interest in real estate would thus be competent against him, they are also competent against persons subsequently deriving title through or under him. The ruling in this case was approved and followed in *People of New York Water Co. v. Crow*, 110 App. Div. 32, 100 App. 899.

People v. Laughlin, 99 Me. 26, 105 Am. St. Rep. 253, 58 Atl. 1, plaintiffs, as heirs at law of one John Phillips, who died in fee simple, sought to recover the premises, which were at one time seised in fee of the premises, sought to recover possession from the defendant, who claimed under a deed from John Phillips to Catherine Phillips, he having acquired the premises from Catherine. Plaintiffs claimed that the deed from John Phillips to Catherine Phillips was a forgery, and certain letters written by Catherine while he was in possession and conveying title to defendant which tended to support plaintiffs' claim were admitted in evidence by the trial court over defendant's objection. In sustaining defendant's exceptions to the admission of these declarations of Catherine Phillips in disparagement of plaintiffs' title, the appellate court seems to have given very little consideration to the question of the admissibility of this character of evidence, and after reviewing at length the previously admitted evidence, as well as the statements found in the text-books, and the much force what seems to be the prevailing opinion as to the admissibility of such evidence, the court gave in evidence the declarations of a former owner of the premises while in possession and in disparagement of title, as against those who subsequently derive title through or under him. The court, speaking through Chief Justice Wiswell: "Is a purchase of land from one who apparently has the record title to land, and who is in possession of a case involving his title, liable to be confronted, and to be contradicted by a declaration made by his grantor to

the effect that a conveyance to that grantor, which, so is in due form and sufficient in all respects to convey for any reason invalid? A doctrine which would add such a character would certainly be a most dangerous one, would allow the most reliable evidence of title to be contradicted and overcome by evidence of alleged declarations of his grantor, made perhaps many years before the deed is recognized as a most unreliable species of evidence, and unable to perceive any good reason why, and we are unable to perceive any general rule under which declarations of this character should be admissible. . . . This evidence at best is hearsay, and should be excluded under the general rule in relation to declarations, unless it comes within some well-recognized exception to the rule, and exceptions to this salutary rule should not be extended. The exception to the effect that the declarations of a party to a suit contrary to his interests are admissible, though recognized by the general rule, is not sufficient to make admissible the declarations of a third person, the party's grantor, which have a tendency to contradict records and matters which can only be proved by records. It is true that numerous cases contain the statement that declarations made by a person while in possession in disparagement of his title are admissible against him, and under him. But an examination of a large number of these cases shows that this general statement is made, or which are cited in support of, a statement in digests and text-books, shows that in every case the declaration held admissible is in regard to the nature, character or extent of the declarant's possession, or as to the location of monuments or the location of boundaries called for in the deed. The court then reviews a number of the cases we have cited, and in the general statement that declarations of a grantor made in possession made in disparagement of his title are admissible against his successors in title, and shows that the declarations are admissible in those cases to prove the nature and extent of the declarant's possession or to locate boundaries, and continued: "The declarations that must be proved or disproved by parol evidence are those which a purchaser knows that however perfect a record title he may have acquired, this title may be affected by parol evidence of an easement gained by prescription, or as to a right of way lost or gained by user, or as to the location upon the ground of earth of monuments and boundaries called for in his deed. So that if any of these questions are involved, the declarations may be proved or disproved by parol evidence, the declarations of a grantor against interest, who had been in possession, as to the nature of that possession or as to its extent, are admissible against his successors. . . . But a purchaser who has obtained a deed from one who has the record title thereto cannot and should not be obliged to anticipate that he may be confronted with declarations claimed to have been made out of court, by a person who has no title, to the effect that a prior deed in the chain of title is invalid, or all the insignia of genuineness, and which has been held to be invalid, for any reason, invalid. . . . Declarations against interest, regard to the nature, character or extent of the declarant's possession, the identity or location upon the face of the deed, and monuments called for in a deed, or in regard to a

physical condition or use of the property, which must be the nature of things, proved by parol, are admissible. But that it is not competent to prove declarations made out by the predecessor in title of the party to an action in court, that a deed which appears to be sufficient in all respects is duly recorded and which a purchaser has been led to believe as one of the necessary links in its chain of title, from the fact of its being recorded, is not what it and the record are intended to be. . . . In many cases where the general rule as to the admissibility of such declarations has been stated, this sentence is found in Wharton on Evidence, section 109, is quoted: 'Declarations of a party in disparagement of the title of the declarant are admissible, as original evidence.' But an examination of the whole section shows that the author was referring to the declarations of persons in possession of land 'explanatory of the character of their possession.' In Wharton on Evidence, section 1157, the author quotes *W. Harris*, 61 N. Y. 448, this statement in regard to the admissibility of such declarations: 'The declarations of a party in possession are admissible in evidence against the party making them, whether in blood or estate, not to attack or destroy the title, but to explain the record and of a higher and stronger nature than to be contradicted by parol evidence. They are competent simply to explain the character of the possession in a given case.' The rule is thus stated, but with the necessary qualification, in 1 American Encyclopedia of Law, second edition, 680: 'The admissions of a person in disparagement of his title, but not in contradiction of a record title, are competent evidence against those claiming under him so far as there is identity of interests.' . . . In *Freedman's Saving etc. Co.*, 93 U. S. 379, 23 L. ed. 920, the court held that: 'The declarations of a party in possession of property are admissible against those claiming under him, competent evidence to explain the character of his possession, and the title by which he claims, but not to sustain or destroy the record title.' The court reached its opinion by saying that while in this case Catherine was dead at the time that these declarations were offered, the fact of her death does not affect the question; the objection is to the character of the declarations as bearing upon the validity of a deed which appears sufficient, and it can make no difference as to the admissibility of such declarations whether the declarant is living or dead." With the rule stated by the supreme court of Maine in the case we have just quoted at length is fully sustained by the long list of cases we have cited on that point, and seems founded in soundness of reason, there are at least two cases which seem to contradict the broad statement that declarations of a deceased former owner in disparagement of his title, made while in possession, are admissible against those claiming under him, without the qualification that such declarations are only admissible as explanatory of the possession or the title by which he held possession. These cases are *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 101, and *Ok v. Knowles*, 38 Mich. 316. In the former, an ejectment plaintiff claimed title by virtue of the levy of an execution in favor against Alva Marks made in 1825. Defendants were Alexander Pettibone, by deed to him from Zachariah Marks, derived title from said Alva Marks. Plaintiff contended

that the deed from Alva Marks to Zachariah Marks defraud Alva's creditors, and in support of this charge to prove by a witness over defendants' objection to Marks, after the deed to him and while in possession before his conveyance to Pettibone, had acknowledged from Alva Marks to him was without consideration defraud Alva's creditors; Judge Daggett, speaking for the court, said: "That such declarations, so made, are admissible, and to have been too long and too well settled to have been so ruled more than twenty times within twenty years. Declarations of a person, while in possession of property against his title, are always admissible, not only against those who claim under him." Many of the cases which were cited by the learned judge who delivered the opinion settling the point decided by the court, were rendered where the declarations were received for the purpose of establishing the declarant's possession rather than for the purpose of defrauding creditors.

In the other case—*Cook v. Knowles*, 38 Mich. 316—was a mortgage foreclosure case, both parties asserted title under T.; plaintiff on an execution sale on a judgment in his favor rendered by the court in an attachment suit against T. Defendant claimed as grantee under Benjamin Knowles, who held as grantee of T. The court held in favor of defendant's grantor and certificate of acknowledgment dated some ten days earlier than the levy of plaintiff's attachment, but the record of said deed was some ten days later than the levy. The vital question involved was, whether the deed of defendant's grantor was in fact delivered before or after plaintiff's attachment. It was held that declaration of defendant's grantor while in possession and before his conveyance to defendant that the deed was in fact delivered before plaintiff's attachment was admissible, the court saying: "There is some confusion of mind concerning the occasion proper for admitting declarations of a person in possession of property to the cause in disparagement of title and the ends to which such declarations are to be restricted," but considered the declarations admissible in accordance with the principles settled in this state and generally approved in the other states.

In this case, however, as in *Norton v. Pettibone*, 7 Mich. 116, the cases referred to as approving the doctrine were not announced, though containing the broad statement approving the doctrine, really received the declarations for the purpose of establishing the nature, character or extent of the declarant's possession of the land, landmarks or boundaries, and not to destroy vested title.

And this was made clear by Judge Cooley in *Cook v. Knowles*, 38 Mich. 316, who, in a strong dissenting opinion, which contains the most valuable discussion of the question involved, gave a careful analysis of the authorities up to that time upon the point, and reached the conclusion that the cases cited and relied on by the majority go to the extent claimed by the majority.

b. Made After Former Owner has Parted With Possession.—As a general rule, the declarations of a previous owner after he has parted with the property, made after such owner has parted with the property, are not admissible against him.

This doctrine was fully discussed by the court in *Paggett v. Lawrence*, 10 Paige Ch. 170, 40 Am. Dec. 170, where it was held that declarations made by the owner of real

locking of a judgment, by virtue of a sale, under which the claimant claimed title to the premises, were inadmissible in evidence in support of the title of such purchaser. "As a general rule," said the court, "declarations made by a person in possession of real estate, claiming an interest or title in the property, may be given in evidence against those who subsequently derive title under him, inasmuch as they could have been used against the party claimant had not parted with his possession or interest. On this point the law is equally well settled that no declarations of a former owner of real property, made after he had parted with his interest in it, are overreached by the purchase of the party claiming title under him, can be received in evidence to affect the title of the purchaser to the premises"; and this doctrine is supported by a great weight of authority: *Doe v. Edmondson*, 145 N. H. 505; *Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 957; *Hatch v. Straight*, 3 Conn. 31, 8 Am. Dec. 152; *Blackf. 445*, 30 Am. Dec. 666; *Thompson v. Thompson*, 68 Am. Dec. 638; *Robbins v. Spencer*, 140 Ind. 483, 40 N. E. 263; *Brashear v. Burton*, 3 Bibb, 9, 6 Am. Dec. 691; *Wilson v. Smith*, 145 Mich. 203, 108 N. W. 691; *Wilson v. Jackson*, 40, 31 Am. Dec. 194; *Jackson v. Gilchrist*, 15 Johns. 40; *Manhattan*, 3 Cow. 612, 15 Am. Dec. 304; *Vrooman v. Y. 477*; *Drum v. Simpson*, 6 Binn. 478, 6 Am. Dec. 688; *Chess v. Martin*, 12 Serg. & R. 269, 14 Am. Dec. 688; *Chess v. R. & W.* 32, 21 Am. Dec. 350; *Felder v. Bennett*, 2 McMillan, Dec. 545.

Even though the declarations were made by such a person while he was still in possession of the premises, but before the conveyance: *Vrooman v. King*, 36 N. Y. 477. In this case, in an action in ejectment, plaintiff sought to show title in the defendant, by proving the declarations of one of the owners of the land and through whom defendant claimed, made from J., who was a grantee of R. It was held that the declarations of R. made after he had sold the land to J., but before the conveyance, that he had nothing but a squatter's title in the premises. Said the court: "Were the statements made by the defendant after the sale by him, and while in possession of the premises, admissible in evidence? The reason why the declarations or statements of a person in possession of the premises are ever admissible is that they affect his title or interest in the premises, while owner, or in possession, of the premises, binding upon the party making the same and upon all who claim title under him, not an owner at the time, upon the premises, can they be held to affect his grantee? . . . The defendant here used, imports a conveyance of the premises, or a grant of the interest which Reeves had therein to Jones, and the declarations could do no act to prejudice the rights of his grantee. Jones did not derive his title subsequent to such declaration or thereto, and, therefore, they were inadmissible to affect the title which Jones then had acquired by virtue of the conveyance. It is true that the rule is well settled, in our own courts, that the declarations of the person in possession of the premises, as to his title, are admissible against the person claiming title under him, and all who claim title under him. . . . But in this case, the possession was that of a person claiming title,

and acting in accordance with such claim, and not by ing title, and declaring at the time that his possession of owner, but at the will or sufferance of another, th In any respect in which the question may be declarations of Reeves, after his sale to Jones, cannot as evidence for any purpose, although it be assumed th made before Reeves actually delivered the possession of to Jones. The declaration of Reeves, while a mere ten ance of Jones, as he certainly was, after the sale to him under any circumstances, be received as evidence again or those claiming under him, to prejudice or impair his to the premises. And if it be doubtful whether the were made by the grantor, before or after he made the his deed, they cannot be received in evidence."

But while the rule seems to be firmly established tha tions of a former owner of land since deceased, in of and made after he had parted with his title, are n as against those claiming under him, it has been held t an action to recover real estate between parties claiming ent deeds from a common source, plaintiff claimed tha claim was, in legal effect, a mere mortgage to secure a tions made by the grantor of such deed subsequent to tion with respect to that particular question are admis issue. The court, however, after reciting the rule, s can be no dispute concerning the correctness of this ru not think it is applicable in this particular instance": ant, 145 Cal. 410, 104 Am. St. Rep. 61, 78 Pac. 957.

III. Declaration as to Boundaries.

a. Breadth of American Contrasted With English D admissibility of hearsay evidence to establish ancient confined in England to cases of a public nature, and it i there that hearsay evidence is not admissible to establi of private estates unless such boundaries are identical of a public or quasi-public nature: *Curtis v. Aaronson* 68, 60 Am. Rep. 584, 7 Atl. 886; *Stroud v. Springfield*, Wood v. Willard, 37 Vt. 377, 86 Am. Dec. 716; *Putn* 52 Vt. 191, 36 Am. Rep. 746. An exception, however, t rule excluding hearsay evidence seems to have been England for the purpose of establishing boundaries of ture, upon the ground of necessity, and, as was said by court of Vermont in *Wood v. Willard*, 37 Vt. 377, 86 A "The reason upon which this exception is based would ply with equal force to questions as to boundaries dividuals. The fact that many persons may be inte establishing of the line of a municipal jurisdiction cannot difficulty of proving it under the general rule of e landed estates in England are large, and the bound doubtless generally settled and clearly defined, so that to them may not so frequently arise, and the necessity to this class of evidence for that reason may not be s the case of municipal boundaries. In this country it i many of the states, and especially in this state, the ter their limits was first divided into townships, and the

divided into small lots, and distributed between the several owners. Almost the only evidence that was left upon the land as to the location of the lines, either of the townships or of sections between proprietors, was marks upon the trees standing upon the land, and these evidences, from lapse of time, accidental causes, and the cutting off the timber, are almost obliterated; at least, such is the case in large portions of this state.

Disputes are now constantly arising between individuals as to the location of these original lines, which to a great extent constitute the original division lines between adjoining land owners. How are these disputes to be established? If it be said that it must be by the testimony of witnesses who have personal knowledge of their origin, they cannot be proved at all, as in the great majority of cases all such persons are now dead.

The necessity resulting from the impossibility of proving the location of such ancient lines and boundaries has led the courts in several of our sister states to extend the exception to the general rule of the hearsay testimony, so far as to admit the declarations of persons, who had knowledge on the subject, as to the location of ancient boundaries between the lands of private individuals." Whether or not the same reason which prompts the English courts to admit hearsay evidence in the form of declarations of deceased persons to establish boundaries of a public nature applies with equal force to questions as to boundaries between individuals, it is that the tendency of the American courts has been to depart from the common-law rule on this question—at least, so far as the declarations of former owners are concerned; and upon the proposition that the declarations of a former owner of land in his possession, regarding his boundaries, are competent evidence in favor of those claiming through or under him, the authorities in this country are practically unanimous.

See the numerous cases which sustain this general doctrine are, *Crawford*, 102 Ala. 387, 14 South. 854; *Stanley v. Green*, 48 Ala. 48; *Sharp v. Blankenship*, 79 Cal. 411; *Porter v. Warner*, 2 Cal. 411; *Higley v. Bidwell*, 9 Conn. 447; *Noble v. Chrisman*, 88 Ill. 411; *Smith v. Smith*, 152 Ind. 469, 53 N. E. 469; *Justice v. Justice*, 144 S. W. 351; *Royal v. Chandler*, 83 Me. 150, 21 Atl. 842; *Perry v. Perry*, 100 Me. 139, 60 Atl. 872; *Williamson v. Gooch*, 402, 69 Atl. 691; *Howell's Lessee v. Tilden*, 1 Har. & McH. 368; *Cadwalader's Lessee v. McCabbin*, 1 Har. & McH. 368; *Cadwalader v. Tilden*, 111 Md. 310, ante, p. 603, 73 Atl. 273; *Rex v. Smith*, 145 N. H. 108, 108 N. W. 691; *Smith v. Forrest*, 49 N. H. 230; *Nutter v. Nutter*, 67 N. H. 185, 68 Am. St. Rep. 647, 30 Atl. 352; *Halcomb v. Mullin*, 93 N. C. 252; *Davis v. Jones*, 3 Head, 603; *Montgomery v. pscomb*, 105 Tenn. 144, 58 S. W. 306; *Hurt v. Evans*, 49 Tex. 166; *Whitman v. Haywood*, 77 Tex. 557, 14 S. W. 166; *Beal v. Beal* (Tex.), 20 S. W. 115; *Mathews v. Thatcher*, 33 Tex. Civ. App. 76 S. W. 61; *Battinger v. McMinn* (Tex. Civ. App.), 104 Tex. 199; *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716; *Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835; *Harriman v. Brown*, 8 W. Va. 602, 26 S. E. 536; *Dewhurst v. Dewhurst*, 68 Fed. 336, 15 C. C. A. 466.

While there is great unanimity of judicial opinion upon the proposition that the declarations of a deceased former owner

of land are competent evidence against his successors : are several qualifications or limitations to the rule state been generally recognized by the courts. Unfortunately scribing the conditions upon which this character of hear is admitted is not uniformly stated in the different state there is no disagreement among the courts as to some tations, the precise limitations which have been fixed by some of the states are not followed in others, and this in considerable confusion, and even direct conflict of au the proper application of the rule itself.

We will now notice the qualifications or limitations rule is subject.

b. Declarant must be Disinterested and the Declarant Made Ante Litem Motam.—To render admissible in declarations of a former owner of land regarding the lo boundaries of his land, the declarations must have been the declarant had no interest in misrepresenting the tru location of such boundaries.

This principle is found running through all the ca ground upon which it has met such universal approval wa by the supreme court of Connecticut in the early case Warren, 2 Root, 22: "To admit hearsay from a man wh ested in the question would be deriving evidence from source, which the law will not allow."

The supreme court of Virginia, speaking to the sa said: "Always, however, excluding those declarations wh to the suspicion of bias from interest": *Harriman v. Bro* 697.

And since the declarant must be disinterested, it fol declarations, to be admissible, must have been made motam.

"Men are not presumed to be indifferent," said the s of Texas, "in regard to matters in actual controversy, contest has begun, people generally take one side or th if they are disposed to speak the truth, facts are or ma them through a false medium": *Stroud v. Springfield*, 28

This limitation to the rule was also clearly recognized cipal case (*Cadwalader v. Price*, 111 Md. 310, ante, p. 274), and among numerous other cases to the same e mentioned the following: *Noble v. Chrisman*, 88 Ill. 1 Chandler, 83 Me. 150, 21 Atl. 842; *Wilson v. Rowe*, 93 Atl. 615; *Emmett v. Perry*, 100 Me. 139, 60 Atl. 872 v. Gooch, 103 Me. 402, 69 Atl. 691; *Partridge v. Rus* 601, 2 N. Y. Supp. 529; *Bethéa v. Byrd*, 95 N. C. 309, 240; *McCloud v. Mynatt*, 2 Coldw. 163; *Whitman v. Tex.* 557, 14 S. W. 166; *Wood v. Willard*, 37 Vt. 377, 716; *Robinson v. Dewhurst*, 68 Fed. 336, 15 C. C. A. 466 the authorities seem agreed that the declarations of a : regarding the location of the boundaries of his land petent evidence against those claiming through or unde the declarant was disinterested at the time the declar made and they were made ante litem motam, there is lack of harmony among the courts regarding other limit

admission of this character of hearsay evidence in some of the cases.

the qualifications or limitations to which we refer are those which require that the declarations must be made while the declarant is on the land and in the act of pointing out the boundaries, and that the declarant must be in possession as owner at the time; and to these we now direct our attention.

Declaration must be Made While Owner is on the Ground and in the Act of Pointing Out the Boundaries.—In some jurisdictions it is required that in order for the declarations of a former owner of land to be admissible against the location of his boundaries, to be admissible in evidence against his successors in title, such declarations must be made while the declarant is on the ground and engaged in the act of pointing out the boundaries.

This rule seems to have originated in Massachusetts in 1842, and has been followed by the courts of that state ever since: *Daggett v. Met.* 223; *Bartlett v. Emerson*, 7 Gray, 174; *Ware v. Emerson*, 7 Gray, 454; *Flagg v. Mason*, 8 Gray, 556; *Whitney v. Gray*, 206, 69 Am. Dec. 281; *Long v. Colton*, 116 Mass. 414; *Keenan v. Keenan*, 196 Mass. 416, 82 N. E. 427; and the rule has been published in Massachusetts has also been approved and followed in New Jersey: *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886.

In *Colton*, 116 Mass. 414, the court, speaking with reference to the question, said: "In *Bartlett v. Emerson*, 7 Gray, 174, it was held, to be admissible, such declarations must have been made while the declarant was in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an intent to deceive, the declarations are admissible. . . . The declarations offered and rejected in this case do not come within the exception thus defined to the rule which hearsay is excluded. The decisive objection to their admission is that they do not appear to have been made while the declarant was pointing out the boundaries of the declarant's land. This objection which cannot be disregarded, especially when the question is of private boundary. The declaration derives its force from the fact that it accompanies an act which it qualifies. It has no character to. The declaration is then a part of the act, and without such accompanying act, the declaration is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail against hearsay evidence."

The supreme court of New Jersey, speaking to the same question in *Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886, said: "The rule of declarations of persons since deceased, in respect to boundaries to be admissible in evidence, must have been that the declarant in possession as owner at the time, and while in the act of pointing out the boundary in question." In thus holding, the New Jersey court referred to the Massachusetts cases which it cited, and said that the rule in Massachusetts was approved by the federal courts; citing *Hunnicutt v. Peyton*, 102 U. S. 333, 26

It is true that in this case, Mr. Justice Strong, speaking for the court, said: "We will not undertake to review the vast number of decisions of state courts upon this subject. It would be to detract this opinion. Some things may be deduced from

them, which, though not universally recognized, are to which, we think, a great majority of them lead. In private boundary, declarations of particular facts, and from reputation, made by deceased persons, are not less they were made by persons shown to have known whereof they spoke, or persons on the land, or in presence when the declarations were made. To be evidence, they been made when the declarant was pointing out or boundaries or discharging some duties relating thereto. Declarations sought to be introduced in this case, and forth the language quoted, were not those of a former owner of the land, and this decision, therefore, cannot be safely taken as a solemn expression by the supreme court of the United States. This limitation to the rule regarding the declarations of deceased owners, since the declarations of deceased former owners are not admissible as was said in *State v. King*, 64 W. Va. 546, 63 S. E. 2d 101, the assumption that the declarant had an interest in the land and his own land which induced him to ascertain the boundaries of his own tract."

There are numerous cases, however, in other states where it has been held that the declarations of a former deceased owner of the boundaries of his land are admissible where he was upon the land and in the act of pointing out the boundaries. *Payne v. Crawford*, 102 Ala. 387, 14 South. 854; *Dickinson v. Payne*, 145 Ala. 585, 40 South. 315; *Royal v. Chandler*, 83 Me. 842; *Emmett v. Perry*, 100 Me. 139, 60 Atl. 872; *Parsons v. Sell*, 50 Hun, 601, 2 N. Y. Supp. 529; *Wood v. Willard*, 86 Am. Dec. 716; *Robinson v. Dewhurst*, 68 Fed. 330, 100 466; but in all of these cases the decision but followed the rule in the cases, and the question was not presented whether the declarations would have been inadmissible if the declarant was not engaged in pointing out the boundaries when he made the declarations. For instance, in *Wood v. Willard*, 37 Vt. 377, 100 716, the court, speaking of the admissibility of declarations of a former owner of land touching the location of his boundary, held that such declarations were admissible if made at a time when the declarant had no interest to misrepresent and made 'in the immediate vicinity of the boundary referred to and in pointing it out'; but in the later case of *Powers v. Silsby*, 41 Vt. 100, the declarations were objected to because they were not made when the declarant was in the act of pointing out the boundaries. It was held that it is not necessary that the declarant be upon the land in the immediate vicinity of the boundary in dispute and pointing it out in order to make the declaration admissible. "We stand," said Judge Prout, speaking for the court in *Powers v. Silsby*, "on the fact that the declaration was made upon the land and in connection with the act of pointing it out. The principle is the same. That the declaration be made off and away from the premises, as well as upon or near the land, the ancient line, boundary or monument could be maintained by reference or description as to its locality, and as to its position with reference to these known existing lines or monuments actually showing or pointing out where it was."

same court in the comparatively recent case of Hathaway v. Wood, 77 Vt. 199, 59 Atl. 835, referring to the language we have in Wood v. Willard, 37 Vt. 377, 86 Am. Dec. 716, said that the rule which permitted the declarations of a former deceased in such declarations were a part of the *res gestae* was a general application, and that declarations respecting boundaries, under certain circumstances, be brought within this rule, "its admission is not controlled by it."

In *Forrest v. Forrest*, 49 N. H. 230, where the main question presented on appeal was whether the declarations of a former deceased touching the land in dispute, touching its boundaries, made at a distance from the land or pointing out the boundaries, had been properly admitted against one claiming under the deceased, in giving what it considered the correct rule in such cases, the court said: "Two things are necessary in order to make the declarations of a deceased person competent evidence as to boundaries: first, it must appear that the deceased party or declarant had knowledge of the boundaries; second, he must have no interest to misrepresent. In the trial of such cases, where this kind of testimony is resorted to, the aforesaid principles should exist and govern the court and jury. It is a general presumption that owners of land know their boundaries, unless they do not, and when they are ignorant of them, of their statements in relation to them, whether made on or off the land, are of but little or no consequence, but when such boundaries are clearly known, or established by those in interest, then the declarant can communicate accurate knowledge, whether their statements be made at the boundary or at a distance from it. It is for the court and jury to determine the weight to be attached to the evidence of this nature, or whether the parties have the means of knowledge, or have in any way been misled, or whether they had reason to misrepresent by a statement too favorable to their private interest. It seems to us that because the statements made by the father to the son, when not at the bound or off the land, as no solid objection to the admissibility of such testimony, to the same effect is *Morse v. Emery*, 49 N. H. 239.

The doctrine stated by the New Hampshire and Vermont courts, in *Forrest v. Forrest*, is also upheld in *Abeel v. Van Gelder*, 36 N. Y. 513, and *Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536. And though there may be some confusion, and even direct conflict, upon this question, it has already been seen that according to the preponderance of current authority, which admits the declarations of a former owner of land against his successor in title, regarding the location of his boundaries, the use of their peculiar means of information, the only qualification of the rule seemed to be that the declarations must be made by the deceased and when the declarant had no interest in the land and therefore made *ante litem motam*.

Declarations Made After Parting With the Land.—There are many cases where there has been any adjudication upon the question whether the declarations of a deceased former owner of land touching the boundaries thereof, made after the declarant had parted with the land, are admissible against those claiming under him. Of course it is not disputed that the vendor of land cannot assert the rights of a vendee after he has parted with the property,

but it seems that this universally accepted general rule does not under all circumstances render inadmissible the declarations of a deceased former owner regarding the boundaries of the land made after he has parted with it.

This is made clear by the principal case, where a farm expressly excepted from the deed a "landing on the river" without further description, and afterward conveyed the same description to another, and it was held that declarations made after made by him as to the boundary of the landing were admissible after his death, as impairing the rights of the farm, because the declarant was not only vendor of the farm, but also of the landing, and if he had been still living the landing could have called him as a witness to show that the landing was a well-defined tract of land, and to point out the boundaries.

Likewise in *Simpson v. Blaisdell*, 85 Me. 199, 35 Am. Dec. 27 Atl. 101, it was held that, if land conveyed in a deed therein as a "one-half acre tract near the wharf or wharves" the admissions of the grantor made subsequently as to the boundaries of the land so conveyed are admissible in evidence in claiming title under him.

Also, in the matter of ancient boundaries, it was held in *Warner*, 2 Root, 22, that a declaration made by the owner of the land, since deceased, who had sold and warranted the land, was admissible, by reason of his interest, to show the ancient boundaries.

And in *Higley v. Bidwell*, 9 Conn. 447, when it appeared that in 1765, while A and B were proprietors of adjoining lands, a controversy existed between them respecting their boundaries, in pursuance of an agreement between them, B released to C a disputed tract. In an action, tried in 1833, wherein the plaintiff claimed the lands formerly owned by A and B was in support of his claim, the declarations of B and of C, a tenant under B after 1765, B and C having long since deceased. It was held that such declarations were admissible.

Another case which seems to recognize that under certain circumstances the declarations of a deceased former owner of land as to the boundaries thereof are admissible in evidence, though made after his ownership ceased, is that of *Martyn v. Curtis*, 35 Atl. 333. In this case, which was one to determine the boundaries between individual property, the plaintiff offered in evidence the declarations of a former owner of the land in controversy thirty years after his ownership ceased. The court held that such declarations are sometimes admissible and sometimes not, and that if they are admissible, they must be brought within the rules established by the cases. *Wood v. Willard*, 37 Vt. 377, 86 Am. Dec. 716, and *Powell v. Wood*, 41 Vt. 288." Both of the cases thus referred to have been cited and reviewed, and the declarations in this case were held admissible, because the court said that they did not come within the rules established by those former cases. And it is somewhat difficult to see how the declarations of a former owner of land who had parted with the land could ever come within the rule established in the two cases referred to, for in *Wood v. Willard*, :

716, it was held that the declarations to be admissible must while the declarant is on the land and engaged in the act of marking out the boundaries, and in *Powers v. Silsby*, 41 Vt. 288, it was held that the test of their admissibility did not depend upon whether the former owner was on the land at the time and in pointing out the boundaries, but in neither of these cases was the question raised as to the admissibility of such declarations if the declarant had parted with possession.

Death of Declarant.—In the principal case (ante, p. 603), and in nearly all the cases we have heretofore cited, it was held that declarations of a former owner against his successors in title after his death, are admissible, and though in this case, as well as in others, the declarant was dead at the time of the trial, the language used in all the cases seems to warrant the conclusion that the courts considered the fact of the declarant's death a necessitation to the admissibility of his declarations; and in some cases it was directly held that the former owner must be deceased for his declarations could be admitted.

In *Flagg v. Mason*, 8 Gray, 556, it was held that the declarations of a former owner of land, not shown to be deceased, as to its boundaries is not competent evidence, though made upon the land; and saying: "The decisive objection to their competency is, that it does not appear that the person who made them was deceased. It is not that it is shown he is still living, and might have been a witness." To same effect is *Williamson v. Gooch*, 103 Atl. 691.

The supreme court of North Carolina speaking of the admissibility of declarations touching the boundaries of land, under an exception to the general rule excluding hearsay evidence, said: "It is only as a preliminary to its admissibility, to prove that the declarant's statement it is proposed to offer in evidence is dead—on the ground that the fact of his being dead gives any addition to the credibility of his statement, but on the ground that he be alive, he should be produced as a witness": *Yow v. Yow*, 136 N. C. 357, 48 S. E. 782.

In some cases it is held that the declarations are admissible whether the declarant be dead or alive. In the very recent case of *Walker*, 204 Mass. 71, 90 N. E. 405, 26 L. R. A., N. S., 814, it was held that declarations of the owner of land, made while upon it, as to the location of a boundary line, are competent evidence against the owner and those claiming under him, although it was not shown that the declarant was dead at the time of the trial. The court in this case was entirely of the opinion that in the great mass of cases where it was held that the declarations were admissible after the death of the declarant, the courts did not intend to hold that their admissibility depended upon the death of the declarant, for, referring to some cases so holding, *Sheldon, J.*, said: "In many of these cases the person who made the declarations was shown to be dead, and it was sometimes adverted to by the court, but in others his death was not shown; and we are not aware of any case in which the death was decided to be necessary before admitting evidence of such declarations against the declarant and those claiming under him in disparagement or limitation of their title." The ruling

in this recent Massachusetts case finds support in *Dem-
ton*, 12 Conn. 1, 30 Am. Dec. 591; *Davis v. Jones*, 3 H.
gomery v. Lipscomb, 105 Tenn. 144, 58 S. W. 306; and
a statement in *Smith v. Powers*, 15 N. H. 546, which
rule, but the former owner whose declarations were com-
mitted in that case was dead, and the statement that
have been admissible if he had been alive was only an
We believe that this apparent conflict in the author-
reconcilable. Statements of an owner of land, whether
thereof or otherwise, may relate either to his possession
and when they relate to his possession, may respect the
pose or manner in which he holds possession or to some
separating his holdings from those of a contiguous owner
relate to the possession or boundary, they usually, if not
may be regarded as part of the *res gestae* and admissible
whether the owner is dead or alive, whether present or
and whether he admits or denies making the declaration
the meaning, we take it, of *Abbott v. Walker*, 204 Mass.
405, 26 L. E. A., N. S., 814, and the other decisions cited
thereto. Except to this extent, we think that the declara-
former owner, still living, in disparagement of his title
sally held inadmissible against his successor in interest
tion to which we have referred becomes apparent when
that the declarations in *Abbott v. Walker* related to a
which the owner pointed out when in possession of the
tending to show that such line was along certain space
claimed by the contiguous owner and as indicated by a
the property, and the court, in sustaining the admission
mony, said: "It may be granted that such declarations,
by any act which they characterized or explained, would
tent at common law in favor of their maker or his grantee."

ROSSBERG v. STATE.

[111 Md. 394, 74 Atl. 581.]

MUNICIPAL CORPORATION—Police Power
State.—When the legislature grants a city power to police
relating to specific police powers, and further grants
commonly known as the police power, to the same
state has or could exercise said power within said limits
is authorized to enact an ordinance penalizing the sale
and kindred substances except upon specific conditions.

MUNICIPAL CORPORATION—Police Power
State.—The legislature may, either expressly or by im-
pate to municipal corporations authority to exercise their
within their boundaries. (p. 630.)

MUNICIPAL CORPORATION—Concurrent Power
to Punish Offenses.—Municipal authorities may be given
power with the state to punish certain classes of offenses
which first obtains jurisdiction of the person of the
punish to the full extent of its power. (p. 632.)

MUNICIPAL CORPORATION—Forbidding Act Covered by A municipal ordinance is not made invalid by the mere fact and the state law provide in terms for distinct prosecution same act. (p. 632.)

MUNICIPAL CORPORATION—Ordinance Inconsistent With Further and additional penalties for an act may be imposed by a municipal ordinance, without creating inconsistency between it and the state law. (p. 632.)

MUNICIPAL CORPORATION—Ordinance Conflicting With An ordinance may prescribe different regulations than a state law, without conflicting with the state law, where the ordinance is for the sale of drugs, without conflicting with the state law. (p. 633.)

MUNICIPAL CORPORATION—Ordinance Inconsistent With An ordinance forbidding the sale of cocaine and kindred substances, except under certain conditions, is not invalid because the conditions it imposes are heavier, and the regulations prescribed by the ordinance are more stringent than those imposed by a statute of the state. (p. 633.)

MUNICIPAL CORPORATION—Penalty for Selling Cocaine.— Forfeiture of the license of a pharmacist would be a proper punishment for his selling cocaine in violation of law, still a municipal ordinance cannot impose this form of punishment without express authority. (pp. 634, 635.)

C. France and James J. McNamara, for the appel-

Lobe Straus, attorney general, and Albert S. J. Straus, attorney of Baltimore City, for the appellee.

APPEAL. The appellant, William Rossberg, in the grand jury for the city of Baltimore for the purpose of an ordinance of the mayor and city council of Baltimore known as the "Cocaine Ordinance," approved June 1, 1904, which prohibits the sale, furnishing, giving away, or being in possession, cocaine and kindred substances or compounds thereof, except upon certain conditions provided by the ordinance and which provides certain penalties for violation thereof. At the time of the passage of this ordinance there was in force a state law, being chapter 607 of 1904, as amended by chapter 523 of 1906, which forbid the selling, furnishing or giving away of cocaine and of the same substances and compounds mentioned in said ordinance, except upon the same conditions substantially as provided in said ordinance, and which provided certain penalties for violation thereof by statute.

The penalty provided by the ordinance is a fine of not more than one hundred nor more than five hundred dollars, or imprisonment in jail for not less than six nor more than twelve months, and if a licensed pharmacist, physician, or veterinary surgeon, the forfeiture of his license.

The penalty provided by the state law is a fine of from five dollars to fifty dollars for the first offense; fifty dollars to one hundred dollars for the second offense, and from one hundred to two hundred dollars, with imprisonment in

jail for not more than six months, for the third and subsequent offenses. The state law does not, as the ordinance makes, make the mere possession of the drugs mentioned in the ordinance a misdemeanor, nor does it provide at all, as the ordinance does, for the revocation of the offender's license. The ordinance, therefore, is ⁴¹⁰ somewhat broader in scope and its penalty is heavier. The indictment contained nine counts, charging the traverser with selling, furnishing and giving away cocaine, and with having the same in his possession, the traverser being a licensed pharmacist. He demurred to the indictment and to the ordinance, contending that the ordinance was invalid because it conflicted with the existence of the state law dealing with and punishing the same offense dealt with by the ordinance. The case was argued by Judges Harlan, Stockbridge and Niles, who overruled the demurrer, whereupon the traverser submitted upon a plea of not guilty, and a verdict of guilty was rendered on the first count, charging a sale of cocaine to one Howard, and a fine of one hundred dollars and imprisonment for thirty days was imposed, from which judgment the traverser appealed. While sustaining the demurrer, the lower court, however, held that part of the penalty which required the revocation of the license to be unusual and oppressive, and therefore inoperative and void, but that its elimination would destroy the intent of the ordinance, and left the rest of the ordinance in full operation and effect.

The first inquiry is as to the power of the municipal government of the city of Baltimore to pass the ordinance in question, or, in other words, whether such power was delegated to it by the legislature of the state. The powers thus vested in the city are broad and sweeping, and are expressed in terms which indicate a liberal view of broad powers for effective local government in a large city. They are contained in thirty-one sections of the city charter as it appears in the Baltimore City Code, and cover twenty-seven pages of that volume. The section entitled "Police Power," is as follows: "The municipal council of Baltimore shall have full power and authority to pass ordinances for preserving order, and for the safety and security of persons from violence, danger and destruction, and for protecting the public and city property, rights and interests from waste or encroachment, and for ⁴¹¹ promoting the public interests and insuring the good government of the city, and to have and exercise within the limits of the city all the power commonly known as the police power, to the same extent as the state has or could exercise the same within said limits. But no ordinance heretofore or that shall hereafter be passed by the mayor and council of Baltimore, shall hereafter conflict or interfere with the

for the exercise of the powers of the board of police of Baltimore, heretofore created, nor shall the said any officer or agent of the city, or of the mayor in any manner impede, obstruct, hinder or interfere with the said board of police, or any officer, agent or servant thereof thereunder."

Section 31, entitled "Welfare and Other Powers," is as follows: "The foregoing or other enumeration of powers in this article shall not be held to limit the power of the mayor and council of Baltimore, in addition thereto, to pass all ordinances, not inconsistent with the provisions of this article and the laws of the state, as may be proper in executing any powers, either express or implied, enumerated in this article and elsewhere in this article, as well as such ordinances as they may deem expedient in maintaining the peace, good government, health and welfare of the city of Baltimore; they may provide for the enforcement of all such ordinances and impose penalties and imprisonments as may be prescribed by law; but no fine shall exceed five hundred dollars, nor imprisonment exceed twelve months for any offense." We have been referred to, nor have we discovered, any other provisions in the charter of the city which relate to the question involved in this case.

More or more comprehensive police powers could not be granted under any general grant of police power, for the powers mentioned in section 18, than those granted in that section and when we consider the "Welfare Clause" of the same section 31, greater emphasis could not be laid upon the enumerated powers of the city for the maintenance of the good government, health and welfare of the city, where laid. That section expressly declares that no restriction of powers in that article shall be deemed to limit the power of the city, in addition thereto, to pass all ordinances, not inconsistent with that article, or the laws of the state, as may be proper in executing any of the enumerated powers, express or implied, contained anywhere in said article. The able argument of the appellants practically ignores the existence of any implied powers, and apparently proceeds upon the theory that where there is a state law dealing with a specific evil, then, unless specific power is granted upon the city to deal by ordinance with that specific evil, an ordinance attempting to deal with that evil is unconstitutional and void. The primary question in the case is thus clearly and sharply defined.

No judicial decision to this effect was produced, and we believe can be, nor does the suggestion find support in any writer quoted or referred to in argument. Judge speaking of the powers of municipal corporations, says: "The powers of these corporations are either express or

implied. The former are those which the legislator which they exist confers in express terms; such as are necessary in order to carry into effect expressly granted, and which must therefore be have been within the intention of the legislator. Cooley's Constitutional Limitations, 5th ed., p. present case, the legislative grant is not merely to pass ordinances relating to specified police regarded as a part only of the general police power. The grant is of "all the power commonly known power, to the same extent as the state has or could exercise said power within said limits." The implication is a necessary one, that notwithstanding the presence of that section of the charter enumerated certain powers which ordinances might be passed, the legislature gave the city to have, in addition, the power to pass ordinances for any and all purposes relating to the exercise of police power. If, therefore, ⁴¹³ the power to pass ordinances the question can be considered as an implied power within the definition of an implied power given in Cooley, since the whole police power cannot be exercised, the exercise of any part of such power is to be considered as cause such part is not expressly granted. But whether the power here in question as an express power, and whether we look, in the construction of the charter, to one or both of the sections heretofore referred to, the grant of all the police power is an express grant, and every part of the whole is therefore derived by express grant from section 18. If there could be any doubt of this, it is set at rest by section 31, which, as we have seen, declares that the power to pass any ordinance shall not be limited by that article or with the laws of the state, nor be limited by any enumeration of powers anywhere in this article. We regard the legislative intent, therefore, as clear whether the power be viewed either as express or implied. We did not understand the appellant to contend that this power can be delegated by the state to a municipal corporation. It is true, as a general proposition, that a legislature cannot delegate its power to make laws, as expressed in 28 Cyc. 693: "After repeated challenges to the municipal authority to exercise the police power, none of which has been sustained, the doctrine is firmly established and now well recognized that the legislature may expressly or by implication authorize municipal corporations the lawful exercise of police powers within their boundaries. . . . It may be full, partial, regular or summary; but it is never exclusive. A legislature has no authority to divest itself of any of its essential functions or powers." And Judge Cooley says

Constitutional Limitations: "The legislature in such cases regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the legislature; and when it interferes, as sometimes it must, to re-assert and control the local action, there should be reasons of public policy or dangers of local abuse to warrant the interference." But passing from this consideration, the principal and substantial contention of the appellant is twofold: that a penal ordinance punishing the same act as is punished by state law is invalid and void; and second, even if this cannot be sustained as broadly stated, that such ordinance is invalid where it is inconsistent with the state law upon the same subject, and that in this case the ordinance in question is inconsistent with the state law punishing the same act punished by the ordinance.

Polley's Constitutional Limitations, fifth edition, page 100. The author says: "The state law and the by-law may stand together if not inconsistent. Indeed, an act may be a criminal offense under the laws of the state, and further, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other. The clear weight of authority, though the decisions are not uniform."

Quillan on Municipal Ordinances, a recent elaborate book, it is said: "It is entirely competent for the legislature to confer in express terms such powers as will enable a municipal corporation to declare by ordinance any given act to be a crime against its authority, notwithstanding such act is not made by statute a public offense and a crime against the State, . . . and further penalties may be imposed for its commission or omission by municipal ordinance."

Cyc. 697, it is said: "Unless it is prohibited by express constitutional or statutory provision, by the weight of authority, municipal corporations may, by force, prohibit and punish acts which are also prohibited punishable as misdemeanors under the general statutes of the State or which may involve a common-law offense; such ordinances after much strenuous contention are generally recognized as valid."

his statement of the law is supported by an over-
g array of decided cases, collected in the notes to the
above cited, many of which we have laboriously ex-
but we do not deem it necessary to review them.
The view taken in these cases it tersely expressed in
v. Hardy, 46 La. Ann. 1232, 15 South. 696, which
rosecution by the mayor of a city for a fine imposed
nance upon crap-shooting, which was prohibited also

by the state law, and the court said: "In case of offenses there may be concurrent powers in the municipal authorities to prohibit them. The fact that this point have been so numerous and uniform in this doctrine that it has passed into an elementary principle in the text-books."

It cannot be said that the question now under consideration has been decided in any reported case in this state, as said in the opinion of the lower court in this case. The rule above laid down "seems to have been recognized in the law of Maryland in a dictum in *Shafer v. Municipal Corporation*, 331, 79 Am. Dec. 656, even where the same question of jurisdiction of a state statute and a municipal ordinance was presented. The question actually decided in that case was that of the validity of a fine and the mayor of the city was exercising the police power as contradicting the judicial power of the state, but in the concurring opinion Chief Justice Le Grand said: "She was fined for an offense against the decency and morals of the town, and not against those of the state; she offended within the corporate limits, and for such offense she was liable to answer. This did not wipe out all responsibility for an offense to the dignity and sovereignty of the state." In a dictum, this recognition of the rule by such eminent judges as Le Grand, Tuck and Bartol must be taken into weight with their successors, especially when such decisions are in harmony with the decisions of other courts of high authority.

It follows from what we have thus far said that the municipal authorities may be given concurrent power with the state to punish certain classes of offenses, and that the state obtains jurisdiction of the person of the accused to the extent of its power; and further, that this power is not made invalid by the mere fact that the state and the ordinance provide in terms for distinct proceedings under the same act. The lower court, in this case, expressed its view so clearly that we reproduce and adopt the following passage from the opinion set out in full in the report. It is not necessary in the present case to decide whether a conviction or acquittal on a charge of the violation of a state statute could properly be pleaded to an indictment for a violation, by the same act, of a municipal ordinance. The question could be raised by a plea in bar on a second trial, and the court now is only required to determine whether this demurrer whether the possible condition mentioned invalidates the entire ordinance, so that no part of it can be sustained under it. And the court is of opinion that the ordinance cannot be held invalid on such ground."

the appellant further contends that this ordinance is under the express terms of the legislative grant, be- is inconsistent with the law of the state, and this inconsistency is found in the fact that the penalties in the state law are different from those of the ordinance, the latter being heavier, and not distinguishing, the state law does, between first, second and third offenses. All the text-writers already cited herein united in de- claring that further and additional penalties may be imposed by ordinance, without creating inconsistency. The true doc- trine, in our opinion, is concisely stated in 28 Cyc. 701, as "Such ordinances must not directly or indirectly conflict with the general law. Hence ordinances which assume to prohibit or indirectly to permit acts or occupations which the state constitution prohibits, or to prohibit acts permitted by state constitution, are under the familiar rule for validity uniformly declared to be null and void. Ad- ministration by the ordinance does not render it invalid." And when their validity is challenged, such ordinances will receive favorable construction, and be sus- tained by the court, unless their invalidity clearly appears: New Jersey Police Commrs., 68 N. J. L. 127, 52 Atl.

The reason for this rule is well stated in Van Buren v. State, 3 Ark. 368, 22 Am. St. Rep. 214, 14 S. W. 38, as "Municipal corporations are in some respects local governments, established by law to assist in the civil govern- ment of the country. They are founded in part upon the local needs of the localities for which they are organ- ized. The reason of the density of population, or other cir- cumstances, are more extensive and urgent than those of the public in the same particulars.' Many acts are often locally injurious, while the temptation to do them is much greater in such localities than in the state generally. When such localities they are not only wrongs to the pub- lic, but are additional wrongs to the corporation. They must be repressed when it can be done, and when there is a duty to do so to punish the guilty parties, in many cases it is a part of the duties of such corporation. Many of these acts, and ought to, be made penal by incorporated cities and towns, although already made so by the statute. It sometimes becomes necessary for them to do so in order to accomplish the objects of their organization." This lan- guage is especially applicable to the nefarious sale, and hav- ing possession for unrestricted sale, of cocaine and other drugs, so largely used in this day as a substitute for stimulants or intoxicants, and a good example of the application of the principles above stated is found in Mon

Luck v. Sears, 29 Or. 421, 54 Am. St. Rep. 804
32 L. R. A. 738.

There are abundant adjudications upon the proper consideration.

In *Ex parte Hong Shen*, 98 Cal. 681, 33 court said: "Whenever a municipal by-law comes in conflict with the state law, the by-law must give way. If there is no conflict, then the ordinance is valid. If there is such conflict because the ordinance is in conflict with other and different regulation for the sale of goods or commerce than that made by the state statute, the ordinance is void. The contention we cannot admit. There are no different regulations, without conflict."

In *State v. Ludwig*, 21 Minn. 202, a state law prohibited opening any place of business on Sunday under penalty of two dollars, while the city ordinance forbade the sale of liquors in saloons under penalty of twenty-five dollars. The ordinance was upheld. "There is no state law authorizing the acts made unlawful by this ordinance. On the contrary, the state law prohibits the same. The ordinance is unlawful. The legislature may authorize a municipality to impose new and additional penalties in addition to the ready made penal by laws of the state," and the city charter forbade the passage of any ordinance in conflict with the state laws, there was held to be no conflict in this case.

In *McPherson v. Chebanse*, 114 Ill. 46, 55 A. 28 N. E. 454, in a similar case, the court said: "The ordinance does not prohibit what the statute permits. There is no repugnancy between them."

In *Linneus v. Dusky*, 19 Mo. App. 20, the ordinance prohibited all persons, except certain officials, from carrying weapons, under certain penalties. The state law prohibited anyone whose life had been threatened to carry such weapons. The ordinance made no such exception. It was held that there was no repugnancy and that the ordinance was valid.

In *Commonwealth v. Goodnow*, 117 Mass. 111, the act of 1799 forbade the projection of any bow window more than one foot, under the penalty of one dollar a day after notice to remove. The act of 1854 authorized a city to make all needful and salutary ordinances not inconsistent with the laws of the commonwealth, under penalty not exceeding fifty dollars. An ordinance passed by the city authority forbade projecting bow windows beyond a certain distance under a penalty from four dollars to ten dollars, and it was contended the ordinance was void because in conflict with the act of 1799, but the court upheld the ordinance.

These illustrations will suffice without further examples.

This brings us to the final question of the validity of the provision of the ordinance for the forfeiture of the license of the person convicted, if he be a licensee.

physician, dentist or veterinary surgeon. The court held that "this part of the penalty in the ordinance is unusual and oppressive as to be unreasonable, and is condemned for that reason." Without entering into a discussion of that question, we are not prepared to say that a pharmacist, physician, dentist or veterinary surgeon's violation of the restrictions of this ordinance, deliberately or recklessly selling the prohibited drugs, or keeping them in possession for the purpose of such sale, that the forfeiture of his license is so oppressive as to be unreasonable. We are disposed to believe that both with regard to the gravity of the offender and to the protection of the public against the evil at which the ordinance is aimed, forfeiture of license is the only fully adequate penalty, but we decline the condemnation of that provision of the ordinance on another ground.

Our examination of the matter leads us to the conclusion that under its charter the city of Baltimore has no power to exact any forfeiture.

As to Cooley's Constitutional Limitations, page 249, in discussing the author says: "Municipal by-laws may impose penalties on parties guilty of a violation thereof, but they may not impose forfeiture of property or rights without express legislative authority"; citing *State v. Ferguson*, 33 Pa. 481, and *Phillips v. Allen*, 41 Pa. 481, 82 Am. Dec. 486. Millon states the law in the same way, in his work on Municipal Corporations, volume 1, section 336. And McClellan on Ordinances, section 170, says "the general rule is that an ordinance cannot create a forfeiture in the absence of express power so to do," citing *Kirk v. Nowill*, 1 Term Rep. 1. He adds in the same section: "The American courts have generally followed the early English rule, and have held that in the absence of express power given an ordinance may be enforced by forfeiture." It was so held in *White v. New York*, 26 N. J. L. 67, *New York v. Ordrenan*, 12 Johns. 404, *Barter v. Mount*, 78 Ky. 86, 39 Am. Rep. 208, *Barter v. Commonwealth*, 3 Penr. & 420 W. 253, per Chief Justice *Kneedler v. Norristown*, 100 Pa. 368, 45 Am. Rep. 1, *State v. Columbia*, 6 Rich. 404, in which the court held there was no distinction between forfeiture of goods and of license. Also in *Carey v. Washington*, 5 Cranch C. C. 13, No. 2404, the court said: "A corporation cannot be prohibited or prohibited any person from the full exercise of all rights under the law of the land unless such power is expressly given by the charter, or necessarily results from some express power. This is a rule applicable to all corporations existing under a charter." No authority is required to show that unless the elimination of forfeiture of license as the penalty would operate to destroy the general in-

tent of the ordinance, the rest of the ordinance full force and effect.

Finding no error in the judgment of the court affirmed.

Judgment affirmed, with costs to the appellant below.

The Power of a Municipal Corporation to Punish Acts by statute is the subject of a note to *Thrower v. City of St. Louis*, 110 Am. St. Rep. 149. The mere fact that the state, of the police power, has made certain regulations does not prevent a municipality from exacting additional requirements, where there is no conflict between the two, and the requirements of a municipal by-law are not in themselves pernicious, reasonable or discriminatory, both will stand. But where a conflict exists between the ordinance of a municipality and the statute, the ordinance must give way to the paramount law of the state. *Hoffman*, 155 Cal. 114, 132 Am. St. Rep. 75.

MOUNT VERNON-WOODBERRY COTTON DUCK COMPANY v. FRANKFORT MARINE ACCIDENT INSURANCE COMPANY

[111 Md. 561, 75 Atl. 105.]

TITLE OF STATUTE.—Under an Act to Regulate the employment of children generally, the employment of children under a certain age may be prohibited as part of the regulation.

TITLE OF STATUTE.—An Act Unconstitutional. A Defective Title may be repealed and re-enacted by a statute of which clearly indicates its subject matter. (p. 640.)

TITLE OF STATUTE.—Where a Law is Repealed and re-enacted under a title that discloses its subject, the new title has the force and effect of valid independent legislation.

TITLE OF STATUTE.—The Title of an Act is defective because it indicates that the statute is to apply to the whole state, while in the body of the act many counties are excepted from its operation. (p. 640.)

CONSTITUTIONAL LAW.—The Presumption is in favor of the validity of a statute should prevail unless the lack of constitutional authority is clearly demonstrated. (p. 642.)

CONSTITUTIONAL LAW.—Employment of Children. A statute forbidding the employment of children under sixteen years of age in mills and factories other than those in which the employment is constitutional. Courts will not hold the classification unreasonable. (pp. 642, 643.)

Edward Duffy and Bond & Robinson, for the appellant.

George Dobbin Penniman, for the appellee.

⁵⁶² THOMAS, J. This is an action brought by the Mount Vernon-Woodberry Cotton Duck Company against

the Accident and Plate Glass Insurance Company to
 a policy of indemnity issued by the defendant to
 the plaintiff, whereby the defendant, in consideration of the
 sum of \$500 therein contained and of the sum of \$1,650,
 indemnify the plaintiff "for the term of twelve
 months beginning on the twentieth day of March, 1906, at
 and ending on the twentieth day of March, 1907, at
 . . . against loss arising from legal liabilities for dam-
 account of bodily injury or death suffered by any
 or employes of the assured resulting from any and
 accident of whatsoever nature or cause happening in,
 about the premises and in the business of the assured
 and on the back" of the policy.

The parties were joined on the pleas of "never promised as al-
 leged" and "never indebted as alleged," and by agreement
 the defendant's third plea was withdrawn, "all errors
 of law" were waived, and the case was submitted to the
 court on an agreed statement of facts by the following agree-

ment: It is further agreed that article 100 of the Code
 of General Laws shall be considered in evidence, and
 acts of 1894, chapter 317, and 1902, chapter 566,
 shall be considered in evidence, and they may be read in the
 court and in the court of appeals, either from the
 volumes or from certified copies thereof or of parts
 thereof and it is further agreed that this case shall be tried
 in the court, and that it is submitted to the court for its
 decision in the law, and the court is requested to render a
 judgment in accordance with its said opinion, and if the said
 court shall find for the plaintiff on the facts hereinbefore stated and
 if it is that notwithstanding the terms of paragraph 11
 of the aforesaid policy, the said policy applies to and covers
 the loss suffered by said John H. Ball, the judgment of the
 court shall be for the plaintiff for an amount equal to the
 amount paid in satisfaction of the judgments aforesaid, to-
 gether with the sum of \$3,150, with interest thereon from March 1,
 1908, less the amount of \$313.67 paid as aforesaid by the
 plaintiff for costs, and the amount of \$150 paid as aforesaid
 by the plaintiff for counsel fees either or both, provided the
 court shall be of opinion that under the terms of said
 policy the plaintiff is entitled to be reimbursed for either or
 both of said amounts, with interest on the amount so allowed
 by the court of fees and costs from March 1, 1908.

It is further agreed that either party shall have the right
 to appeal from the judgment rendered."

Paragraph 11 of the policy it was agreed: "That this policy
 shall apply to or cover any injury suffered by a child
 of the assured contrary to law, nor to any child
 under the age of years of age where no statute restricts the age of

employment, nor to any injury suffered by others or resulting from such employment."

It further appears from the statement of the plaintiff, who was carrying on in Baltimore City of manufacturing cotton duck, on the 26th of May, 1906, employed one John H. Ball to work in its mill known as the "Meadow Mill." At the time of the accident John H. Ball was between eleven and twelve years of age (of which fact the plaintiff had knowledge by the accident), having arrived at the age of eleven years on the 20th of March, 1906, and resided in Baltimore with his father, John T. Ball. He was not dependent upon the plaintiff for employment for self-support, and just prior thereto he was attending a public day school, which had closed for summer vacation, and it was at the request of his father that he was employed to work in the mill during the summer. While so employed, and while working for the plaintiff on the premises mentioned in the policy, the plaintiff, John H. Ball, on the 29th of June, 1906, had his right arm injured by coming in contact with a revolving fan in the mill. The plaintiff subsequently brought suit against the plaintiff for damages for such injury. His father, John T. Ball, also brought suit against the plaintiff to recover the loss he sustained by the accident. The defendant was given due notice of the accident and of the suits, as required by the policy, but refused to defend the suits on the ground that John H. Ball had been employed by the plaintiff contrary to the policy. These suits were defended by the plaintiff, but the plaintiff obtained judgment in favor of John H. Ball for \$2,500 damages and costs, and judgment in favor of John T. Ball for \$31.75 costs. The judgment in favor of John T. Ball was entered satisfied upon payment by the plaintiff of the damages and costs, and the judgment in favor of John H. Ball was paid in full by the plaintiff, and it was for the purpose of recovering these amounts so paid by the plaintiff and the costs thereof paid by plaintiff to counsel for defending such suits that the action was brought.

The appeal is from a judgment of the court in favor of the defendant, and it is conceded by counsel for the defendant that if the act of 1902, chapter 566, is a valid law, there was no error in that judgment.

The contention of the appellant is, (1) that the act of 1894, chapter 317, is unconstitutional, because it is defective, and that the act of 1902, chapter 566, is unconstitutional, the act of 1894, and is therefore also unconstitutional; (2) that the acts of 1894 and 1902 are in conflict with the fourteenth amendment to the constitution of the United States.

1. Act of 1894, chapter 317, is as follows: "An Act to amend Article one hundred of the Code of Public General Laws of Maryland, title 'Work, Hours of, in Factories,' by adding thereto a section, to be known as section 4, regulating the employment of children under twelve years of age, in mills and factories in this state.

"Section 1. Be it enacted by the General Assembly of Maryland, That Article one hundred of the Code of Public General Laws of Maryland be amended by adding thereto the following section, to come in immediately after section three of said Article, and to be known as section four:

"Sec. 4. No proprietor or owner of any mill or factory in this State, other than the establishments for manufacturing canned goods, or manager, agent, foreman or other person in charge thereof, shall after the first day of October, in the year eighteen hundred and ninety-four, employ or retain in ~~see~~ employment in any such mill or factory, any person or persons under twelve years of age; and if any such proprietor or owners of any such mill or factory, or manager, agent, foreman or other person in charge thereof, shall willfully violate the provisions of this section, he shall be fined not less than one hundred dollars for each and every offense so committed, and pay the costs of prosecution, one-half of the fine to go to the informer and the other half to the school fund of the county or city in which the offense shall have been committed; provided, that nothing in this Act shall apply to Frederick, Washington, Queen Anne's, Carroll, Wicomico, Caroline, Kent, Somerset, Cecil, Calvert, St. Mary's, Prince George's, Howard, Baltimore, Worcester and Harford Counties."

It is claimed, upon the authority of *Whitman v. State*, 80 Md. 410, 31 Atl. 325, that it is an attempt, under an act entitled an act to regulate the employment of children under twelve years of age, to prohibit the employment of children under that age, and for that reason, is in violation of section 29 of article 3 of the Maryland constitution, which requires the subject of an act to be described in its title. Assuming this contention to be sound, the act of 1894 was repealed and re-enacted by the act of 1902, chapter 566, the title of which is "An act to repeal and re-enact section 4 of article 100 of the Code of Public General Laws, as enacted by chapter 317, acts of 1894, title 'Work, Hours of, in Factories,' regulating the employment of children," and which prohibits the employment in any mill or factory, other than establishments for the manufacturing of canned goods, of any person under fourteen years of age, "unless such child is the only support of a widowed mother or invalid father, or is solely dependent upon such employment for self-support." It cannot be said, nor do we understand counsel for the appellant as seriously contending, that under an act entitled an act to regulate the

employment of children generally the employment of children under a certain age may not be prohibited by the regulation. In the case of *Osborn v. Chan*, Judge, 114 Mich. 655, 72 N. W. 982, the court in an act entitled "An ⁵⁶⁷ act to regulate the taking of fish in the waters of this state, by the use of throw nets, gill nets, seines, and other apparatus," and in an alleged unconstitutionality of act No. 151 is said to be defective title, in that it prohibits, during a year, while it professes to regulate, the taking of fish. It is said that this prohibition is not mentioned in the title, and again, that prescribing certain methods and a regulation, which is the only object stated in the title, may reasonably conclude that the object of this, laws, is to preserve the industry of fishing, a food product, by protecting fish during certain seasons, preventing the taking of young fish that have not reached proper size. Any provision that tends to this effect recognizes a reasonable exercise of the right to regulate, and prescribes rules under which it may or may not be exercised within the term 'regulation.' " That case fully expresses the views expressed by this court in *Whitman v. Md.* 410, 31 Atl. 325, where it is said that: "which was necessary or appropriate to carry out the operation a scheme embodied in an act whose title is that it was an act to regulate liquor traffic in this state, have been constitutionally included under the title, though the total abolition of the liquor traffic is in no sense the object of it." The act of 1902 does not prohibit the employment of children, but regulates the employment of children by prohibiting the employment of children under a certain age, except under certain circumstances.

But it is insisted that the title of the act of 1894 is that it is an act to regulate the employment of children, and that the act of 1902 is based on the act of 1894, and must therefore fall with it. There would be no merit in this contention if the title of the act of 1894 was that it was an act to regulate the employment of children, and the title of the act of 1902 simply referred to the title of the former act, for in that case, as the title of the act was insufficient, the title of the latter would not give proper notice of the legislation proposed. The title of the act of 1902 not only states that it is an act to regulate the employment of children, but also states that it re-enact section 4 of article 100 of the constitution ⁵⁶⁸ by the act of 1894, but that it is an act to regulate the employment of children, which it does in the act by prohibiting the employment of children under a certain age, etc. If an act contains in its title a description of the subject of the act, its validity is not affected by the fact that it also proposes in its title to amend and re-enact, and does repeal and re-enact, an act.

defective, nor is it dependent in any sense for its operation on the act so repealed and re-enacted. Much display may be found in the reported cases as to when and under what circumstances an unconstitutional act may be amended, but we find no case intimating that an act unconstitutional because of its title may not be repealed and re-enacted by an act of which clearly indicates its subject matter: State v. *Ward*, 67 N. J. L. 596, 52 Atl. 362, 60 L. R. A. 564, and where a law is repealed and re-enacted under a title which changes its subject, the new law has all the force and effect of valid independent legislation.

The title of the act of 1902 is claimed to be misleading, because it indicates that the act is to apply to the whole state, while in the body of the act many of the counties are excepted from its operation. Much of the legislation of this state has been enacted in the same way, and we find no instance in which its constitutionality has been questioned on that ground. The act of 1898, chapter 13, entitled "An act to repeal and re-enact with amendments 13, 14 and 15 of article 99 of the Code of General Laws, title 'Wild Fowl, Birds and Game'; and to add certain new sections to said article, for the better protection and preservation of birds and game animals," etc., and the second section repeals all laws inconsistent with its provisions except the local laws of Kent and a number of counties of the state relating to game and wild fowl. The court, in *Stevens v. State*, 89 Md. 669, 43 Atl. 929, overruling the objections made by counsel, said, in relation to that act: "It cannot be successfully contended that the law now under consideration is unconstitutional, because it operates ⁵⁰⁹ unequally upon the inhabitants of different parts of the state, and that it discriminates against the residents of Baltimore City, by reason of the fact that a number of counties are excepted from its operation. It has been the policy of the state of Maryland to enact local laws relating only to certain counties, or to exempt particular localities from the operation of general laws or from the provisions thereof.

The law is at variance with the provisions of article 29 of the state constitution, because it embraces more than one subject and has a misleading title. The law is described as 'An act to repeal and re-enact sections 14 and 15 of article 99 of the Code of Public General Laws, title "Wild Fowl, Birds and Game," and to add certain new sections for the better protection and preservation of birds and game animals.' The several sections of the act are germane to one subject matter, the protection and preservation of birds and game animals, which is

2. In their objection to the act of 1902, on it is in conflict with the fourteenth amendment constitution, counsel for the appellant do not claim the power of the legislature to prohibit the employment of children under fourteen years of age in mills and factories. They contend, as stated in their brief, that the act is unconstitutional by reason of the classification of the business of canning factories and owners of all other factories between mill owners in Baltimore City and other counties and in all the other counties."

In *Ex parte Weber*, 149 Cal. 392, 86 Pac. referring to a law regulating the employment of "In matters of this kind the legislature has It must determine the degree of injury to the which the different kinds of employment in child and the corresponding necessities for child from the effects thereof, and unless its regard is manifestly unreasonable, there is judicial interference." In *Cooley's Constitu tions*, sixth edition, page 216, it is said: "The a law be void for its repugnancy to the cons times a question of much delicacy, which o ever, to be decided in the affirmative in c And again, on page 220, that the courts "m legislative discretion has been properly ex dence was required, it must be supposed th the legislation when the act was passed. *Spencer*, 149 Cal. 396, 117 Am. St. Rep. 13 9 Ann. Cas. 1105, it was said that: "The pres is that an act of the legislature is constitu this depends on the existence or nonexistence

or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in its decision, unless the error clearly appears." In the case of *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, the court referring to an act limiting the hours of labor in underground mines, etc., said: "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employé, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts." And in the case of *Cochran v. Preston*, 108 Md. 220, 129 Am. St. Rep. 432, 70 Atl. 113, 23 L. R. A., N. S., 1113, 15 Ann. Cas. 1048, this court said that: "The presumption in favor of the validity of the statute ⁵⁷¹ should prevail, unless the lack of constitutional authority is clearly demonstrated."

The conditions under which children labor in canning factories may be entirely different from the conditions under which they are required to work in other factories or mills, and much less injurious or dangerous to health, and we must assume that the legislature in exempting from the operation of the act of 1902 "establishments for manufacturing canned goods," did so for reasons entirely consistent with the purpose of the act to protect the health of the children of the state, and that it acted upon knowledge possessed by it that fully justified the exemption of such establishments from the regulations applicable to other factories and mills. The legislature has determined that it is injurious to the health of children under fourteen years of age to work in mills and factories, other than canning factories, and how is this court to determine that this is not so? We cannot assume that the legislature acted arbitrarily or unreasonably, but must presume, in the absence of any indication to the contrary, that the classification was based on reasonable grounds.

In the cases of *Luman v. Hitchens Bros. Co.*, 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393, and *Gulf etc. Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666, cited and relied on by counsel for the appellant, the statutes considered were not police regulations, and the court held that their provisions were manifestly arbitrary and unreasonable. In *Luman's* case (90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393), Chief Judge McSherry said: "This attempted classification in the act of 1898 is obviously arbitrary, and was not made to rest, as we have above pointed out, upon some difference which bears a reasonable and just relation to the act—the thing—in respect to which the classification is proposed. The statute was not passed in the exercise of the police power of the state, as was the case in *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201, 43 Atl. 771, 45 L. R. A. 433, and *Atchison etc. R. R. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. Rep. 609,

43 L. ed. 909, and is repugnant to the fourth amendment."

The classification made by the act of 1902 to be "obviously arbitrary," and we must hold sons ⁵⁷² stated, that the act is free from any ties suggested by the appellant, and that, under the policy, its provisions constitute a complete recovery by the plaintiff.

The judgment of the court below must be affirmed.

Judgment affirmed, with costs.

A Statute Prohibiting the Employment and Labor of under fourteen years of age in certain designated occupations not be held to be unlawful class legislation on the ground that there are other employments not falling within the purview of the act which are equally hurtful to children. The decision is affirmed, holding that the specified occupations are more injurious than other occupations not mentioned, and that they include virtually all the injurious occupations in which children are employed at all, is not so manifestly incorrect as to justify the holding it unfounded and the law consequently invalid. 149 Cal. 396, 117 Am. St. Rep. 137.

A Statute is Constitutional Which Fixes an Age Limit for the Employment of Boys boys shall not be employed: *Lenahan v. Pittson* Conn. 311, 120 Am. St. Rep. 885. And a statute is constitutional which forbids the employment of females for more than a certain time in any factory, laundry or mechanical establishment. 48 Or. 252, 120 Am. St. Rep. 805. But it has been held that a statute prohibiting and making criminal the employment of women in any factory before 6 o'clock in the morning and after 9 o'clock in the evening of any day is unconstitutional. *Williams*, 189 N. Y. 131, 121 Am. St. Rep. 854. *State v. People*, 41 Colo. 495, 124 Am. St. Rep. 143.

The Sufficiency of the Title to Statutes Within the Requirements of the Constitution is discussed in the notes to *Lewis v. Dunn*, 267; *Crookson v. County Commrs.*, 79 Am. St. Rep. 267; *People*, 64 Am. St. Rep. 70.

CASES

IN THE

SUPREME COURT

OF

MASSACHUSETTS.

COMMONWEALTH v. GRIFFITH.

[204 Mass. 18, 90 N. E. 394.]

EMPLOYMENT OF CHILDREN—Theatrical Exhibition.—A statute providing that “no child under the age of fourteen years shall be employed at work . . . after 7 o'clock in the evening,” a child who takes a speaking part in a play, although he receives compensation other than the training which results from his participation in the performance. (pp. 646, 647.)

EMPLOYMENT OF CHILDREN—Interpretation of Statute.—The statute provides that “no child under the age of fourteen years shall be employed at work performed for wages or other compensation to whomsoever payable, during the hours when the public schools of the city or town in which he resides are in session or be employed at work before 6 o'clock in the morning or after 7 o'clock in the evening,” the last clause is an absolute provision of general application, and is not confined to employment in a factory, workshop or other establishment, but is applicable to work in a theatrical exhibition, and is not inconsistent with the first prohibition in the statute. (pp. 646, 647.)

WORDS AND PHRASES.—The Word “Work” is of Broad Signification. One of its primary meanings is “effort directed to an object,” which includes taking part in a theatrical exhibition. (p. 647.)

WORDS AND PHRASES.—The Word “Employ” Means to Use the Services of, as Agent or Representative. There may be employment without wages or compensation. (p. 647.)

EMPLOYMENT OF CHILDREN—Nonresident Parent and Child.—The Massachusetts statute forbidding the employment of children under fourteen years of age applies to the employment of a child in that state under an employment contracted for in that state by persons residing there. (p. 648.)

Dwyer, assistant district attorney, for the commonwealth.

Rackett, for the defendant.

DOWLTON, C. J. The defendant was convicted upon a plea of guilty for the unlawful employment of children. William Short, a boy nine years of age, took a speaking part in a theatrical exhibition. (645)

part between the hours of 8 and 10 o'clock in a play produced by the defendant, as manager of the Majestic Theater, in Boston. The company in question appeared played an engagement at this theater for the first time beginning Monday, April 5, 1909. Antrim resided with his father and mother in New York city, and came with his father, to take part in this play as an actor. He was not paid wages or a compensation for his appearance, but his appearance was with the sanction of his father, who also appeared as an actor in the same play. Antrim appeared, and Antrim's participation in the play was a part of his training for the dramatic profession. The defendant procured the boy to appear in the play, and it is so stated. This was the subject of the first count in the complaint.

The second count alleged similar facts as to the appearance of Grace Shanley, a girl thirteen years of age, who appeared in the same cast of the same play as did Antrim, between ²⁰ the hours of 8 and 10 o'clock in the evening, in a speaking part. The facts in reference to her appearance are the same as those in reference to Antrim, except that her appearance was with the knowledge and consent of her mother, an actress who also took part in the play. She was paid a certain compensation by the week for her appearance of herself and her daughter. This engagement lasted for several weeks. The defendant asked the judge to rule that, upon the facts, he could not be convicted upon either count. The judge accepted to the refusal so to rule, and to the submission of the case to the jury under an instruction that they should return a warrant a conviction.

The complaint was under the Revised Laws, chapter 106, section 28, as amended by the Statutes of 1905. A part of the section which is relied on is as follows: "No child under the age of fourteen years shall be employed to perform work performed for wages or other compensation, however payable, during the hours when the public schools are in session in the city or town in which he resides are in session, or employed at work before 6 o'clock in the morning or after 7 o'clock in the evening." The last clause of the section is the one deemed applicable to the present case.

The defendant contends that this is not an application of general application, but that it relates only to employment in some factory, workshop or mercantile establishment, such as is referred to earlier in the section. The defendant contends that it is not applicable to work in a theatrical production, because of the prohibition of employment in certain things connected with such exhibitions. The defendant relies on the Revised Laws, chapter 106, section 45, which prohibits employment in theatrical exhibitions, and contends that, if applied to such exhibitions, it would be inconsistent with this last section. We are of opinion that

tentions is well founded. By the Statutes of 1888, 348, section 2, where this provision appears at the beginning of a section, which then goes on to deal with other things, it is made plain that this is an absolute and general prohibition. The language there is: "No child under four years of age shall be employed in any manner before or after 6 o'clock in the morning or after 7 o'clock in the evening." The provision has been retained, without material change, in various re-enactments, to the present time. We find no inconsistency ²¹ between it and the Revised Laws, 1906, section 45, which deals with a limited class of children.

Children were performing their parts after 7 o'clock in the evening. One question is whether one, employed as an actor, in a speaking part, is at work, within the meaning of the statute. It is contended by the defendant that the word "work" should be given a narrow meaning, and limited to manual labor done in a factory, workshop or mercantile establishment.

We are of opinion that it should be given a broad meaning. The statute was intended to protect children from employment calling for constant attention, regular and physical or mental strain to accomplish the desired result. The word "work" is of broad signification. One of its many meanings, as it is defined in Webster's International Dictionary, is, "Effort directed to an end," and the words from Shakespere Portia's call:

"Come on Nerissa; I have work in hand
That you yet know not of."

The effect of the statute forbids restriction of the word to a narrow meaning.

Another question is whether the jury could find that the defendant employed these children. Here again, if we go to the dictionary, we have as a meaning of "employ," "To employ a servant, agent or representative." These children were engaged in a regular service for the defendant in Boston, for several weeks. He depended upon them to do what was a necessary part of that which he was presenting every evening for the entertainment of theater-goers. Without them his performance could not go on; at least, it could not go on in the manner that he desired to have it go. The facts find that he employed the boy to appear in the play as aforesaid." He gave the boy a compensation for the service of the girl. He gave the girl an opportunity for valuable training, and for companionship with his father, who was an actor in the play. The service was rendered regularly, under an engagement relied on by both parties, for such benefits as might be derived from it. The payment of compensation, as such, is not an essential element of employment. If one is procured to perform regularly under an engagement, rendering valuable ser-

vice for a specified time, it ²² may be found employed, although he receives nothing as an agreement. He is used and relied upon to accomplish of his employer. The statute itself recognizes that be employment without wages or compensation, provides that employment during the hours when schools are in session shall be punishable only without wages or other compensation, while employment at any other time is punishable without reference to its being with or without wages or compensation.

There is no good ground for the defendant's contention that the statute is not applicable to work in the state, done under an employment contracted for by persons residing there. It looks to employment work here, wherever the contract is made, and whether the children are inhabitants of this state or nonresidents.

Exceptions overruled.

For Statutes Forbidding the Employment of Children in Factories, etc., see Mount Vernon-Woodberry Cotton Duck Co. v. Maryland etc. Ins. Co., 111 Md. 561, ante, p. 636, and cases there cited, and cross-reference note thereto.

SHEPARD v. JACOBS.

[204 Mass. 110, 90 N. E. 392.]

EMPLOYER—Liability for Acts of Loaned Servant.—The general master of a servant may lend him, with his consent, to another person, for services in the business of the latter, who is engaged in the business of the other and in all respects subject to his direction and control, he becomes a servant of the latter, and who becomes liable for the negligence of the servant.

EMPLOYER—Liability for Acts of Loaned Employee.—In determining whether, in a particular act, a loaned servant is the servant of his original master or of the person to whom he has been loaned, the general test is whether the act is done in business for the person to whom the servant is loaned, so that he can act for or continue it and determine the way in which it shall be done, and not merely in reference to the result to be reached, but in reference to the method of reaching the result. (p. 649.)

AUTOMOBILE—Liability for Act of Chauffeur or Driver.—Where the owner of an automobile lends it, with a license, to another person in charge, under an agreement for a specified amount of time, the car with the driver for two days, the chauffeur to drive the car in the directions of the hirer, the owner is liable for an injury to a third person caused by the negligence of the chauffeur in operating the car. (pp. 649, 651.)

A. P. Sawyer, for the plaintiff.

F. J. Daggett, for the defendants.

SNOWLTON, C. J. This is an action for damages resulting from a collision between an automobile of the plaintiff owned by the defendants. The defendants let their automobile, with one Lodge, a licensed chauffeur, in charge of the Fiat Automobile Company, to be used by one Hollander, a representative of that company, in and around the city at the time of the automobile races there in September, 1908. The defendants were to receive fifty dollars for the use of the car, with the driver, for two days. Hollander was to direct the driver as to when and where the car should be used, as one would order the driver of a common carriage which he had hired by the day or the hour. The question was whether, upon the evidence, the judge, before whom the case was tried without a jury, was bound to find, as requested by the defendants, that the Fiat Automobile Company was liable for the negligence of Lodge in the management of the car at the time of the accident, and that Lodge was then the servant of the defendants, for whose negligence they could be held.

The case turns upon the law of master and servant in its application to the facts. It is well settled that the general rule is that a master may lend his servant, with his consent, to another person for service in the business of the other, and that if the servant is engaged in the business of the other person and is under his direction and control, he becomes the servant of the new master, and this master becomes liable for his negligence. ¹¹² In determining whether, in a particular case, he is the servant of his original master or of the new master to whom he has been furnished, the general test is whether the act is done in business of which the person is the proprietor, so that he can at any time stop it or alter it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result. Is this person the proprietor of the business in which the act is done? It is meant not merely the general business which the master intended to promote, but the particular business which he intended for the act, in the smallest subdivision that can be made. See *Wheeler v. Cambridge*, 166 Mass. 268, 44 N. E. 218; *Delory v. Gett*, 185 Mass. 126, 102 Am. St. Rep. 328, 69 N. E. 414; *L. R. A.* 114; *Samuelian v. American Tool & Machine Co.*, 168 Mass. 12, 46 N. E. 98; *Rourke v. White Moss & Co.*, 2 C. P. D. 205; *Donovan v. Laing, Wharton, & Construction Syndicate* (1893), 1 Q. B. 629.

The application of these principles to the hiring of an automobile with horses and a driver, to be used for the conveyance of the hirer from place to place, it has been held almost universally that in the care and management of the horse and the driver does not become the servant of the hirer,

but remains subject to the control of his general employer and that therefore the hirer is not liable for his negligence in driving: *Driscoll v. Towle*, 181 Mass. 416, 6 Am. Rep. 645; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Casey*, 160 Mass. 374, 36 N. E. 58; *Quarman v. Mees. & W.* 499; *Jones v. Corporation of Liverpool*, 12 D. 890; *Lewis v. Long Island R. R.*, 162 N. Y. 548; *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 29 L. ed. 652; *Standard Oil Co. v. Anderson*, 29 Sup. Ct. Rep. 252, 53 L. ed. 480; *Joslin v. Green Ice Co.*, 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 724, 52 L. R. A. 205; *Frerker v. Nicholson*, 41 Pac. 224, 13 L. R. A., N. S., 1123, 14 Ann. Cas. 7.

In *Donovan v. Laing* (1893), 1 Q. B. 629, Bowen said: "There are two ways in which a coachman may employ his men and his machines. He may employ them to do the work, and, the end being prescribed, the means of doing it may be left to him. Or he may employ them in a different manner, and, not doing the work himself, he may put his servants and plant under the control of another person—he may loan them—¹¹³ and in that way he does not exercise control over the work. . . . If a man lets out a horse to hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may direct the destination to which he wishes to be driven. The coachman does not become the servant of the person he is hired to drive, if the coachman acts wrongly, the hirer can only sue for damages to the owner of the carriage." The rights and duties of the parties depend upon their contract, expressed or implied. The subject was considered in *Delory v. Blodgett*, 126, 102 Am. St. Rep. 328, 69 N. E. 1078, 64 L. R. A. 101, and reference was made to the implication in such cases that "as to the particulars of the management of the team [the driver] is the servant of his general employer, and in his interest and as whose representative he will manage the team, direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the passengers. In these particulars, for the preservation of his property, he will be presumed that the owner of the team reserves to himself a right of control": See, also, *Huff v. Ford*, 126, 30 Am. Rep. 645; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58. A similar view is indicated in *Jones v. Corporation of Liverpool* (1898), 2 Q. B. 565, 572, 574. The health and safety of the horses and the protection of the whole team by the coachman are of so much importance to the owner that, in the absence of an express contract, he will not be presumed to have given up their management to the hirer, and the owner must send his own servant for the special purpose of managing the team.

defendants had furnished horses, a carriage and a driver under a similar contract, instead of an automobile and driver, there would be no doubt of their liability for the negligence of the driver in the management of the team. The question is whether the same result should be reached on the facts of this case. The analogy between the two contracts is very close. The management of an automobile properly can be trusted only to a skilled expert. The hirer cannot permit such a vehicle to be run in the streets without a licensed chauffeur of approved competency. The risk of great loss of property by the owner, as well as of injury to the chauffeur, his servant, is such as to make it of the greatest importance that care should be exercised in his selection, and that the control and management of the machine should not be given up to the hirer. The reasons for applying this rule in a case like the present are fully as strong as in a case where a carriage and horses are let with a driver.

Decisions are conflicting in cases where there has been a negligent letting of railroad trains and large machines of various kinds, with a man or men to work with them. It has been held in such cases, where the hirer was to have the general control and use of them, that the men in charge were his servants, for whose negligence he alone was liable. See *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 205; *Murke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Currie v. Currie*, L. R. 6 C. P. 24; *Byrne v. Kansas City*, 11 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. But there is much of opinion that there is a distinction between these cases and the so-called carriage or driving cases, and that the liability for an automobile, with a licensed chauffeur in the service of an owner, falls within the principle covering the latter class. The decisions overruled.

Use of the Automobile is the subject of a note to *Christy v. Christy*, 108 Am. St. Rep. 212. As to the degree of care toward which one must use in operating an automobile in a highway, see *McIntyre v. Orner*, 166 Ind. 57, 117 Am. St. Rep. 359; *McIntyre v. Dielmann*, 124 La. 421, ante, p. 508. And as to the liability of the owner of an automobile for injuries occasioned by his driver, see *Lotz v. Hanlon*, 217 Pa. 339, 118 Am. St. Rep. 922.

A Livery-stable Keeper Lets a Conveyance for a particular purpose and exercises reasonable prudence in selecting the team, and driver, he is not answerable for injuries sustained by a falling in the vehicle, occasioned by negligent driving: *McGill v. Gill*, 114 Tenn. 524, 108 Am. St. Rep. 919. As to the liability of a livery-stable keeper where he lets an unruly or vicious horse, see *Hunsberger*, 224 Pa. 154, 132 Am. St. Rep. 770.

Owner of a Horse and Vehicle Furnishes Them, Together With a Driver to one who hires them, such owner is liable for injuries to persons caused by the negligence of the driver: *Sacker v. Sacker*, 98 Md. 43, 103 Am. St. Rep. 374.

A Master may so Hire or Loan His Servant to Another for special service, and part with all control over the servant's will, as to that particular service, become the servant of that person: Sacker v. Waddell, 98 Md. 43, 103 Am. St. Rep. 103. Cases cited in the cross-reference note thereto. If a master hires his servant to another to do work for and under the direction of the latter, the servant becomes a fellow-servant of the person to whom he is thus lent or hired, and the master cannot recover of their master if injured through their negligence: *v. Blodgett*, 185 Mass. 126, 102 Am. St. Rep. 328.

CITY OF NEWBURYPORT v. SPEAR

[204 Mass. 146, 90 N. E. 522.]

APPEAL—Facts Agreed to by Parties.—When a case is brought to the supreme court on a report stating that the facts therein cited “appeared in evidence,” such facts must be treated as true by both parties, and the trial judge regarded as justified in his rulings of law upon them accordingly. (p. 653.)

MUNICIPAL CORPORATION—Check by Treasurer for Personal Debt.—A city may maintain an action for money received to recover the amount of a check drawn by the treasurer without authority upon its bank account, payable to the treasurer personally, indorsed in blank, received by the defendants in payment of a personal debt of the treasurer, and deposited in the bank in the usual way. (pp. 653, 654.)

MUNICIPAL CORPORATION—Form of Check by Treasurer.—An ordinance providing that “no money shall be drawn out of the city treasury except on the written order of the treasurer, addressed to the treasurer and countersigned by the city clerk,” is in reference to the form of the check to be used by the treasurer in drawing money from the bank, but only to the regulation of the conduct in making payments, whether by check or otherwise. (p. 654.)

MUNICIPAL CORPORATION—Custody of Money by Treasurer.—The treasurer of the city holds all its moneys as agent and exclusively for its use. But he holds them by virtue of his official authority and duty, and not merely as the agent of the city or a corporation. (p. 654.)

BANKING—Checks Drawn by City Treasurer.—The treasurer, in the absence of any provision in the charter varying the general law, can, by virtue of his official authority, control the disbursement of the city's money and draw necessary checks for that purpose, without the fact that they do not disclose on their face that they are not authorized is not notice to the bank that they should not be cashed. (p. 655.)

BANKING—Check Drawn by City Treasurer.—A check drawn by the treasurer of a city on its bank account, payable to his order, and is indorsed by him, is not void, although the bank that the check has not been authorized and should not be cashed. (p. 655.)

MUNICIPAL CORPORATION—Recovery of Proceeds of Treasurer's Check.—It is no defense to an action by a city to recover the proceeds of a check, drawn without authority on its bank account, that the check was drawn by the treasurer. (p. 655.)

treasurer and received by the defendant in payment of a debt of the treasurer, that the defendant paid the money and retained none except the amount of his commissions.

actions on contract by the city of Newburyport for had and received against different defendants, who re- from a former treasurer of the city, named Felker, drawn without authority upon a bank account of the Felker as treasurer, payable to himself personally, dorsed by him in blank. The cases were tried to- The judge refused to make certain rulings requested defendants, and ordered the jury to return a verdict plaintiff in each case. The defendants allege excep-

Dodge and C. W. Blood, for the plaintiff.

Coit and E. E. Elder, for the defendants.

KNOWLTON, C. J. These are two actions, depend- n similar facts, to recover for money had and received several defendants to the plaintiff's use. They grow the embezzlement of the plaintiff's moneys from time by its city treasurer, as it is shown in Newburyport lity Mut. L. Ins. Co., 197 Mass. 596, 84 N. E. 111. nicipal difference between the facts of that case and ts of the present case is that in that case the checks ade payable to the order of the defendant's cashier, n the present cases they were made payable to the f James V. Felker, who was the city treasurer, who the checks in his official capacity. In all the cases ks appear on their face to be drawn on the account plaintiff city by its official representative, and they ceived by the defendant in payment of a personal debt reasurer, and afterward deposited in the defendant's count and collected in the usual way. The cases come n a report in which it is stated that the facts after- ecited "appeared in evidence." These facts must ed as agreed ¹⁴⁸ to by both parties, and the judge tified in making rulings of law upon them accordingly. case he directed a verdict for the plaintiff, refusing us requests for rulings presented by the defendants. not be necessary to consider these requests in detail, nd that the plaintiff was entitled as matter of law to upon the undisputed facts. Each defendant re- checks drawn upon the plaintiff's bank account, which form payable from this account, were expected to be om it and were in fact paid from it, the defendant g the proceeds. As these were taken in payment of al debt of the treasurer, the defendant is chargeable ey had and received, under the decision above cited,

which fully covers this part of the case. The interpretation of the statement that "the defendant checks, deposited them in his bank account, and paid by the banks upon which they were drawn the money was collected for the defendant in through the bank which received the checks on that purpose.

The defendants contend that the bank could not cash the checks, and that the plaintiff's money in the bank was not diminished by the payment, and the plaintiff was not damaged, as the bank is still accountable for the money if the checks had not been drawn. This contention is based on the view that if the bank could not properly make the payment, the plaintiff could not treat it as having received the money to the defendants, and cannot maintain an action against them for money had and received. This view is supported by the plaintiff, which contends that, even if the payment was made by the bank without authority, the bank still may elect to follow the money. In support of this doctrine it cites *Van Dyke v. State*, 24 Ala. 81, *Whitinger*, 67 Ill. 551, and *Bolles' Modern Law of Banks*.

We do not find it necessary to pass upon this question. We are of opinion that, upon the facts before us, it appears that the payment by the bank was made without authority. On this point the defendants contend, first, that the checks were made without authority, and should be treated as if the signature of the drawer had been forged. They cite an ordinance of ¹⁴⁹ the city, providing that "no money shall be drawn out of the city treasury, except on the warrant of the mayor, addressed to the treasurer and countersigned by the city clerk." We do not understand this ordinance as having any reference to the form of the checks, but as relating to the treasurer in drawing money from the bank. It is to the regulation of his conduct in making payments to the treasury, whether by check or otherwise. It is well remembered that a treasurer is a public officer with the custody of the moneys of the city and gives a surety for their security. In the language of *Wells in Railroad National Bank v. Lowell*, 109 U.S. 358, "The treasurer of a city or town is an independent public officer, by statute made a depository of the moneys of the city or town: Gen. Stats., c. 18, secs. 54, 59, c. 19, sec. 1. The legal possession of the specific moneys in his hands, whatever source, is in him: *Hancock v. Hazzard*, 112, 59 Am. Dec. 171; *Colerain v. Bell*, 9 Met. 511. The moneys of the city or town he holds as its proper depository exclusively for its use. But he holds them by virtue of his public official authority and duty, and not merely as an agent or servant of a corporation": See, also, *Benjamin*, 125 Mass. 15.

charter of the city of Newburyport (Stats. 1851, c. 296, which provides for the election of the city treasurer, is nothing different from the general law in regard to treasurers. We have discovered no different provision in any amendment of the charter. The provision in the same section that the city council shall take care that money shall not be paid to the treasurer unless granted or appropriated," relates to disbursements such as are referred to in the ordinance, and does not attempt to interfere with the custody of the money by the treasurer. It is said in the statement of facts in *Newburyport City Mut. L. Ins. Co.*, 197 Mass. 596, 84 N. E. 111, "these bank accounts were established under the authority of the city, and the form of the checks likewise was prescribed by the authority of the city." But there is nothing to show that the form of the checks requires the signature of the mayor or city clerk upon them, and, in the absence of anything to the contrary, it must be assumed that, by virtue of the official authority, the treasurer could control the custody of the money and draw necessary checks for that purpose. So far as appears, he might have drawn all the money from one bank and might have deposited it in another. That the checks did not bear evidence on their face that payment had been authorized in writing by the mayor, and were countersigned by the city clerk, was not notice to the bank that they should not be paid.

It was the fact that the checks were payable to the order of the city treasurer, and indorsed by him, such notice. This has expressly been held in *Goodwin v. American National Bank*, 100 Mass. 550, in these words: "The law will not charge the bank of a depositor with knowledge that a depositor has committed a fraud, nor impose upon them the duty of inquiry, whether he has drawn upon a treasurer's account checks payable to himself or to bearer, or has transferred money from his own to his own and from his own to it. They are not required to assume the hazard of correctly reading in each check the purpose of the drawer": See, also, *Walker v. Metropolitan Bank*, 25 Fed. 247; *Gray v. Johnston*, 3 H. L. 14. A check in that form is equivalent to one payable to the bearer. It is not an unusual form of making a check a legitimate payment. There was nothing in this form of check that it was not delivered in payment of an acknowledged debt of the city. Beyond that, there was nothing to inform the bank to whom or for what purpose it was made.

In the absence of suspicious circumstances the bank had no duty to concern itself with that subject. The presumption is that its arrangement with the treasurer, the custodian of the city's moneys, was to pay checks in the form which he was using, without reference to the person to whom they were made payable, so long as there was nothing to indicate that they were not given for

a proper purpose: *Gray v. Johnston*, 3 H. Upon the facts in this report, there is nothing the bank was liable to the plaintiff for an unment of any of these checks, or that there is the defendants should not be accountable which they received with notice that it was p

The defense that the defendants were not they paid the money to others and retained cept the amount of their commissions, is not This also is ¹⁵¹ covered by the decision in *N Fidelity Mut. L. Ins. Co.*, 197 Mass. 596, 84 N also, *Rochester & Charlotte Turnpike Road* 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. Milmine, 88 Fed. 868; *Lamson v. Beard*, 94 F A. 56, 45 L. R. A. 822; *Anderson v. Kissam Park Hotel Co. v. Fourth National Bank of Fed.* 742, 30 C. C. A. 409.

Judgment on the verdicts.

A Public Officer Intrusted With Public Funds is n them, nor has he the right to use them in any wa purpose of the trust, and he holds them, not stri bailee, but as a trustee, clothed with legal duties such: *State v. Copeland*, 96 Tenn. 296, 54 Am. St. Re Board of Supervisors v. Verkerke, 128 Mich. 202, 92

Money Paid Out by Public Officers in Direct Violati recovered from the officials themselves, and from the in actions seasonably brought by taxpayers on beha Webster v. Douglas County, 102 Wis. 181, 72 Am. St.

The Effect of a Deposit in Bank to a "Trustee," liability of the bank in paying checks drawn there in the note to *Central State Bank v. Spurlin*, 82 An

A Person Who is Dealing With a Tax Collector E cepts his check signed "John A. Perkins, T. C.," is that "T. C." stands for tax collector, and that he officer's check upon his trust fund held for the state: 117 La. 286, 116 Am. St. Rep. 208.

HUTCHINS v. PAGE.

[204 Mass. 284, 90 N. E. 565.]

PARTNERSHIP DISSOLUTION—Accounting chinery.—A partner who continues a profitable man ness of the firm after its dissolution, and takes all t including a large number of machines, which are of s cannot be purchased in the general market, is properl accounting, with the value of the machines to him, position, rather than with what they would sell fo market. (p. 658.)

PARTNERSHIP ACCOUNTING—Books Improperly Kept.—Master, in an accounting against a partner who has kept books and accounts improperly and is responsible for their contents, makes the best finding as to profits that he can, and the master fails to show that the finding is erroneous, his exception will be overruled. (p. 659.)

PARTNERSHIP—Liability as General Partners.—Where articles of partnership provide for a limited partnership, but the partners do not comply with the statute, they become subject to the liabilities, and lose the rights of general partners. (p. 659.)

PARTNERSHIP—Goodwill.—The Original Intention to Form a Partnership.—A partnership, which proves abortive through failure to comply with the statute, does not affect the rights of the partners in the goodwill on dissolution at the expiration of the time for which the firm was to continue. (p. 659.)

PARTNERSHIP—Goodwill, Right to After Dissolution.—A partner has any right to avail himself of the goodwill of the partnership after the termination of the partnership, without paying for it, if he may commence a new business in his own name, and take advantage of the fact that he has formerly been a member of the partnership. Neither has the right, as against the other, to continue the business of the firm and retain the advantages that come from a succession and continuation of a going business. (p. 660.)

PARTNERSHIP—Goodwill, Whether Abandoned by Retiring Partner.—Where one partner continues the business after the termination of the partnership agreement, the retiring partner does not lose the right to compel an accounting for the goodwill by a delay of a reasonable time, knowing until then, when he consults an attorney, that he has no rights, and doing nothing thereafter to prejudice his rights.

PARTNERSHIP—Goodwill, Whether Abandoned by Retiring Partner.—Where, upon the dissolution of the partnership, one partner continues the business, and appropriates the goodwill of the firm, he is liable for the value thereof to the retiring partner. His liability is the same as though the retiring partner had given him a bill of sale, except that in determining the value, it will be estimated as if it were disposed of at a judicial sale. (p. 661.)

Kennard and W. J. Drew, for the plaintiff.

Boutwell and W. H. Hastings, for the defendant.

HOWLTON, C. J. This is a bill for an accounting, filed by a partner against his copartner after the dissolution of the partnership. The general question is, How much should the defendant pay the plaintiff? Both parties excepted to the master's report and appealed from the master's decree confirming the report. The defendant took exception to the partnership property and continued to carry on the business of the profitable manufacturing business in which the partnership had been engaged. The first question raised is whether the master applied the right rule in determining the value of the partnership property. He ruled that the fair market value of the machinery, fixtures and other assets, in the open market, was not necessarily the value with which the defendant should be charged; but that having preferred to

acquire them, he must now pay the fair value for him, or to one in his position." He also found "Page took into his possession and control all the assets; . . . apparently he made no effort to sell the machinery, stock or finished merchandise of the firm in the general market, or to any other person than himself, evidently intended and expected to be able to use the Hutchins upon some future figure which would represent the master's interest in the firm's assets and business." The business involved the use of numerous machines, a large part of which, the master found, "could not be sold in the general market, but were machines of special construction." About seventy men were employed in the business, and it was earning very large profits at the time of the dissolution of the partnership.

The question which the master decided was whether the property should be valued at what it would bring if sold away and sold in the general market, or at what it was worth to be used as a part of a going concern. The defendant who wished to sell it would endeavor to find a purchaser who would want it for the use to which it was put. The master seemingly ²⁸⁷ found that it was worth more to be kept together in its place, and used in the business, than it would bring if separated and carried off and sold piecemeal in the general market. It does not appear that the firm had legal rights, beyond possession, in the real estate where the business was done; but it was found that the defendant was able afterward to continue the business of the same real estate, and presumably, if he had sold the business, the same opportunity could have been given to the purchaser. Probably another person, familiar with the business, would have given as much for it as the defendant has found it to be worth to the defendant. If the defendant wanted to sell it, he should have endeavored to find the way in which it would bring most; and the master was undoubtedly right in finding it was most valuable for the use where it was. If the defendant chose to keep it, he should pay for it what other persons who knew all about it and who might want it for use in that place would be willing to give for it. One who wished to continue the business, if he had not the machinery ready on hand, would have been obliged to procure the machines and set them up, and provide everything necessary for the purpose of carrying on the business. The finding was simply an application of the familiar and equitable principle which has often been applied in analogous cases: *Beale v. Boston*, 166 N. E. 1029; *Troy Cotton & Woolen Manufactory v. Troy River*, 167 Mass. 517, 46 N. E. 99; *Wall v. Platt*, 139 N. E. 398, 48 N. E. 270; *Washington Mills Mfg. Co. v.*

Free Mutual Ins. Co., 135 Mass. 503; Stickney v. Gray, 352.

Defendant also contends that the master was in error in giving the plaintiff forty per cent of the additional amount that the master found due him, which was the share to which he was entitled during the last three of the five years that the partnership continued, instead of twenty per cent which was the share to which he was entitled during the first two years of these five. As to this, the evidence does not show that nearly, if not quite, all of the increase in profits by the master was properly referable to the profits of the last three years. The books had been kept by the defendant, and the plaintiff knew little about books, and left the matter to the defendant. The defendant had rendered him incorrect accounts of the profits, and, in finally making up the amount due the plaintiff, he valued the property at such values that the amount found due the plaintiff by the master, without allowing anything for the goodwill of the business, exceeds the amount shown by the defendant's accounts by five thousand five hundred and one dollars and fifty-four cents. Through the defendant's fraud or negligence, the books were so improper that it is impossible to determine with certainty, for some time of the profits, to what time they should be referred. The master says that the evidence does not enable him to correct or reconstruct the books in this particular, and that the only inventories of stock for four years have been destroyed. As the master has made the best finding he can from the books and accounts, and as the defendant is responsible for the way in which the books were kept in their present condition, and as he fails to show that the finding of the master is erroneous, this exception is overruled.

The plaintiff's exceptions raise the question whether he is entitled to an allowance for the goodwill of the business. The rules of copartnership provided for a limited partnership. Through the failure to comply with the statute, the partners became subject to the liabilities, and had the same rights as general partners: Rev. Laws, c. 71, secs. 4, 6, 11. The question is whether the original intention to form a limited partnership affects the rights of the partners in relation to the goodwill, on dissolution. We cannot say so: See Nutting v. Ashcroft, 101 Mass. 300. The partnership was to continue for five years, and at the end of the term there was to be a settlement of the partnership and a division of the assets. Neither party had any claim to the goodwill of the business, after the dissolution of the partnership, without paying for it. The plaintiff could commence a new business in his own name, and take advantage of the fact that he had formerly been a

member of this firm. But neither had a right the other, to continue the business of the firm the advantages that come from a direct succession of a going business. The value, so far as it had a transferable value, belonged either could insist upon having his share of it: *Moore v. Rawson*, 199 Mass. 493, 85 N. E.

The master has found that there was a value which belonged to the firm. The only remaining ²⁸⁹ whether the defendant has so conducted be accountable to the plaintiff for it. The partnership arrangement in regard to it and did not terminate. Indeed, the master has found that the plaintiff that he had any rights in this particular until a lawyer in March, 1906, nearly a year after termination of the partnership. He also found that right by abandonment. He could not lose such mere abandonment, so long as he was ignorant of the right. Nothing less than estoppel could of it; and he did nothing that would work. It is expressly found that, after he consulted, did nothing to prejudice whatever rights in the had at that time. In less than a month as brought this suit to recover for the goodwill.

The real question in this case is whether the been lost as a valuable asset by the neglect of or whether it has been used and appropriated by the plaintiff. In its material facts, does the case resemble *son v. Nay*, 183 Mass. 355, 67 N. E. 601, 187 Mass. Am. St. Rep. 390, 72 N. E. 974, 68 L. R. A. 186 *Rawson*, 185 Mass. 264, 70 N. E. 64, 199 Mass. 586, and *Griffith v. Kirley*, 189 Mass. 522, 76 N.

In the first of these cases the firm was dissolved at the death of the plaintiff's intestate. The next day after the death the surviving partner crossed the "& Co." on the billheads that had been used by the firm, and with only his name upon them. In less than a month afterward he bought of the plaintiff all of the defendant's "interest in the firm and chattels, except outstanding accounts," and immediately a new set of "& Co." painted off from the carts of the team which the firm had carried on. It was expected that he did not buy the goodwill, and the effect of the evidence was to show that he did not attempt to appropriate it, but only to exercise his right to carry on the business in his own name among the customers of the firm, as well as others. Probably, under the circumstances of that case, as against this right of the surviving

will of the business would have been of but little

In the present case "Page [the defendant] went on with business in the same place and under the same name, ²⁹⁰ F. M. Page and Company. . . . Page took possession and control all the firm's assets, and, so appears, collected the bills and accounts receivable, charged the liabilities. Apparently he made no effort to get the machinery, stock or finished merchandise of the firm out of the general market, or to any other person than

He evidently intended and expected to be able to deal with Hutchins upon some figure which should represent the latter's interest in the firm's assets and business, so far as appears, he was ready and willing to pay whatever amount the parties might agree upon. There is no evidence that Hutchins ever complained or objected to the manner in which Page was making use of the firm's assets, both tangible and intangible, but Hutchins' sole objection was to the statements rendered, which purported to show the value of Hutchins' interest, were incorrect." These are the facts that there was an appropriation of all the assets of the firm, with the acquiescence of the plaintiff, and with the intention to pay for them. The defendant rendered no accounts, and the parties were in dispute as to the value of these assets. Among the assets so appropriated was the goodwill of the business, which the defendant used and enjoyed as fully as it is ever possible to use such an asset after a purchase of it under an order of court in settling up the affairs of a partnership. A liability to pay for the goodwill follows in the same way as the liability to pay for any other part of the assets that he took and appropriated. The case comes within the principle of the last two cases above. An appropriation and use of the goodwill and other assets by one partner, with the acquiescence of the other, creates the same liability to account for them and their value as a wrongful appropriation of them. It is equivalent to a purchase. In the present case the liability of the defendant to pay for the goodwill and other assets of the firm is precisely the same as if the plaintiff had given him an order of sale of the goodwill and assets, to be paid for at its fair value, except that, in determining the value of the goodwill, it is to be estimated as it would have been if disposed of at a judicial sale—that is, at its value, with the intention of the plaintiff to set up a competing business among the customers of the firm and others. This appropriation of the goodwill of the firm, under such circumstances, virtually creates an implied contract to pay ²⁹¹ for it, however it is worth. This makes it unnecessary for the plaintiff to apply for a sale of it.

Besides the cases cited above, cases in which principles involved in this decision are discussed: *Publishing Co. v. Lothrop, Lee & Shepard Co.*, 77 N. E. 841, 5 L. R. A., N. S., 1077; *Old Corner v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 228; *Wedderburn v. Wedderburn*, 22 Beav. 84; 70 N. Y. 465; *Slater v. Slater*, 175 N. Y. 14; Rep. 605, 67 N. E. 224, 61 L. R. A. 796.

The decree should be modified by adding to be paid to the plaintiff the value of the plaintiff's interest in the goodwill, as found by the master.

Ordered accordingly.

The Goodwill of a Partnership, and the means of making good on the dissolution of the firm, are considered in the case of *Slater*, 96 Am. St. Rep. 610.

CONNORS v. CUNARD STEAMSHIP CO.

[204 Mass. 310, 90 N. E. 601.]

CARRIER—Duty to Accept Sick Passenger.—A carrier is not bound to take as passengers all who offer themselves, ill or otherwise, unless the carrier can furnish the necessary accommodations. A passenger is willing to pay for what he demands. But when a passenger is ill presents herself for transportation by water, it is the duty of the carrier to state the fact that she is ill and make special arrangements for her transportation as a person in need of medical attention. (See also 670.)

CARRIER—Duty to Accept Sick Passenger.—A carrier is not bound to receive, as an ordinary passenger, a person in need of medical attention. Hence, where a ticket is issued to a person, without giving notice of her condition, and she herself for embarkation as an ordinary passenger, and the surgeon discovers that she will need medical attention during her voyage, which attention has not been arranged for, the carrier is depended upon to furnish, she may be rejected.

CARRIER—Action by Rejected Passenger.—A passenger who sues in tort against a steamship company for refusing to accept her as a passenger, if the plaintiff's evidence discloses that the carrier was unable to transport her without medical attendance, and she herself for embarkation as an ordinary passenger, and the surgeon discovers that she will need medical attention during her voyage, which attention has not been arranged for, the carrier is depended upon to furnish, she may be rejected.

CARRIER—Recovery of Money Paid for Ticket.—Where a ticket was purchased by a third person for an intended passenger, and the carrier refused to transport because of her need of medical attention, her administrator is entitled, in an action against the carrier, to show, if he can, that he is the person to whom the money paid for the ticket was paid.

ADMINISTRATION.—The Probate Court has jurisdiction to grant administration of the estate of a person who at

as an inhabitant or resident in the county, without proof of estate to be administered within the county. (p. 672.)

ADMINISTRATION—Collateral Attack on Letters.—The questioner the probate court was wrong in finding as a fact that the decedent before her death was an inhabitant of, or resident in, the county, is not open to contest in an action by the administrator as carrier for rejecting the decedent, in her lifetime, as a dependent. (p. 672.)

actions, one on contract and the other in tort, by Alice Connors as administratrix of the estate of Margaret Connors against the defendant steamship company, for removing the plaintiff's intestate from its steamship on which the intestate had a ticket for transportation. The judge, against the plaintiff and exception of the plaintiff, compelled her to elect between the two actions. And the plaintiff, subject to the election, elected the action in tort, whereupon the judge directed the jury to return a verdict for the defendant in the action on contract. The money paid as passage money was refunded by the defendant. The plaintiff alleged that she was injured in the action on contract. In the action of tort the jury refused to rule, among other things, that upon all the evidence the jury would not be justified in returning a verdict for the plaintiff. He submitted the case to the jury, and a verdict for the plaintiff was returned in the sum of one thousand and three hundred and eighty-four dollars. Of this the plaintiff, on a motion by the defendant for a new trial, asked that all in excess of one thousand dollars. The defendant asked for the plaintiff.

Verdict, for the plaintiff.

Putnam, for the defendant.

SPRING, J. On February 24, 1905, the defendant sold a ticket entitling the plaintiff and the intestate to a second cabin passage from New York to Queenstown (or Liverpool) on the "Ivernia," sailing for Boston on the 28th of the same month. The ticket was issued to Mrs. Freeman (by whom the plaintiff and her husband had been employed for some two years), and not to the intestate. But no question on that point was raised at the trial.

The intestate came to this country in 1893 and had been employed as a servant in several families during the intervening twelve years. On February 13 or 14, 1905, upon the advice of her physician, she submitted to an exploratory operation at a hospital. This operation disclosed the fact that she was suffering from a cancer of the uterus, and that removal of the peculiar position of the growth and its contents at an early stage an operation would not be of benefit to her. The plaintiff's evidence also showed that her death was ex-

pected in five or six months. These facts and result of an operation were known to the plaintiff to the intestate.

On the morning of February 28th the two sisters and friends, drove to the defendant's wharf in East Boston. "Ivernia" was not ready to receive second-class passengers when they arrived, and they waited in a room for fifteen minutes.

The evidence was somewhat conflicting as to the time when she left the room and went to bed in her room on the "Ivernia." ³¹³ The plaintiff's evidence tended to show that she walked about and talked with her friends. The defendant's evidence tended to show that she was almost carried to her room, and that she was in bed at the time. The evidence of both parties showed that she was undressed and went to bed before the "Ivernia" left the wharf.

The fact that the intestate had undressed and gone to bed was reported to the ship's surgeon, who was on duty in the third-class gangway. He immediately stopped her at that gangway and went to her room. On arrival he felt her pulse, looked at her tongue and asked her name, and the plaintiff what the matter was. Whereupon the plaintiff handed to the surgeon the following letter from

"Ship Surgeon S. S. Ivernia

"My dear Doctor,

"May I explain to you a most sad case which has come under your care during this crossing.

"The patient herself has no idea of the nature of her trouble, so will you kindly make light of anything occurring, and give us your aid in concealing facts.

"This note will be handed to you by her sister, and I am, all.

"She has endothelioma of uterus too advanced for cure by curetting and cautery, which I did Feb. 1st. Immediately this is her week to expect menstruation, and this will give you no special trouble. She will be given creolin for douches and codeia suppos. (5 v grs) if needed.

"May I suggest an early vaginal pack should the blood pass the normal that strength may be secured when she reaches home.

"Any kindness shown to her if in need will be appreciated by myself and others.

"Thanking you in advance I am

"Very sincerely,

"C. I.

surgeon read this letter, left the room, and gave direct that the intestate should not be allowed to proceed on the

The plaintiff testified "that thereupon the intestate and walked to the stairs, where some stewards made of their hands and carried her up and placed her on the in the second-cabin waiting-room on the wharf," he had to wait for an hour or more while a carriage secured. Finally the carriage arrived, their baggage and, and they drove to the house of a friend in Chelsea, there between 4 and 5 o'clock in the afternoon. The and her intestate stayed at the friend's home in for five weeks, when they sailed on the White Star "Cymric" as first cabin passengers, arriving at Queens- April 13th. The intestate died at her home in Ire- July 29th of the same year.

Ship's surgeon testified that after reading the letter he that, under the circumstances, Margaret Connors was condition to travel without serious risk to her life. The told me that Dr. Hare said she was fit to travel, and the statement made in Dr. Hare's letter as to the men- period." He further testified: "I told Margaret Con- and her sister I considered her in an unfit condition to ust then, and that they should postpone the voyage. I d Mr. Edwards, of the Cunard Boston office, that I to take charge of the case."

The part of the plaintiff testimony was given by a Boston an and by the specialist who performed the exploratory on on the intestate, and also by a surgeon who examined t after February 28th: "That in their opinion there thing about the physical condition of the plaintiff's e on or about February 28, 1905, that would make e across the ocean dangerous to her; that she was not k to travel; that she was not in any danger of imme- eath from the disease or from its rapid progress; that ress would be slow; that there was no reason to expect tal hemorrhage or any sudden termination of the that she was just as safe on the sea as on the land; y packing rendered necessary or advisable during the on account of any possible hemorrhage would require ical instruments, and could be accomplished by the that if one desired to use instruments, an ordinary was as useful as anything else; that any such packing require the skill of a physician, ³¹⁵ but could be per- by a nurse, the intestate's sister, or any ordinary fairly conversant with such matters."

ing was said to the defendant corporation when the or the intestate and the plaintiff was bought of it, as to state's condition.

The defendant asked for thirty rulings on liability on the damages recoverable. Among other rulings by it was a ruling directing the jury, as matter of law, to return a verdict in its favor.

The plaintiff was required to elect between her action in contract and she elected to go to her action in tort. The action in tort is the second action now before us.

The presiding judge instructed the jury that one of the defendant there was only one question for the jury to decide, to wit: Did the intestate leave the "Intestate" property?

The plaintiff had a verdict and the case is hereby dismissed.

The principal question presented by the defendant in the second action is an important one. It has been decided in any case which has come to our attention.

The general rule that a common carrier is bound to take anybody and everybody who presents himself for transportation and pays the regular fare has its limitations. The carrier is bound to care for all who have become passengers. For that reason not only is it not bound to refuse it is under obligation to refuse to accept, as a passenger, an insane person without a proper attendant (Owens v. Macon etc. Ry., 119 Ga. 230, 46 S. E. 2d 946; Meyer v. St. Louis etc. Ry., 54 Fed. 11, 221); or one who has smallpox: Paddock v. Atchafalaya R., 37 Fed. 841, 4 L. R. A. 231. And the same rule applies to one who because of intoxication or for any other reason is offensive to other passengers: Vinton v. Middlebury R., 304, 87 Am. Dec. 714; Murphy v. Union F. R., 228; Hudson v. Lynn & Boston R. R., 178 Mass. 647; Lemont v. Washington & Georgetown R. R., 180.

³¹⁶ The jury were instructed in Thurston v. Union F. R., 4 Dill. 321, that a common carrier was not bound to accept as a passenger one who sought transportation for a criminal purpose, and on that ground that the defendant was justified in refusing to sell a ticket to a three-car passenger.

It was held in all these cases that the justification for refusing to accept a passenger was not if the carrier had reasonable cause to suppose, that the safety or convenience of other passengers would be endangered by the person in question. It was not necessary to wait to see whether the person was or was not, and with reason, to be afflicted with an infectious disease so insane, drunk or sick as to be likely to interfere with the safety or convenience of other passengers was a fact in the condition he appeared to be in.

doctrine established by these cases is admitted by the counsel for the plaintiff. His contention is that the carrier is confined to those cases where the safety or comfort of other passengers is endangered or thought to be endangered, and that "the mere fact that a person is afflicted with an internal disease will not justify" a carrier in refusing to take him as a passenger if he offers to pay the regular fare. He relies on statements in *Sheridan v. Brooklyn City R. Co.*, 36 N. Y. 39, 93 Am. Dec. 490; *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89, New Orleans etc. R. R. v. Statham, 42 Miss. 607, 97 Am. Dec. 478, and the opinion in *Zachery v. Mobile etc. R. R.*, 74 Miss. 520, 60 Am. Rep. 529, 21 South. 246, 36 L. R. A. 546, in support of his contention.

The decision in *Zachery v. Mobile etc. R. R.* does not help the plaintiff. What was there decided was that the complaint stated a good cause of action. It was a complaint for refusing to sell the plaintiff a ticket because he was blind. The report states that "it is alleged in the complaint and proved by the demurrer that appellant was not infirm, but was able to take care of himself, and to comply with the requirements of the law relating to passengers generally; that he had been traveling on appellee's road for several years, and given no complaint to appellee's servants, and none was ever made; all this being admitted by the demurrer, the doctrines stated in *Sevier v. Vicksburg etc. R. R.*, 61 Miss. 317 8, 48 Am. Rep. 74, relied on by appellee, do not apply to this case. There is nothing to show that appellant was informed that the refusal of an attendant was the cause of his rejection, and no showing that he needed one."

There is a general statement in the opinion in *Sheridan v. Brooklyn City etc. R. R.*, 36 N. Y. 39, 93 Am. Dec. 490, that every person is entitled to ride in the cars, and there is a statement in *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89. But taken in connection with the other discussion in the case in question neither statement is of importance. The question to be decided in *Sheridan v. Brooklyn City etc. R. R.*, 36 N. Y. 39, 93 Am. Dec. 490, was whether the judge was wrong in refusing to instruct the jury that the fact that the deceased (for whose death the action was brought) was a child (he was nine years old) made no difference in the rule of law as to the question of negligence; if not of years of discretion he should have a seat. The court held that the ruling asked for was correct. And in discussing that question said that "a sick or infirm person, a delicate woman, a lame man, or a child" is entitled to more attention in getting on or off the cars or in traveling on a street than one in good health and under no dis-

ability. The court then added the statement h
 "All these classes are entitled to use the street
 in the cars." The similar statement made in *Pu*
Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89,
 significance. In that case a car of the Pullman
 on fire through the negligence of its servants, a
 tiff had to leave her berth and go to another ca
 tremely" cold night, in her nightclothes. "S
 severe cold which caused the cessation of her
 resulted in a long period of illness." It was
 negligence of the defendant was not the immed
 that illness. In deciding that point the court sa
 who are ill have a right to enter the cars of a
 pany and travel therein; as a common carrier
 the company has no right to prevent them, but
 risk arising from conditions affecting their fitne
 certainly where they are unknown to the carri
 upon their own shoulders." There is a some
 statement of no more consequence in *New Orle*
v. Statham, 42 Miss. 607, 97 Am. Dec. 478.

³¹⁸ On the other hand, it is plain that the rig
 is not confined to cases where the safety or co
 other passengers is endangered or thought to be

In *Jencks v. Coleman*, 2 Sum. 221, Fed. C
 Judge Story charged the jury that a carrier h
 refuse to accept as a passenger a man who ca
 while in transit as a passenger, patronage for a
 coaches which ran in opposition to the line wi
 carrier had made a contract in order to create
 through line of travel. Similar decisions were
D. R. Martin, 11 Blatchf. 233, Fed. Cas. No.
Barney v. Oyster Bay & Huntington Steamboat
 301, 23 Am. Rep. 115.

It was held in *Louisville etc. R. R. v. Fleming*
 that an old colored man eighty-three years of age
 were partially paralyzed and numb, had no ca
 for being put off the train on his failure to prod
 or pay his fare. There was evidence that he ha
 his pocket and that the conductor, although he t
 find it.

In *Sevier v. Vicksburg etc. R. R.*, 61 Miss. 8,
 74, it was held that a man had no cause of acti
 sick with fever got on a train and told the cor
 he gave him his ticket that he was sick with f
 wanted to sleep, and to be waked up at Jackson;
 did not wake him up and he had to walk back fo
 the station next beyond Jackson.

In *Croom v. Chicago etc. Ry.*, 52 Minn. 296
 Rep. 557, 53 N. W. 1128, 18 L. R. A. 602, "t

the plaintiff as a passenger on its train for transport from Savannah, Illinois, by way of Austin, Minnesota, in this state. He was aged eighty years, feeble, in mind and body, and hence required special care and assistance during his journey, of which fact the defendant was informed when it accepted him as a passenger by its station agent at Savannah, which accompanied him, and was exhibited to each successive conductor on the train. It was held that having voluntarily accepted as a passenger one who required extra care, it was bound to furnish it. In coming to that conclusion it was said, at page 319 of course, a railroad company is not bound to turn its stations into nurseries or hospitals, or its employes into nurses. A passenger, because of extreme youth or old age, or mental or physical infirmities, is unable to take care of himself and ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a passenger, without an attendant, whose inability to take care of himself is apparent or made known to its servants, it is negligent if such assistance is not afforded. In such cases the company must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and the care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition.

On the most favorable view is taken of the plaintiff's evidence in the case at bar, her intestate presented herself on May 28th, as a person who would require medical attendance during the voyage in question, and expected the defendant to furnish it. There is nothing in the evidence which could warrant a finding that the intestate's sister was to have any medical knowledge or skill.

The question of accepting as a passenger a person in need of medical attention is a more serious one in case of a carrier by sea than in case the proposed transportation is on land. There are physicians and surgeons can be found at different stopping places to whose care the traveler in need of medical attention can be confided. But in case a person in need of medical attendance is taken as a passenger on a sea voyage, the carrier is to be cared for until the voyage is at an end, and if she is accompanied by her own physician, it might well be held that the responsibility of caring for her had been assumed by the physician and the carrier.

It is of opinion that a common carrier is bound to take as passengers all who offer themselves, ill or well, provided the carrier can furnish the necessary accommodations and the passenger is willing to pay for what he demands. But where a

person who is ill presents herself to a common transportation by water, it is her duty to state that she is ill, and make special arrangements for her attention as a person in need of medical attention. In another connection this court said in *Spade v. Lynn*, 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88, 512: "If, for example, a traveler is sick ³²⁰ or weak in health, specially nervous or emotional, upset by slight causes, and therefore requiring special care which are not usual or practicable for travelers, notice should be given, so that, if practicable, a special arrangement may be made accordingly, and extra care be observed."

The case of a person requiring medical attendance comes within the same class as the cases (put in the opinions) where a very old or a very young person travels from a car, and for that or any other reason requires more time than a person in good health and not under special care. Those persons and persons laboring under other disabilities are included in the class of persons fit to travel. We do not have to consider in the case at bar is the case of one not fit to travel without medical attention. Had notice been given to the defendant corporation of the condition of the plaintiff, the ticket bought for her, the question would have been whether the care her physical condition was likely to demand could have been provided by whom it was to be provided could have been provided with deliberation, and some special arrangement made for the necessary extra care, and the amount to be paid to the defendant corporation if it was arranged that the extra care should be furnished by it.

But nothing of that kind was done in the case at bar. The ticket for the plaintiff's intestate was bought and she presented herself for embarkation as an ordinary passenger. We are of opinion that the presentation of the letter was a representation by her that she needed medical attention during the voyage, and looked to the defendant corporation to supply it.

If after the visit which the ship's surgeon paid to the plaintiff's intestate while she was lying in bed in her room the intestate had not been put ashore, there would have been a serious question whether the defendant corporation had not assumed the responsibility of giving her proper medical care during the voyage, on the principle acted upon by the court in *Croom v. Chicago etc. Ry.*, 53 Ill. 38 Am. St. Rep. 557, 53 N. W. 1128, 18 L. R. A. 601.

A ship's surgeon seems to have been aboard the ship in compliance with Statute 18 & 19 Victoria, c. 64, section 41, which requires every "passenger ship" to have on board a duly qualified medical ³²¹ practitioner whenever the number of persons on board (including cabin passengers and crew) exceeds three hundred. So far as the

d of the two cases now before us is concerned, it may be said that a passenger who falls ill during the voyage upon the "medical practitioner" for medical attention at neither Statute 18 & 19 Victoria, chapter 119, section 1, nor the presence on the "Ivernia" of a "medical practitioner" in compliance with that act changes the right of a common carrier by water not to receive as an ordinary passenger a person in need of medical attention.

In our opinion such a carrier has that right.

In the case at bar the facts which made out the defendant's action in refusing to accept the plaintiff's intestate as a passenger were a part of the plaintiff's case put in by her. These circumstances a verdict for the defendant should not have been directed, as matter of law, in spite of the fact that the burden of proving a justification in the action of tort was on the defendant, as to which see *Mountford v. Cunard S. S. Co.*, 202 Mass. 345, 88 N. E. 782. For cases where it has been held under similar circumstances that a verdict for the defendant should have been entered as matter of law see *Debbins v. Old Colony R. R.*, 154 Mass. 402, 28 N. E. 414, and *Emery v. Boston etc. R. R.*, 173 Mass. 136, 53 N. E. 8.

In our opinion that the entry in the second action was not properly judged for the defendant: See Stats. 1909, c. 236. It is not necessary to decide whether the order of the judge directing the plaintiff to elect would have been right had the plaintiff had a right of action in tort. As we have said, the plaintiff in our opinion, had no right of action in tort. Some of the money in our opinion, had no right of action in tort. Some of the money a right to have the passage money paid for the ticket for the plaintiff and her sister returned, or such part of it as the plaintiff after the defendant has been allowed to recoup any part of it was at in providing for the passage of the two. The question was not tried. The plaintiff should have a verdict for that reason the plaintiff's exceptions to the order of the judge for a verdict for the defendant in the first action were sustained.

In the first action must go back for a new trial, the question of the legality of the appointment of the plaintiff as administratrix ³²² of the estate of her sister will come up for consideration, and, although it was raised by the defendant's bill of exceptions in the second action, we shall consider it as a question likely to arise at the new trial of the first action. The plaintiff's petition for administration on the estate of Margaret Connors was founded on the fact that Margaret Connors was an inhabitant of, or resident in, the county of Suffolk at the time of her death. It follows the approved form and alleges that she "last dwelt in Boston." The defendant's petition for probate of the will of Margaret Connors, late of Boston, of the estate of "Margaret Connors, late of Boston,"

is an adjudication that Margaret Connors was an inhabitant of, or resident in, the county of Suffolk at the time of her decease. The probate court has jurisdiction to grant administration of the estate of persons who at the time of their decease were inhabitants of, or residents in, the county out of which proof that they left estate to be administered with was given. Jurisdiction to grant administration in case the deceased was a resident was given by Statutes of 1783, c. 46, section 1. The other jurisdiction to grant administration in case the deceased was a nonresident who left property to be administered within the commonwealth was first given by Statutes of 1817, chapter 190, section 1.

The question whether the probate court was wrong in assuming as a fact that Margaret Connors was before her decease an inhabitant of, or resident in, the county of Suffolk is not in issue in this action. By Revised Statutes, chapter 83, section 12, it was provided that the jurisdiction assumed by a judge of probate, so far as it depends upon the place of residence of any person, shall not be contested except in an appeal, when the want of jurisdiction appears in the same. This was re-enacted in General Statutes, chapter 117, section 4, and in Public Statutes, chapter 156, section 4. The jurisdiction of the probate court was put on the same footing as that of the supreme judicial court in equity by Statutes of 1891, c. 415, section 4—that is to say, on the footing of a court of general jurisdiction. Both provisions were reported to the commissioners who drafted the Revised Laws: Commissioners' Report, Rev. Laws, c. 162, secs. 2, 8. The legislative committee omitted section 8, being the proposed re-enactment of Revised Statutes, chapter 83, section 12. This evidently was done because the broader provisions of Statutes of 1891, chapter 415, section 4, made the continuance of Revised Statutes, chapter 83, ³²³ section 12, unnecessary. We are of opinion that the finding of fact made by the probate court as to the residence of Margaret Connors was not the subject of attack in this action.

The result is that the entry in the first action must stand, the exceptions sustained, and in the second action judgment for the defendant.

So ordered.

The Right of a Carrier to Refuse to Accept as a Passenger an infirm person is discussed in the note to Illinois Cent. R. R. v. Smith, 85 Miss. 349, 107 Am. St. Rep. 302. A carrier must receive for transportation anyone presenting himself and offering to pay for it irrespective of his past or present character, if there is nothing to show his condition or conduct when he so presents himself to justify exclusion: *Meisner v. Detroit etc. Ferry Co.*, 154 Mich. 545, 111 St. Rep. 493. As to the duty of a carrier to receive an intoxicated passenger, see *Benson v. Tacoma Ry. etc. Co.*, 51 Wash. 216, 101 St. Rep. 1096.

HANDY v. BLISS.

[204 Mass. 513, 90 N. E. 864.]

BUILDING CONTRACT—Substantial Performance—Quantum
To entitle a building contractor to recover on a quantum meruit there must be an honest intention to perform the contract and an attempt to perform it. There must be such an approximate performance that the owner obtains substantially what was called for by the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in every material respects, nor that there should be no omissions of material which cannot be done by the owner except at great expense or at great risk to the building. Notwithstanding such omission, there is a substantial performance of the contract. (pp. 674, 675.)

BUILDING CONTRACT—Satisfaction of Owner—Quantum
The doctrine of substantial performance, which permits a building contractor to recover on a quantum meruit, applies where the contractor has to be performed "to the entire satisfaction and approval of the owner," according to the usual meaning of this expression as applied to such contracts, namely, to his satisfaction so far as he is actuated in considering the work in connection with the contract. (pp. 675, 676.)

BUILDING CONTRACT—Substantial Performance—Quantum
The doctrine of substantial performance which permits a building contractor to recover on a quantum meruit does not apply where the builder does not intend to perform the contract. But an omission to do certain things called for by the contract, which leaves them as they are not called for, and intends in good faith to do what he has agreed to do, does not prevent the application of the doctrine. (p. 675.)

BUILDING CONTRACT—Satisfaction of the Owner—Quantum
The owner should not be permitted to escape payment for work done on account of an idiosyncrasy, under a contract that the work shall be done "to the entire satisfaction and approval of the owner." If the contract is not performed by reason of his failure to do so, and with that which ought to satisfy him, there can be a recovery on a quantum meruit. (p. 676.)

BUILDING CONTRACT—Architect as Arbitrator.—Where a building contract makes the architect an arbitrator between the owner and the contractor to determine practical questions of construction that arise out of the plans and specifications in the execution of the work, his decision upon these matters, made in good faith, is binding. And the contractor should be so instructed in reference to the builder's claim for extra work, about which there was a dispute between the parties, that whether the labor and materials charged for were included in the contract or not. (pp. 676, 677.)

BUILDING CONTRACT—Payment as Acceptance of Work.—Where there is a provision in a building contract that no payment shall be considered as an acceptance of defective work or improper materials does not mean that payment without objection may not be considered in that sense, but only that it does not itself constitute an acceptance. (p. 677.)

W. A. Morse and F. J. Geogan, for the plaintiff.

O. Ray, for the defendant.

⁵¹⁷ KNOWLTON, C. J. This is an action to recover the balance due a contractor for the construction of a building. One of the counts was upon an account annexed to the contract, which opened to the plaintiff the right of recovery upon a quantum meruit for labor and materials. The defendant requested, among others, the following instructions:

"That if the jury believe that pages 1 and 2 of the specifications ⁵¹⁸ entitled, 'General Conditions,' were a part of the contract, there can be no recovery on the ground of substantial performance.

"If the jury shall be of the opinion that pages 1 and 2 of the specifications entitled 'General Conditions' were a part of the original contract, then that where a payment is due only on completion of the contract, as here, the plaintiff must show substantial completion; that is, if the plaintiff knowingly omitted to do certain things required by the contract, and they are of such a nature that the work is not complete in all material respects, then the contractor may recover the contract price less what it would necessarily cost to complete the work, but the performance, so far as it goes, must be in exact compliance with the terms of the contract to constitute substantial performance a general adherence to the plans and specifications is not sufficient, the builder being entitled to willfully or carelessly depart from the details or to leave his work incomplete in any material respect; that the builder is not entitled to make changes which are so substantial that an allowance out of the contract price will not give the owner substantially what he contracted for or to omit work that cannot be done by the owner without at great expense or with great risk to the building.

"That this doctrine of substantial performance does not apply where omissions by the builder were intentional or where the contract is to be performed to the satisfaction of the owner."

The law relative to the matters mentioned in these instructions has been considered in different cases, and it was discussed at length in *Bowen v. Kimbell*, 203 Mass. 364, 133 N. E. Rep. 302, 89 N. E. 542. To entitle the plaintiff to recover in a case of this kind there must be an honest intention to perform the contract and an attempt to perform it. The work must be such an approximation to complete performance that the owner obtains substantially what was called for by the contract, although it may not be the same in every particular, and although there may be omissions and in-

tions on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner except at great expense ⁵¹⁹ or with great risk to the building. There may be omissions of that which could not afterward be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable. Notwithstanding such omission, there might be a substantial performance of the contract.

There is no reason why the doctrine of substantial performance should not apply where the contract is to be performed to the satisfaction of the owner, according to the usual meaning of this expression as applied to contracts of this kind, namely, to his satisfaction, so far as he is acting reasonably in considering the work in connection with the contract. This doctrine does not apply where the builder intends not to perform the contract. But an intentional omission to do certain things called for by the contract, if he believes that they are not called for, and intends in good faith to do all that he has agreed to do, does not prevent the application of the doctrine. These requests for rulings were rightly refused.

Another request, numbered 3, relates to the requirements that the work should be done "to the entire satisfaction and approval of the owner." The question is whether this language means that the owner must act reasonably in determining whether the work is satisfactory, or whether, if he acts in good faith, he may decline to be satisfied and refuse his approval upon a whimsical and unreasonable exercise of personal taste or prejudice. Sometimes it is difficult to determine which construction should be given to a contract of this kind. Cases in which the language has been given the former meaning are, *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312; *Noyes v. Commercial Travelers' Eastern Accident Assn.*, 190 Mass. 171, 76 N. E. 665; *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25, 66 N. E. 420. See *C. W. Hunt Co. v. Boston Elevated Ry.*, 199 Mass. 220, 85 N. E. 446; *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284; *Webber v. Cambridgeport Savings Bank*, 186 Mass. 314, 71 N. E. 567. Contracts which are given the latter meaning are found in *Williams Mfg. Co. v. Standard Brass Co.*, 173 Mass. 356, 53 N. E. 862; *White v. Randall*, 153 Mass. 394, 26 N. E. 1071; *Whittemore v. New York etc. R. R.*, 191 Mass. 392, 77 N. E. 717.

520 Where the subject matter of the contract seems to involve questions of personal taste or prejudice, and especially when in such a case no benefit will pass under the contract unless the work is accepted, there is more reason for such language the latter construction. But as was held in *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 19, N. E. 312: "When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either in whole or in great part, unless paid for, a just hesitation is not felt, and clear language required, before deciding that the contract is left to the will, or even to the idiosyncrasies of the interested party. In different cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant."

The erection of a building upon real estate ordinarily confers a benefit upon the owner, and he should not be permitted to escape payment for it on account of a personal caprice. Indeed, under the law of Massachusetts, this construction is usually of little practical application to contracts for buildings upon real estate; for if the contract is not performed by reason of the failure of the owner to be satisfied with that which ought to satisfy him, there can be no recovery upon a quantum meruit; and in most cases the defendant would be made from the contract price for the difference between the literal performance of the contract and the performance which would have been a complete performance if the contractor had acted reasonably and accepted the work would be satisfied if anything. This request for an instruction was refused.

The instruction requested, "that article 2 of this contract be so construed as to have the effect that the decision of the architect as to the construction and meaning of the drawings and specifications shall be final, is a condition binding upon the parties, and shall be correct, and should have been given. It is well established that, where a building contract makes the architect a arbitrator between the parties to determine practical questions of construction that arise under the plans and specifications in the execution of the work, his decision upon these questions is binding: *Norcross v. Wyman*, 187 Mass. 25, 75 N. E. 822; *Hebert v. Dewey*, 191 Mass. 403, 77 N. E. 822. This law had an important bearing upon the claims of the plaintiff for extra work, about which there was a dispute between the parties as to whether the labor and materials charged for as extra were included in the drawings and specifications. The defendant was entitled to have the contract construed as to the law applicable to this provision of the contract, in its application to the matters in controversy. The judge refused to give the instruction, and there

indicate that he said anything to the jury equivalent to it. Indeed, the bill of exceptions gives what was to be his instructions in regard to extra work, and contains nothing touching this subject. The exception of refusal to give this instruction must be sustained.

The defendant also requested three other instructions, which are a concrete application of this provision of the contract to the facts in dispute under the plaintiff's claim for extra work, and these were also correct statements of the law without express language to that effect, we may assume that the architect's construction of the specifications set out in each request was his real construction, made in good faith, and not a pretended or fraudulent construction. In the present case there are circumstances from which it might be contended that the architect was not acting fairly. It is not that he was the husband of the owner, and acted as agent in procuring the erection of the building and in superintending the work while the work was going on, brings the question of good faith into prominence. It may be that the architect was not obliged to give these instructions because they did not in express terms include the element of good faith entering into the architect's conduct. But the attention was directed to these important subjects, and which the jury well might have been instructed.

The defendant is right in her contention that, under article 3 of the contract, no payment shall be construed to be an acceptance of defective work or improper materials. This does not mean that, upon a question whether there has been acceptance by the owner, a payment without objection must be considered, in connection with other evidence, as evidence of similar conduct may be considered, so far as it indicates purpose and state of mind. It simply means that a payment does not of itself constitute such an acceptance. The instruction requested on this question properly might have been given, although it was ⁵²² included in another instruction that was not called for by the evi-

dence. The request for an instruction, that upon the "auditor's finding that the plaintiff cannot recover the balance due on the contract price," evidently had reference to the fact that certain amounts which were allowed by the auditor as a setoff had been used directly in diminution of the contract price. This did not affect the result, and the request was properly refused in substance, although not in terms, by the language of the charge.

Exceptions sustained.

RIGHT OF A BUILDING CONTRACTOR TO RECOVER SUBSTANTIAL PERFORMANCE OF HIS CONTRACT

- I. Application of Equitable Principles to Building Contract
- II. The Doctrine of Substantial Performance of Building Contract
 - a. The Rule and the Reason Therefor, 679.
 - b. Effect Where Omissions, Deviations or Defects are Work not Result of Good Faith, 683.
 - c. Amount Recoverable Under the Rule of Substantial Performance, 684.
- III. What Constitutes Substantial Performance of a Building Contract.
 - a. In General, 686.
 - b. As Dependent upon Character of Deviations, Defects or Omissions, 686.
 - c. As Dependent upon the Cost of Remedying the Deviation or Defect, 691.
 - d. As Dependent upon Time of Completion of the Work
- IV. Form of Action for Recovery Under Rule of Substantial Performance and Burden of Proof, 693.

I. Application of Equitable Principles to Building Contract

The ordinary rule applicable to written contracts is that parties thereto must fully comply with the terms thereof. An exception to this rule has, however, been created in respect to building contracts by what is called the doctrine of substantial performance. The work done under a building contract is generally of a nature that it is beneficial to the owner of the land even if it has not been done in strict conformity with the plans and specifications. Although it is conceded that the owner has a right to building constructed according to his own notions of taste, the whimsical or peculiar, still in most cases where the contractor substantially performs his contract for such construction, the building so constructed is an additional value to the land which it is deemed fair to allow to the owner without compensation. The difficulty under such circumstances is how to be just to both the owner and the contractor. Approximate justice is awarded in such cases by the application of the doctrine of substantial performance, which doctrine the contractor is allowed to recover the contract price less a deduction for the damage caused by the omissions or deviations. Some apparent difficulty arises in respect to whether the recovery for substantial performance should be by a suit based on the contract or by an action as on a quantum meruit. In a majority of the states the action seems to be one based upon the building contract, although in a few states the practice is to seek recovery by an action as on quantum meruit, as was done in the principal case. But regardless of the form in which the recovery is sought, the measure of the amount of the recovery is the same. Hence the important feature of this subject is the general rule as to the substantive law applicable to cases of this character. The form

*REFERENCES TO MONOGRAPHIC NOTES.

- Quantum meruit under special contract: 19 Am. Dec. 272.
 Entirety of building contracts: 59 Am. St. Rep. 285.
 Architects' certificates and engineers' estimates: 56 Am. St. Rep. 312.
 Acceptance of work as a waiver of imperfect performance: 115 Am. St. Rep. 256.
 Right of party to proceed to execute contract after his adversary has refused to do so on his part: 33 Am. St. Rep. 791.

must necessarily be determined by the practice followed in state where precedents exist.

The Doctrine of Substantial Performance of Building Contracts.

The Rule and the Reason Therefor.—In respect to building contracts, the rule is well established that where a contractor who endeavors to perform his contract in good faith has done so as to unimportant deviations, omissions, or defects which are intentional or willful, but the result of mistake or inadvertence, he may recover as for a substantial performance: *Walstrom v. Oliver-Const. Co.*, 161 Ala. 608, 50 South. 46; *Seebach v. Kuhn*, 9 Op. 486, 99 Pac. 723; *Pinches v. Swedish Evangelical Lutheran*, 55 Conn. 183, 10 Atl. 264; *Morehouse v. Bradley*, 80 Conn. Atl. 937; *Peterson v. Pusey*, 141 Ill. App. 578; *Evans v.* 211 Ill. 85, 71 N. E. 854; *Concord Apartment House Co. v.* 228 Ill. 360, 81 N. E. 1038; *Fauble v. Davis*, 48 Iowa, 462; *Id v. Mastin*, 6 T. B. Mon. 609, 17 Am. Dec. 168; *Dugue v.* 14 La. 21, 37 South. 995; *Hayward v. Leonard*, 7 Pick. 181, Dec. 268; *Gleason v. Smith*, 9 Cush. 484, 57 Am. Dec. 62; *Id v. Sears*, 112 Mass. 299; *Handy v. Bliss*, 204 Mass. 513, ante, 90 N. E. 864; *Strome v. Lyon*, 110 Mich. 680, 68 N. W. 983; *Id v. Little*, 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell*, 43 357, 45 N. W. 845, 9 L. R. A. 52; *Boteler v. Roy*, 40 Mo. 34; *Hahn v. Bonucum*, 76 Neb. 837, 107 N. W. 1001, 109 N. W. 357; *Feeney v. Bardaley*, 66 N. J. L. 239, 49 Atl. 443; *Nolan v.* 88 N. Y. 648; *Van Orden v. MacRae*, 121 App. Div. 143, 100 N. Y. Supp. 600; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Id v. Ohio Stone Co.*, 39 Ohio St. 1; *Ashley v. Henahan*, 56 Ohio 47, 47 N. E. 573; *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295; *Id v. Bridge Co. v. Pomroy*, 15 Pa. 151; *Gallagher v. Sharpless*, 134, 19 Atl. 491; *Aldrich v. Wilmarth*, 3 S. D. 523, 54 N. W. 333; *Minnings v. Willer* (Tex. Civ. App.), 32 S. W. 24; *Franks v.* 117 S. W. 913; *Foulger v. McGrath*, 34 36, 95 Pac. 1004; *Gilman v. Hall*, 11 Vt. 510, 34 Am. Dec. 104; *Anthony v. Stock*, 133 Wis. 107, 113 N. W. 443; *Foeller v.* 137 Wis. 169, 118 N. W. 543, 24 L. R. A., N. S., 327.

The absence of substantial performance of a building contract, and the fact that the existence of an express contract excludes an implied contract covering the same subject applies: *Burke v. Cogne*, 188 301, 74 N. E. 942. In *Manitowoc Steam Boiler Works v. Manitowoc Blue Co.*, 120 Wis. 5, 97 N. W. 515, the court said: "The general principle of law is firmly established that he who makes an entire contract can recover no pay unless he performs it entirely and according to its terms: *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331; *Id v. Plumer*, 88 Wis. 622, 60 N. W. 1000; *Widman v. Gay*, 104 77, 80 N. W. 450. This general rule has, with considerable exception, been relaxed for equitable considerations in certain exceptional situations where it is believed to work hardship: First, in cases where laborers who contract to perform personal services, and with the result of either party fail of complete performance (*Diefenback v. Hildebrand*, 56 Wis. 462, 43 Am. Rep. 719, 14 N. W. 621; *Walsh v. Hildebrand*, 102 Wis. 172, 72 Am. St. Rep. 865, 78 N. W. 437, 43 L. R. A. 826); secondly, in building contracts, where the

contractor constructs something on the land of another with oversight, but in good faith effort to perform, fails to entirely satisfy the contract, but is so substantially in compliance that the structure fully accomplishes the purpose of that contract, and the other party voluntarily accepts the benefit thereof, where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment (*Malbon v. Birney*, 107 Wis. 107; *Fuller-Warren Co. v. Shurts*, 95 Wis. 606, 70 N. W. 103; *Williams v. Thrall*, 101 Wis. 337, 76 N. W. 599; *Laycock v. Williams*, 103 Wis. 161, 79 N. W. 327; *Pritzlaff H. Co. v. Berghoefer*, 103 Wis. 359, 79 N. W. 564; *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 359; *Smith v. School Dist.*, 20 Conn. 312, 43 Am. Rep. 373; *Stratton v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Dermott v. Jones*, 2 Vt. 17, 17 L. ed. 762); and, thirdly, where the contractor supplies an article different from or inferior to that promised, and the recipient, after being full opportunity to reject without loss or injury, decides to accept and retain the thing furnished. This third phase is hardly an exception, for such voluntary acceptance may well be deemed a making of a new contract to take and pay reasonably for the thing which does not satisfy the original contract."

In other words, by the strict rules of the common law full performance was required as a condition precedent to a right of recovery, but the rigor of this rule has been relaxed, and the tendency of later decisions is to administer equitable relief rather than to hold the parties to the strict letter of the agreement. Hence, in some jurisdictions the contractor is allowed under the doctrine of substantial performance to recover as upon a quantum meruit (*Erick v. Lee*, 17 Okl. 165, 87 Pac. 859).

The leading case upholding the doctrine of substantial performance is that of *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 137, which arose over a special contract for the performance of a year's service. The court in that case reviewed the earlier American and English cases. The case is cited by many of the cases involving building contracts as setting forth the principles which the rule respecting substantial performance embodies. Mr. Justice Parker, in delivering the opinion of the court said: "If a person makes a contract fairly, he is entitled to have it fully performed, and if this is done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the nonperformance.

"The benefit and advantage which the party takes by the performance, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put up with the defense, he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor as remains after deducting what it costs to procure a completion of the residue of the service, and to pay any damage which has been sustained by reason of the non-fulfillment of the contract.

"If, in such case, it be found that the damages are equal to or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, cannot upon the whole case received a beneficial service, the plaintiff cannot recover.

"This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages for the value of the service he actually performs, is a rule of justice and equity."

he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the expiration of his term by ill-treatment, in order to escape from payment; the latter to desert his service before the stipulated time, for no sufficient reason; and it will, in most instances, settle the controversy in one action, and prevent a multiplicity of suits and cross-actions."

Clay v. Hedge, 18 Iowa, 66, Mr. Justice Dillon, referring to *Turner*, 6 N. H. 481, 26 Am. Dec. 713, in applying its rule to a building contract which had not been fully performed, observed: "That celebrated case has been criticised, doubted and denied to be sound. It is frequently said to be good equity, but bad law. Yet its principles have been gradually winning their way to professional and judicial favor. It is bottomed on justice, and right upon principle, however it may be upon the technical and illiberal rules of the common law, as found in the older cases. With the known and natural disposition of courts and juries in favor of the cause of him who has broken his contract, and yet without recovery, and with the limitations stated in *Pixler v. Nichols*, 106, 74 Am. Dec. 298, the application of this rule will not lead practically to work injustice to the employer or contractor, who is without fault."

Of the most comprehensive statements to be found as to the rule on the subject under discussion is that in *Bowen v. Kimbell*, 133 Mass. 364, 133 Am. St. Rep. 302, 89 N. E. 542, wherein Mr. Justice Knowlton said: "Formerly, it was generally held in this country, as it is held in England, that a contractor could not recover under a building contract, unless there was a full and complete performance of it, or a waiver as to the parts not performed, so that he could not recover on a quantum meruit after a partial performance from which the owner had received benefit, unless there had been such subsequent dealings between the parties as would imply an implied contract to pay for what had been done: *Smith v. Barry*, 17 N. Y. 185, 72 Am. Dec. 442; *Ellis v. Hamlin*, 3 Taunt. 100; *Prothro v. Butt*, 8 El. & Bl. 738; *Sumpter v. Hedges* (1898), 1 Q. B. 101, and cases cited. But in most of the American states a more liberal doctrine has been established in favor of contractors for the completion of buildings, and it is generally held that if a contractor has attempted in good faith to perform his contract and has substantially performed it—although by inadvertence he has failed to perform it literally according to its terms—he may recover under the contract, with a proper deduction to the owner for the imperfections or omissions in the performance: *Woodward v. Fuller*, 80 N. H. 100; *Phillip v. Gallant*, 62 N. Y. 256; *Nolan v. Whitney*, 88 N. Y. 100; *Berlies v. Bullinger*, 132 N. Y. 598, 30 N. E. 999; *Elliott v. Hall*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Jones & Hotchkiss v. Davenport*, 74 Conn. 418, 50 Atl. 1028; *Pitcairn v. Philip*, 100 Mo. 113, 113 Fed. 492, 51 C. C. A. 323; Page on Contracts, secs. 604, and cases cited. It would seem that in cases of this kind while the plaintiff recovers under the contract, not the contract price, but the contract price less the deduction, he ought to recover for absolute performance, but only substantial performance of the contract and a right to recover only the balance after allowing the owner a proper sum for the failure to do the work exactly in accordance with the contract required: *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51

L. R. A. 238. The rule very generally adopted is that, to the plaintiff to recover, he needs to show only that he proceeded in good faith in an effort to perform the contract, and that there was a substantial performance of it, although there may be various imperfections or omissions that call for a considerable diminution of the contract price. The reason for this construction of such contracts is in part the difficulty of attaining perfection in the use of the materials and workmanship, and of entirely correcting the effect of a slight inadvertence, and the injustice of allowing the owner to retain without compensation the benefit of a costly building upon his real estate, that is substantially, but not exactly as he agreed to pay for. In none of the courts of this country, so far as we know, is the contractor left remediless under conditions like those above stated. The recovery permitted is generally on the basis of the contract, with a deduction for the difference between the value of the substantial performance shown and the value of the performance which would be paid for at the contract price."

Inasmuch as the labor and material furnished by the contractor for the performance of his building contract ordinarily furnish an added value to the land, the owner cannot, as a general rule, refuse to accept the work without doing an injury to the contractor. Therefore, one of the principal reasons why the general rule requiring absolute compliance with the contract has been modified and the rule of substantial performance created for such cases: *Dyer v. Lincoln*, 68 Atl. 908. The erection of a building upon real estate ordinarily confers such a benefit upon the owner that he should not be allowed to escape payment for it on account of a personal idiosyncrasy: *Handy v. Bliss*, 204 Mass. 513, ante, p. 673, 90 N. E. 86. Of course, the contractor should not be allowed to gain by his fault in violating his contract, as he would if he were allowed to recover the actual value of the building constructed, for he may have contracted to build at a price below the value, or the value of the property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore is entitled to have the contract price determine the extent of the contractor's recovery after deducting the loss or damage occasioned by his variation from the contract: *Hayward v. Leonard*, 7 Pick. 19 Am. Dec. 268. The doctrine of substantial performance is, however, applicable where the deviations from the contract are so substantial that an allowance out of the contract price would give the owner essentially what he contracted for. The purpose of the doctrine is to secure substantial justice between man and man by relaxing in proper cases the rigid, and, in practice, somewhat harsh, rule, as to the entirety of contracts: *Anderson v. Pringle*, Minn. 433, 82 N. W. 682.

The law recognizes the fact that notwithstanding the efforts of the contractor to comply with his contract, there may be slight defects in the construction of the building by reason of misconstruction of terms or other inadvertencies: *Small v. Lee*, 4 Ga. App. 395, 19 E. 831. Hence the rule of substantial performance is only intended to cover unimportant and slight omissions or deviations: *Smith v. Gugerty*, 4 Barb. 614; *Glacius v. Black*, 50 N. Y. 145, 10 Am. 449; *Bush v. Jones*, 144 Fed. 942, 75 C. C. A. 582, 6 L. R. A., 774. Under the rule of substantial performance each party is

what he was equitably entitled to—the contractor, payment for all that he did, and the owner, compensation for all that the contractor omitted to do: *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238.

A different rule, however, exists in respect to a contract for the manufacture of a chattel. In adverting to the distinction in respect to the rule of substantial performance as applied to a chattel and as applied to a contract for the construction of a building, the court in *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621, said: "Under a special contract for the manufacture or sale of a specific chattel, the purchaser is not bound to accept one differing from the one bargained for, though of equal value and usefulness. . . . In such cases no recovery can be had for labor or material in constructing a strictly personal chattel which does not conform to the requirements of a special contract for its manufacture, because the purchaser, not having accepted and not being obliged to accept the different article tendered, has received no benefit from the labor and materials of the contractor. But in special contracts for labor day by day, or for labor and materials in erecting a building upon land of another, the person for whom the work is done necessarily receives the value of the work done as it is done, and, if any advantage has accrued to him therefrom, is liable to pay for the benefit received—the worth to him of the partial performance of the contract by the other party."

b. Effect Where Omissions, Deviations or Defects are Willful or not Result of Good Faith.—The rule of substantial performance cannot be invoked where the omissions or defects from the requirements set forth in the building contract are intentional and not the result of an attempt in good faith to perform the contract: *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723; *Morehouse v. Bradley*, 80 Conn. 611, 69 Atl. 937; *Beha v. Ottenburg*, 6 Mackey, 348; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038; *Peterson v. Pusey*, 237 Ill. 204, 86 N. E. 692; *Handy v. Bliss*, 204 Mass. 513, ante, p. 673, 90 N. E. 864; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Nolan v. Whitney*, 88 N. Y. 648; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Kane v. Ohio Stone Co.*, 39 Ohio St. 1; *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573; *Sticker v. Crespeck*, 127 Pa. 446, 17 Atl. 1100; *Hulst v. Benevolent Hall Assn.*, 9 S. D. 144, 68 N. W. 200; *Foulger v. McGrath*, 34 Utah, 86, 95 Pac. 1004; *Gilman v. Hall*, 11 Vt. 510, 34 Am. Dec. 700; *Kelly v. Bradford*, 33 Vt. 35; *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443.

In *Mitchell v. Dunmore Realty Co.*, 126 App. Div. 829, 111 N. Y. Supp. 322, the court, in referring to the conditions under which the rule of substantial performance is applicable, said: "That rule has no application where the failure to fully perform has been willful and intentional. It is intended to prevent injustice or hardship to a contractor, who has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions: *Phillip v. Galant*, 62 N. Y. 253. In such a case full justice can be done by permitting the contractor to recover the contract price, less the damage

caused by the defects. But where, as in the present case, there has been a willful and intentional refusal by the contractor to perform his contract, and he wholly abandons it, his right to recover is not dependent upon performance of his contract without any omission so substantial in its character as to call for an allowance for damages. If the contractor had acted in good faith. Slight and insignificant imperfections or deviations may be overlooked on the principle of *de minimis curat lex*; but the contract in other respects must be performed according to its terms. When the refusal to proceed is willful, the difference between substantial and literal performance is bridged by the line of *de minimis*: *Van Clief v. Van Vechten*, 130 N. E. 29 N. E. 1017."

Where the failure to fully perform the contract is willful and in good faith, the refusal of the courts to apply the doctrine of substantial performance with its incidental advantages to the contractor could well be upheld upon the principle that one cannot sue for breach by his own wrong.

c. Amount Recoverable Under the Rule of Substantial Performance.—Some apparent conflict exists among the authorities as to the proper rule for ascertaining the amount recoverable in case of substantial performance of the building contract, but this conflict disappears when the nature of the defect or omission is considered. It is apparent that the rule which would be applicable where the defect or omission can be easily remedied would not be equally applicable where it is of such a nature that the building would have to be rebuilt in order to remedy it.

The principle underlying cases of this general character is that a party in default can never gain by his default, and the other party can never be permitted to lose by it: *Allen v. McKibbin*, 5 N. E. 449. Hence where a building contractor has substantially performed his contract, he may ordinarily recover the contract price, less a deduction to reimburse or compensate the owner for his failure to fully complete his contract: *Cook v. American Luxfer Prison*, 93 Ill. App. 299; *Aetna Iron & S. Works v. Kossuth Co.*, 79 N. E. 40, 44 N. W. 215; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 1; *Dodge v. Kimbell*, 203 Mass. 364, 133 Am. St. Rep. 302, 89 N. E. 542; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Feeney v. Dwyer*, 66 N. J. L. 239, 49 Atl. 443; *Dyer v. Lintz* (N. J.), 68 Atl. 1; *Woodward v. Fuller*, 80 N. Y. 312; *Mitchell v. Dunmore*, 126 N. Y. Div. 829, 111 N. Y. Supp. 322; *Ashley v. Henahan*, 56 Ohio St. 47 N. E. 573; *Wade v. Haycock*, 25 Pa. 382; *Gallagher v. Shaw*, 134 Pa. 134, 19 Atl. 491; *Aldrich v. Wilmutt*, 3 S. D. 523, 54 N. D. 811; *Foulger v. McGrath*, 34 Utah, 86, 95 Pac. 1004; *Ashland Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136. In all such cases, however, the price stipulated in the building contract contains a limitation upon the amount which the contractor may possibly recover: *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942; *Buttrick v. Ber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138; *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295; *Kelly v. Bradford*, 33 Vt. 35; *Stephens v. Phoenix Bridge Co.*, 139 Fed. 248, 71 C. C. A. 374.

Where the defects or omissions are of such a character as to be capable of being remedied, the proper rule for measuring the amount recoverable by the contractor is the contract price less the reasonable cost of remedying the defects or omissions so as to make

g conform to the contract. The object of the rule is to give owner in substance as near as practicable the very thing con- for, not merely in value but in form and character: Foeller tz, 137 Wis. 169, 118 N. W. 543, 24 L. R. A., N. S., 327. In v. Madler, 123 Wis. 621, 101 N. W. 1095, the court, in stat- rule for determining what deductions should be made from tract price in cases of this character, said: "In case of entire to furnish an item of labor or material, or in case of a de- nch may be easily remedied without taking down and recon- g a substantial portion of the building, this allowance should be the reasonable expense of supplying or correcting the defect. e of a defect which could only be remedied by taking down constructing some substantial portion of the building, the al- e should be the amount which the building is worth less, by of the defect, than the contract price."

when it is said that in cases of this character the plaintiff cover on a quantum meruit or valebat, nothing more is in- than that he may recover whatever he may be entitled to, ceeding the price fixed by the special contract: Morford v. e, 3 J. J. Marsh. 688.

discussing the amount recoverable under the doctrine of sub- performance, the court, in Danforth v. Freeman, 69 N. H. s Atl. 621, a well-considered case, said: "The effect of the t is to make the contract price the measure of the benefit the owner would receive from a compliance with the contract. structure worth less to him from failure to comply with the t, he is liable to pay only the advantage to him of such a compared with the one he should have had. Estimating his y under the contract completely performed at the contract he benefit received, for which he should pay on the basis of ract, is conveniently ascertained by deducting from the con- rice the damage occasioned by the builder's failure to per- e contract. What elements are to be considered in estimating amage depends upon the facts of the particular case and the e of the defect or failure. 'Sometimes the measure of damages necessary cost of making the work accord to the specifica- . . . The defect may be of such a kind as to diminish the f the house but little, while to make the work conform literally contract would involve reconstruction at unreasonable and ortionate expense.' The question ordinarily is, How much the building fairly worth to the defendant than it would een if the contract had been performed? . . . There may be here the commercial value of the house for sale or use would test of the value to the owner, as when the house is built e or rent; but if at the same time it is of less value to the for the uses and purposes for which he designed it, or in any ay he has been damaged by the contractor's breach of the t, he is entitled, in a suit for the contract price, to such a on as will compensate him for the loss sustained. Evidence commercial value of the house for sale or use, to which the ant excepted, was properly received, as bearing upon the o the defendant of the house as constructed; but the fact, if that the house built could have been sold for as much as one cted in accordance with the contract does not conclusively

establish that the defendant is not damaged by the departure from the contract."

Where the defect is one which cannot be remedied without paying the contractor of adequate compensation for his labor and material, his measure of recovery is the difference between the value of the building as completed and the building as it ought to have been completed: *Small v. Lee*, 4 Ga. App. 395, 61 S. E. 831. In the last cited the court said: "To require that the house should be rebuilt, and that the contractor should pay the cost of rebuilding, that the estimated cost of making the house conform to the contract should be allowed as damages, would be to give an unconscionable advantage to the owner, and would deprive the contractor of adequate compensation for his work and materials. The difference between the market value of the entire premises between the house as constructed and the lot and the house as it should have been constructed and the lot furnishes no just criterion by which the damage to the defendant could be ascertained. This rule of damages would not apply where the house had been located on a different part of the lot than it should have been according to the contract. In such case the location of the house might affect the value of the premises. In such case the measure of damage is not the cost of moving the house, but the difference in the value of the premises with the house misplaced and the value it would have had if the house were set on the lot according to the plan: *Olsen v. Benson*, 113 App. Div. 676, 99 N. Y. Supp. 917."

The above rule was applied in *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264, in a case where the ceiling of a church building was two feet lower, the windows shorter and narrower, and the seats were narrower than required by the specifications. The structure was adapted to the purpose for which it was built. It could not be made to conform to the specifications except by an expenditure which would have deprived the contractor of any compensation for his work, and the court allowed him to recover the contract price less the amount of the diminution in the value of the building by reason of the deviation from the specifications.

III. What Constitutes Substantial Performance of a Building Contract.

a. **In General.**—"Substantial performance is performance, as to unsubstantial omissions, with compensation therefor. Where the omission is slight and unintentional, in order to prevent hardship of a failure to recover even for that which was well compensated, compensation is substituted, pro tanto, for performance. This is a modern rule, adopted upon the theory that the parties are presumed to have impliedly agreed to do what was reasonable under the circumstances with reference to the subject of performance." *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238.

b. **As Dependent upon Character of Deviations, Defects or Omissions.**—The defects occurring in the building must not run through the whole of it, or be so essential that the object of the party is not accomplished: *Woodward v. Fuller*, 80 N. Y. 312; *Braseth v. Bank*, 12 N. D. 486, 98 N. W. 79. "A contract is not substan-

performed by substituting for that which
 rials, methods, or workmanship which, i
 tractor and his experts, are 'just as god
 relates to a matter of minor importance, i
 for sufficient reasons, and there is an ad
 difference. The owner has a right to wh
 to give him, and unless he has it, or, when
 ful nor substantial, is fully compensated f
 no substantial performance, and there can
 not sufficient for the contractor to build a h
 the house contracted for, and substantially co
 tions as to the method of construction, mate
 before he is entitled to payment": *Earthampton Lumber etc. Co. v. Worthington*, 186 N. Y. 407, 79 N. E. 323. In the case last cited the contract was held not substantially performed by reason of the substitution of material for various details of the house, such as sheathing, building paper, sash cords, plumbing supplies and the like. The same rule was followed in *Schultze v. Goodstein*, 180 N. Y. 248, 73 N. E. 21, where earthen sewer-pipes of a smaller size were used instead of iron pipes of a larger size as called for in the specifications. So, also, where a contract requires the furnishing of a particular kind of marble columns from a certain country, which can be procured, the substitution of columns which are substantially like them is not substantial performance: *Luich v. Paris Lumber etc. Co. (Tex.)*, 14 S. W. 701.

688
 So, also
 of the
 spee
 ve

Substantial performance is not inconsistent with imperfections in matters of detail which do not defeat the object of the owner or go to the substance of the subject matter of the contract: *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A., N. S., 327. But deviations from strict performance should be allowed with caution. The owner of the building has a right to choose for himself what he wishes constructed, and should not be compelled to receive something else. In the matter of buildings and their decoration mere taste or preference approaching almost to whim might be controlling with the owner, and therefore the substance of the contract. This is particularly true of contracts involving the painting of buildings: *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443. Thus where the subject matter of the contract involves questions of personal taste, the contract is construed so as to require strict performance to the satisfaction of the builder: *Handy v. Bliss*, 204 Mass. 513, ante, p. 673, 90 N. E. 864. In other words, the ornamentation of a building is a matter of substance, and variations, changes and omissions from the building specifications in that respect constitute a breach of the contract: *McEntyre v. Tucker*, 5 Misc. Rep. 228, 25 N. Y. Supp. 95. In a contract for the construction of a monument to mark the resting place of the dead, substantial performance is not sufficient, but strict performance may be insisted upon: *Oakes v. Barbre*, 127 Ill. App. 208.

Where a contractor builds a house substantially different in dimensions and form, or in materials used, from that contracted to be built, it is not a substantial performance. Thus where the measurements of a veranda and rooms were two feet smaller in dimensions than called for in the plans and specifications, the difference is substantial: *Small v. Lee*, 4 Ga. App. 395, 6 S. E. 831.

established, where both the ceiling of a store building and the cellar thereunder are considerably lower than called for in the specifications, and stone foundations are omitted under the walls, it cannot be said that there is a substantial performance of the contract: *Flannery v. Sahagian*, 83 Hun, 109, 31 N. Y. Sup. 109. Where the foundations are smaller than called for in the specifications and of inferior materials; the timbers in the frame of the building and the partitions smaller than required; the chimneys out of plumb; floors and ceilings out of level; walls uneven at the corners not square; and the doors and windows defective and of inferior material, there is no substantial performance of the building contract: *Anderson v. Petereit*, 86 Hun, 600, 33 N. Y. Supp. 741.

Where there were no plans and specifications stating where the windows of a basement story which was to be placed under the building after raising it were to be placed, the fact that the windows were placed out of alignment with those in the upper story will not prevent the contractor from recovering on a substantial performance where the cost of remedying the defect was only seven dollars and fifty cents and they were so placed in order to afford more free space in the rooms: *Schindler v. Green*, 149 Cal. 752, 87 Pac. 100. The fact that the roof of the rear addition to a house was five inches lower than called for in the plans is not such a defect as will prevent the contractor from recovering, where the defect does not affect the usefulness or symmetrical appearance of the building: *Oberlies v. Bullinger*, 132 N. Y. 598, 30 N. E. 999. And where a contract required the contractor to build a wall four and one-half feet high, his failure to build it to that height in some portions does not prevent him from recovering on a quantum meruit: *Gilman v. Swain*, 11 Vt. 510, 34 Am. Dec. 700. Where a contract required the construction of a sawmill fifty feet by one hundred and fifty feet, and it was held, as a matter of law, that the construction of a mill which was seventy-eight feet by one hundred feet is substantial compliance, even though it be shown that it cost more and was of greater value and better adapted to the purposes to be accomplished: *Swain v. Seamens*, 76 U. S. 254, 19 L. ed. 554.

Where a contract requires the construction of a brick wall of certain dimensions, the construction of a brick wall with a pilaster at one end extending into the wall for a distance of six inches is not such a compliance with the contract as will allow recovery upon the contract as performed: *Bixby v. Wilkins*, 10 Minn. 481. Where a building contract required the placing of joists of a certain length in a certain position and the placing of a wooden partition on a brick wall in the basement, a failure to do so is such a structural defect affecting the solidity of the building as will defeat a claim of substantial performance: *Spence v. Bixby*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. And where a contract called for "No. 1 rustic and the best quality of joist and ceiling," the use of No. 2 rustic and second quality of joist and ceiling is not a substantial performance: *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635. Likewise where the contract required the furnishing of only "5/8 inch beaded yellow pine for standard ceiling," and first and second grade "long leaf yellow pine for flooring, not over 3 1/4 inches wide," the furnishings of a much more expensive and altogether different kind of pine ceiling and floor

is not a substantial compliance, even though the lumber furnished was as good and durable for that specific work, since the difference in finish and appearance between the two kinds of lumber may have been important: *Cannon v. Hunt*, 116 Ga. 452, 42 S. E. 734. And where a contract required the putting in of parquet floorings in a first-class manner, the placing of such a flooring in such a manner that spaces existed between the blocks by reason of the blocks shrinking through not being properly seasoned and exposed to the rain in being hauled to the house is not a substantial performance: *Boughton v. Smith*, 142 N. Y. 674, 37 N. E. 470. But where clapboards were used in the gables and boards in the floor which were wider than those specified in the contract, it will constitute a substantial performance where the usefulness and value of the house were not impaired and the difference in the cost of the material substituted did not exceed \$50: *Healy v. Fallon*, 69 Conn. 228, 37 Atl. 495.

Where a building contract requires the use of hard bricks in the construction of the walls of a building, the use of a considerable quantity of soft bricks is not a substantial compliance with the contract: *Robertson v. King*, 55 Iowa, 725, 8 N. W. 665. So, also, where the contract required the use of Yankton cement, which cost \$3.40 per barrel, while Milwaukee and Louisville cement, which cost respectively, \$1.44 and \$1.79 per barrel, from one hundred and eighty to two hundred and ten barrels being required; the foundation wall did not taper up six feet from a three foot width at the bottom to sixteen inches at the top, but was blocked into a sixteen-inch wall two feet from the bottom, at a saving of six thousand bricks to the contractors; the plate glass was not free from sand holes; the front of the building was not properly constructed; the rear and party-walls were not built of selected brick as to color, together with other defects—the contract cannot be said to have been substantially performed: *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599. Where a contract requires the contractor to make a "water-tight" cellar by pursuing a certain method, the making of a "water-drained" cellar is not a substantial performance: *MacKnight Fluitie Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661. Likewise where a contract required a foundation to be laid according to the usual building regulations and a cesspool to be constructed in a certain manner and cemented throughout, but the contractor failed to do so and failed to make the cesspool water-tight, in consequence of which the owner was required by the city officers to make it water-tight, it is not a substantial performance of the contract: *Cahill v. Henser*, 2 App. Div. 292, 37 N. Y. Supp. 736. And where a contract required the installation of screens and hardware made of bronze wire and doors fitted with Laramie checks, it is not a substantial compliance to use "bronzed" steel wire, which is worth only one-fifth as much as bronze wire, and merely bronzed hardware and no Laramie checks: *Higgins Mfg. Co. v. Pearson*, 146 Ala. 528, 40 South. 579. Where the contract for the construction of a creamery required the building to have a one-third pitch to the roof but it had a pitch of four inches less, which was, however, capable of shedding the rain; a large part of the shingles used were of inferior grade and so laid as to leave holes in the roof; and the siding used was unsound and split—the defects were held to be such as not to amount to a sub-

stantial performance, even though they could be remedied for one-fifth of the entire cost of the creamery when fully equipped: *Cornish, Curtis & Greene Co. v. Antrim Co-op. Dairy Assn.*, 82 Minn. 215, 94 N. W. 724.

The failure of a contractor to put three coats of plaster on a clothes-closet wall according to the terms of his contract will not, as a matter of law, defeat a recovery as for a substantial performance: *Ramstedt v. Brooker*, 113 App. Div. 45, 98 N. Y. Supp. 1044. Where the contract requires the buildings to be plastered and a certain chimney flue to be constructed, the failure to plaster a large room in the basement and to build the flue which was to be constructed constitutes a failure to substantially perform the contract: *Franklin v. Schultz*, 23 Mont. 165, 57 Pac. 1037. So, also, where the last coat of plastering has not been put on and it would cost from \$20 to \$25 to complete the plastering in a hallway, and the contract requires three coats of plastering and the contractor refuses to complete the job, it cannot be said that the contract has been substantially performed: *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017.

Where a contract for the decoration of a storeroom required the contractor to cover wood partitions with canvas to make a suitable surface to work on, and that the materials used should be first class and the work done in a workmanlike manner, the fact that no suitable surface was made on the wood partition will not preclude a recovery on the basis of a substantial performance, where the contract was otherwise properly performed: *Whitcomb v. Roll*, 40 Ind. App. 113, 81 N. E. 106. Where under a contract to repair an old house and build an addition to it no part of the second coat of paint upon the new part had been put on, two doors were not hung, no lock nor fastenings on the front door and windows, and the work-bench of the carpenters and paint which was to be used were still in the house, there was no such substantial performance as would allow a recovery after the destruction of the house by fire: *Clark v. Collier*, 100 Cal. 256, 34 Pac. 677. Under a contract for the painting, varnishing and graining of certain buildings, the fact that some small places in the buildings were not properly grained and finished, the cost of which would not exceed five dollars, will not prevent the contractor from claiming a substantial performance: *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686.

The fact that some brickwork was unfinished and the debris was not removed from some of the floors, the total cost of doing which would not exceed three dollars, will not prevent a recovery as for a substantial recovery: *Hahn v. Bonacum*, 76 Neb. 837, 107 N. W. 1001, 109 N. W. 368. A contract to perform the mason work on a building is substantially performed even though the cellar has not been cleaned and the rubbish removed: *Highton v. Dessau*, 46 N. Y. St. Rep. 922, 19 N. Y. Supp. 395. So, also, where only slight defects existed in respect to the cellar wall and windows, painting and puttying, caused principally by the condition of the weather, and a failure to remove the outside rubbish, the contract for the construction of the house is substantially performed: *Coen v. Birchard*, 124 Iowa, 394, 100 N. W. 48. A contract to construct a barn cannot be said, as a matter of law, not to have been substantially performed because the large doors have not been hung: *Rose v. O'Reilly*, 111

Mass. 57. A contract to furnish the galvanized work and tin roofing of a freight shed, together with two gangway openings, is substantially performed where the two openings were omitted through a mistake and cost of making them did not exceed \$35: *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175. But where a contractor intentionally failed to trowel-strike the brick walls of the building, used brickbats in the inner and outer tiers of the walls, left holes in the walls caused by the mortar falling out and the improper setting of the bricks, and used an inferior quality of brick in the structure, the defects are of such a serious nature that the contract is not substantially performed: *Braseth v. State Bank*, 12 N. D. 486, 98 N. W. 79.

c. **As Dependent upon the Cost of Remedying the Deviation, Omission or Defect.**—The doctrine of substantial performance does not apply where the variations from the terms of the contract are so substantial that an allowance out of the contract price for damages would not give the owner substantially what he contracted for: *Hoglund v. Sortedahl*, 101 Minn. 359, 112 N. W. 408. In many cases, in determining whether or not the contract has been substantially performed, a controlling importance has been given to the cost of remedying the omissions, defects and deviations as compared to the contract price of the whole work in preference to a consideration of the character of them. Thus, where the contract price was \$3,400 and the cost of completing the contract was \$267, it was held no substantial performance: *Smith v. Sheltering Arms*, 89 Hun, 70, 35 N. Y. Supp. 62. And of course where the contract price for the construction of a house was \$3,945, and the contractor abandoned it at a stage where it required an expenditure of \$2,200 to complete it, there was no substantial performance: *Tice v. Moore*, 82 Conn. 244, 73 Atl. 133. And where the contract price was \$3,000, there is no substantial performance where it will cost \$350 to complete the building according to contract: *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740. So, also, where the contract price was \$3,200 and the value of the unfinished work \$300, it was said to be an insufficient showing to constitute a substantial performance: *Anderson v. Peterreit*, 86 Hun, 600, 33 N. Y. Supp. 741. And in another case where the contract price was \$3,100 and the cost of performing the unfinished work was \$314, it was held not a substantial performance: *Rochkind v. Jacobson*, 126 App. Div. 357, 110 N. Y. Supp. 583. And where the contract price of a building was \$14,199 and the cost of completing the building was more than \$1,000 in the opinion of the contractor, and \$6,000 in the opinion of the owner, there cannot be said to be a substantial performance: *Zimmerman v. Jourgensen*, 70 Hun, 222, 24 N. Y. Supp. 170. Substantial performance cannot be claimed where the contract price of the building was \$2,500 and the cost of completing the building was \$876: *Ketchum v. Herrington*, 45 N. Y. St. Rep. 59, 18 N. Y. Supp. 429. So, also, where the contract price was \$2,100, but the omissions on the part of the contractor amounted to ten per cent of the contract price, it was held insufficient to show a substantial performance: *Lashinsky v. Silverman*, 48 Misc. Rep. 501, 96 N. Y. Supp. 135. And where the cost of remedying the defects of the contractor will run from \$3,500 to \$7,000, they cannot be said to be of such an inadvertent character as allow him

to claim a substantial performance: *Nesbit v. Braker*, 104 App. Div. 393, 93 N. Y. Supp. 856.

Where the omissions on the part of the contractor constitute about forty per cent of the entire work to be done, he cannot claim to have substantially performed his contract: *Anderson v. Pringle*, 79 Minn. 433, 82 N. W. 682. A failure to finish work to the extent of one-seventh of the value of the contract price is not a substantial performance: *Mitchell v. Williams*, 80 App. Div. 527, 80 N. Y. Supp. 864. There is no substantial performance where the omissions, deviations and defects amount in value to at least fifteen per cent of the entire work: *Fuchs v. Saladino*, 133 App. Div. 710, 118 N. Y. Supp. 172. And of course a failure to perform the contract to the extent of thirty-nine per cent of the contract price is a failure to substantially perform it: *Excelsior Terra Cotta Co. v. Harde*, 90 App. Div. 4, 85 N. Y. Supp. 732. And where the cost of remedying the defective work was one-third of the contract price, there is no substantial performance: *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443.

It cannot be said, as a matter of law, that omissions to the extent of \$200 on a contract calling for \$29,400 constitute a substantial performance, although in some cases the omissions or defects may be so great as to require a conclusion as a matter of law that the contract was not substantially performed: *Van Orden v. MacRae*, 121 App. Div. 143, 105 N. Y. Supp. 600. Whether a contract of this character has been substantially performed is, however, a question of fact for the jury: *Pitcairn v. Phillip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323. It has been held a substantial performance where the contract price was \$21,700 and the omissions were furnished at a cost of \$154: *Monteverde v. Queen's County*, 78 Hun, 267, 28 N. Y. Supp. 918. A similar conclusion was had where the contract price was \$17,393 and the omissions could be remedied for \$317: *Cullen v. Gallagher*, 28 App. Div. 173, 50 N. Y. Supp. 880. So, also, where the contract price of a building is \$48,700 and the value of the unfinished work is \$2,274.92, the contract was held substantially performed: *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867. A contract to build a house for \$12,650 is substantially performed where the allowance for deviations does not exceed \$380.20: *Anderson v. Meislaha*, 12 Daly, 149. A finding of substantial performance will be sustained where the contract price was \$7,000 and the amount allowed for defects was \$275: *Valk v. McKeige*, 43 N. Y. St. Rep. 26, 16 N. Y. Supp. 741. Likewise where the contract price is \$6,000, defects in the work which cost \$216.71 to remedy will not prevent a recovery as for a substantial performance: *Crouch v. Gutman*, 134 N. Y. 45, 30 Am. St. Rep. 608, 31 N. E. 271. The mere fact that it would cost \$57.25 to complete a contract in which the contract price was \$3.50 will not militate against a contention that it has been substantially performed: *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936. So, also, where the damages for the failure to complete a contract calling for \$3,563 was only \$33, it will be considered as substantially performed: *Hankee v. Arundel Realty Co.*, 98 Minn. 219, 108 N. W. 842. Where the contract price to furnish work on a building was \$2,000, and the value of the unperformed work on the contract amounts to only \$120, the contract is substantially performed: *Felgenhauer v. Haas*, 123 App. Div. 75, 108 N. Y. St. Rep. 476; *Chambers v. Jaynes*, 4 Pa. 39. A contract to furnish a stair-

plant and perform the plumbing work of a building for \$1,400 substantially performed where the cost of remedying the omissions and defects is only \$177.50: *Burgi v. Rudgers*, 20 S. D. 646, 108 253. And where the contract price of a contract similar to the one mentioned was \$621.77, it will be deemed substantially performed where the defects in its performance amount in the aggregate to \$34: *Otis Elevator Co. v. Dusenbury*, 47 Misc. Rep. 450, 95 Supp. 959. A contract calling for \$800 has been held substantially performed where the cost of remedying the defects did not exceed \$75: *Phillip v. Gallant*, 62 N. Y. 256. And where the contract price is only \$390 and the omissions and defects do not amount to more than \$13.80, the contract is substantially performed: *Levy v. Zimmerman*, 17 Misc. Rep. 357, 39 N. Y. Supp. 1086. Where the contract price is only \$145, the fact that it will cost \$100 to finish the job will not militate against a finding of substantial performance: *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 100. And it has even been held that where the contract price was \$100 and the fact that it would cost \$25 to furnish the omissions does not show that the contract was not substantially performed: *Bergfoss v. Boston*, 190 Mass. 168, 76 N. E. 655. And a finding of substantial performance will be sustained where the defects do not exceed six per cent of the contract price: *Murphy v. Stickley Simonds Co.*, 82 N. Y. 8, 31 N. Y. Supp. 295.

Substantial Performance Dependent upon Time of Completion of the Work.—Delivery of a building under a contract, requiring delivery not later than a day after the day following such day at 6:25 A. M. is substantial performance: *New Jersey Co. v. Nathaniel Wise Co.*, 55 Misc. Rep. 231, 39 N. Y. Supp. 231. A stipulation in a contract to erect within a certain year a building for the purpose of manufacturing cabinet and "actually engaging in said manufacturing business" is substantially complied with by the erection and having in such building on the last day of the year the necessary tools and materials on hand and for workmen engaged in combining and putting together into such organs, although the keys, pipes, hinges, paint and varnish were manufactured elsewhere: *McLaughlin v. Child*, 62 N. Y. 2. And where a building was to be completed by a specified time and the contractor liable to certain penalties, it is substantially completed where all that remains to be performed is the removal of the external rubbish, the remedying of a slight defect in the cellar, and a few other minor defects caused by the weather: *Coen v. Birchard*, 124 Iowa, 394, 100 N. W. 48.

Form of Action for Recovery Under Rule of Substantial Performance and Burden of Proof.

There is some diversity of opinion as to the proper form of action for recovery on a building contract for a substantial performance. The great majority of the cases the suit is brought on the contract and not on a quantum meruit, and the court applies the rule of substantial performance without questioning the propriety of the form of action. We deem the action based on the contract itself the most sound and common sense procedure, inasmuch as substantial performance is performance of the contract except as to immaterial parts with compensation therefor. But stripped of verbiage the amount recoverable by the contractor for a substantial

performance is the same whether he sues on the contract or upon a quantum meruit. In other words, even where the contractor sues as on a quantum meruit, the doctrine of substantial performance is applied in ascertaining the amount which he is permitted to recover.

It is true, as was stated by the supreme court of Wisconsin in *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543, 24 L. R. A., N. S., 327, that: "One is liable to be led astray in studying this subject by referring indiscriminately to authorities elsewhere, unless he appreciates that the right to recover for part performance of an entire building contract is widely distinguished from such right generally. The exception is purely of judicial creation, having in view the inequity of permitting a person to suffer great loss to the enrichment of another, in a situation where, in the very nature of things, no opportunity exists for the former, practically and reasonably, to restore the latter to the former position, as in case of one constructing a building upon the premises of another, which that other must necessarily receive because of its being incorporated into and an inseparable part of his property."

"The equity is regarded differently in some jurisdictions than in others, and in the judicial efforts to give a remedy to the one party without unduly injuring the other, we find a well-defined classification of holdings according to jurisdictions. Some, notably New York and Minnesota, are in line with this court. Others permit a recovery for that which they nominate substantial performance, not on the contract, but on a quantum meruit not exceeding the contract rate. Others on a quantum meruit on a basis; quantum valebat. Still others permit a recovery, regardless of substantial performance, to the extent of the actual value of the labor and material to the proprietor, which had become incorporated into his property."

Even in those jurisdictions in which the practice is to sue as upon a quantum meruit the amount of the recovery is always limited by the contract price, less deductions by reason of the variations or omissions from the terms of the contract: *Burke v. Coyne*, 183 Mass. 401, 74 N. E. 942; *Germain v. Union School Dist.*, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Todd v. Huntington*, 13 Or. 9, 4 Pac. 25. The party in default can never gain by his default in fulfilling his contract, and the other party can never be permitted to lose by it: *Allen v. McKibbin*, 5 Mich. 44. There can be, of course, no recovery on a quantum meruit on a building contract which provides for the rights of the parties in case of a breach by either: *Neblett v. McGraw*, 41 Tex. Civ. 239, 91 S. W. 309.

In speaking on this subject, Mr. Chief Justice Knowlton, in *Dodge v. Kimball*, 203 Mass. 364, 133 Am. St. Rep. 302, 89 N. E. 542, observed: "In none of the courts of this country, so far as we know, is the contractor left remediless under conditions like those above stated. The recovery permitted is generally upon the basis of the contract, with a reduction for the difference between the value of the substantial performance shown and the complete performance which would be paid for at the contract price."

"In Massachusetts the hardship upon the contractor of leaving him without compensation, if, acting in good faith, he performs a contract substantially, but fails to perform it completely, was early recognized by the courts, and it was decided that under such cir-

circumstances he might recover upon a quantum meruit. In Massachusetts this method of obtaining relief has ever since been treated as the only one for such cases, and has often been referred to as the doctrine stated in *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268. Because of this rule it is held to this day that, if the declaration is upon the contract alone, there can be no recovery under a building contract unless there has been a complete performance of it: *Allen v. Burns*, 201 Mass. 74, 87 N. E. 194, and cases cited.

"This anomalous form of proceeding in this commonwealth does not give the plaintiff any larger rights than those stated above under the rule which generally prevails in actions upon a building contract in other states. In the first place, it has always been held that he cannot recover upon a quantum meruit unless he has acted in good faith under the contract, in an endeavor to perform it: *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942; *Sipley v. Stickney*, 190 Mass. 43, 112 Am. St. Rep. 309, 76 N. E. 226, 5 L. R. A., N. S., 469, 5 Ann. Cas. 611. If he abandons the contract without excuse when he has only half performed it, he has no remedy: *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160. In both these particulars the contractor is governed by the same rules as those which are adopted generally in other states."

From the above case it will be seen that it is chiefly a matter of practice in each state as to whether a suit to recover for the substantial performance of a building contract be brought on the contract itself or on the quantum meruit. In the absence of a settled practice to the contrary in the jurisdiction, it is doubtful whether any court would refuse relief because the suit was brought on the contract itself. Thus in Oklahoma it was held, in an action for material furnished and services rendered under a contract, it is proper to permit the plaintiff to amend his petition stating no new facts constituting a new cause of action, but merely seeking to recover the value of the material furnished and labor performed upon a quantum meruit: *Limerick v. Lee*, 17 Okl. 165, 87 Pac. 859.

The question whether a building contract has been substantially performed is generally one of fact: *Fitzgerald v. La Porte*, 64 Ark. 34, 40 S. W. 261; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015; *Bauer v. Hindley*, 222 Ill. 319, 78 N. E. 626; *Burrows Co. v. Crittenden* (Miss.), 37 South. 504; *Loh v. Broadway Realty Co.*, 77 N. J. L. 112, 71 Atl. 112; *Woodward v. Fuller*, 80 N. Y. 312; *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *Russell v. Iredell County*, 123 N. C. 264, 31 S. E. 717; *Sticker v. Overpeck*, 127 Pa. 446, 17 Atl. 1100; *Hulst v. Benevolent Hall Assn.*, 9 S. D. 144, 68 N. W. 200; *Bradford v. Whitcomb*, 11 Tex. Civ. 221, 32 S. W. 571; *Pitcairn v. Philip Hiss Co.*, 113 Fed. 492, 51 C. C. A. 323. Of course, as in all the cases of questions of facts, the circumstances may be such as to make a conclusion, as matter of law, that there was or was not a substantial performance of the contract: *Rochkind v. Jacobson*, 126 App. Div. 357, 110 N. Y. Supp. 583.

The burden is on the contractor to prove substantial performance: *Christy v. Price*, 223 Pa. 551, 72 Atl. 895. In *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238, the court, in speaking on the question of the burden of proof, said: "He who relies upon substantial as contrasted with complete performance must prove the expense of supplying the omissions, or he fails in his proof; for he

cannot recover for full performance when a part of the contract is still unperformed. The doctrine of substantial performance necessarily includes compensation for all defects which are not so slight and insignificant as to be safely 'overlooked on the principle of *de minimis non curat lex*.' (*Van Clief v. Van Vechten* [130 N. Y. 571, 29 N. E. 1017].) Unsubstantial defects may be cured, but at the expense of the contractor, not of the owner. The contractor cannot recover the entire contract price when defects or omissions appear, for he must show not only that they were unsubstantial and unintentional, but also the amount needed to make them good, so that it can be deducted from the contract price, and a recovery had for the balance only. This is an essential part of substantial performance, and hence the proof should be furnished by the one who claims substantial performance. (*Zimmerman v. Jourgensen*, 38 N. Y. St. Rep. 414, S. C., 70 Hun. 222, 24 N. Y. Supp. 170; *Cutter v. Chase*, 5 Car. & P. 337; *Chitty on Contracts*, 13th ed., 520; 1 *Hudson on Building Contracts*, p. 394.) There was nothing decided in *Heckman v. Pinkney*, 81 N. Y. 211, which is relied upon by the plaintiff, that is in conflict with these views, for in that case the referee found that the 'defendant had waived performance as to the items wherein there was not perfect performance.' . . . The one who fails in fully performing and who invokes the doctrine of substantial performance must furnish the evidence to measure the compensation for the defects, as that is the substitute for his failure to do as he agreed.

In Minnesota, however, the court, relying on the New York case repudiated in the above-cited case from that state, held that in an action on the contract the contractor may recover the contract price, less the damages on account of the omissions or defects, and if, in such case, the other party wishes to claim a deduction on account of such defects or omissions, the burden is upon him to allege and prove his damages: *Leeds v. Little*, 42 Minn. 414, 44 N. W. 303.

CHARLAND v. HOME FOR AGED WOMEN.

[204 Mass. 563, 91 N. E. 146.]

TAX SALE—Strict Compliance With Statute.—The power to sell property for nonpayment of taxes is strictissimi juris, and a failure to comply with the statutory requirements, even in minute particulars, is fatal. (p. 699.)

TAX DEED—Statements Prescribed by Statute.—A tax deed is void which does not contain the statements prescribed by the statute regulating the form of such deeds. (p. 699.)

TAX DEED—Statement of Cause of Sale.—A tax deed must state the cause of sale, by which is meant a statement of such facts as show that there was a legal cause of sale. (p. 700.)

TAX DEED—Statutory Form—Repetitions.—Where the form of tax deed authorized by statute ends with the statement that the grantor was a holder of taxes, the repetition of that statement at the beginning of the deed is of no consequence. (p. 701.)

TAX DEED—Stating Cause of Sale—"Duly."—In determining a tax deed sets forth a legal cause of sale with sufficient certainty, no reliance can be put on the use of the word "duly."

TAX DEED—Statement of Facts or Conclusions.—A tax deed states facts, not the collector's opinion as to facts. It must state facts, and not conclusions of law. (p. 700.)

TAX DEED—Forms Used in Practice.—In determining what is the proper form of tax deed, apart from the form allowed by statute, it is proper to consider what forms have been used in practice.

TAX DEED—Statement of Cause of Sale.—The statement of a cause of sale in a tax deed cannot be held insufficient because it is not stating in terms that the assessors issued their warrant to collect, where the tax deeds that have been used in practice, and as prescribed by statute, do not contain such statement. (p. 701.)

TAX DEED—Strict Compliance With Statute.—While the statutory requirements of a valid tax sale must be complied with in all particulars, the terms in which a tax deed must be drawn are not strictissimi juris, and it is not necessary to state the facts with the precision of a common-law dictum. (p. 701.)

TAX DEED.—In the Statement of the Cause of Sale in a tax deed, a reasonable certainty is sufficient. (p. 701.)

MORTGAGEE—Allowance for Extinguishing Tax Deed.—A mortgagee who sells under a power in a mortgage which contains a covenant that the premises are free from encumbrances may retain the proceeds of the sale a sum paid for extinguishing a valid tax deed. (p. 702.)

on for surplus remaining in the hands of the defendant mortgagee after a sale of real estate under a power contained in a mortgage given by the plaintiff to the defendant. The mortgage contained a covenant that the property was free from all encumbrances, and the mortgagee retained the surplus to reimburse itself the sum of one hundred and eighty-five dollars paid to clear its title by a tax deed. The tax deed (referred to in the opinion) is as follows:

"COMMONWEALTH OF MASSACHUSETTS.

All Persons to Whom These Presents may Come, I, Frederick W. White, Collector of Taxes for the City of Worcester, in the County of Worcester, and Commonwealth of Massachusetts, Send Greetings:

Whereas Maria L. S. de Vaudreuil, of Oxford, in said County of Worcester, and Commonwealth of Massachusetts, for and to the use of herself, her heirs and assigns, for and to the use of her estate, did on the first day of January one thousand nine hundred and one, was duly assessed as owner of the real estate hereinafter described, and the assessment thereon in the sum of forty-one (\$41) dollars and no cents, for the year one thousand nine hundred and one, for the purpose of paying the same, county and city taxes, and

Whereas, said assessment was duly committed to me for collection, and I served on said person in the manner required by law, a summons, and after ten days therefrom a

demand, for the payment of said assessment; and after fourteen days from the service of the demand, I published on the eleventh, eighteenth and twenty-fifth days of July, A. D. 1902, said last mentioned day being one week, at least, before the day appointed for the sale hereinafter specified, an advertisement in the Worcester Telegram, a newspaper published in said Worcester, and also on the sixteenth day of July, A. D. 1902, being three weeks at least, before the day appointed for said sale, I posted a copy of said advertisement in the city hall, a convenient and public place in said Worcester, said advertisement containing a description of the real estate assessed as aforesaid, sufficiently accurate for identification, and the name of the owner thereof, and a statement of said amount of said assessment, and that the smallest undivided part of said estate sufficient to discharge said amount, and the interest thereon, and the necessary intervening charges, or the whole of said parcels therefor, if no person should offer to take an undivided part, would be sold at public auction for the payment thereof, in the treasurer's office, in the city hall, in said Worcester, at ten o'clock in the forenoon, on the eighth day of August, A. D. 1902. and

"Whereas, said assessment, interest and charges remaining unpaid, at said time and place, and no person offering to take for the amount thereof an undivided part of the real estate so assessed, I sold at public auction for said amount. to the party hereinafter named as grantee, the whole of said real estate.

"Now, therefore, I hereby give, grant, bargain, sell and convey to Arthur C. Perry, of said Worcester, grantee, the whole of the real estate so assessed, the conveyance being made by virtue of the power vested in me by law, and in consideration of the sum of forty-six (\$46) dollars and ninety-four (\$.94) cents, the amount for which the sale was made, as aforesaid, to me paid by said grantee, the real estate so assessed being situated in said Worcester, and bounded and described as follows:

"No. 20,901. About eighty-three hundred eight (8,308) square feet of land, with buildings thereon, situated on the southerly side of Burns Court, between land now or late of Alfred Gledhill heirs and land now or late of Peter Duffy heirs.

"To have and to hold said real estate to the said grantee, his heirs and assigns, to their use and behoof forever, subject to the right of redemption by any person legally entitled to redeem the same; and

"I hereby covenant with said grantee, his heirs and assigns, that the sale aforesaid has in all particulars been conducted according to the provisions of law.

witness whereof, I hereunto set my hand and seal
 eighth day of August, A. D. 1902.

"FRED W. WHITE,

"Collector of Taxes for the City of Worcester.

"COMMONWEALTH OF MASSACHUSETTS.

Worcester,—ss.

On the twenty-seventh day of August, 1902, the said
 W. White personally known to me to be the person
 officer he above represents himself to be, signed said
 document and acknowledged the same to be his free act
 and deed.

"Before me,

"CHARLES H. BENCHLEY,

"Justice of the Peace."

J. McMahon, for the plaintiff.

J. Harris and W. H. Whiting, for the defendant.

LORING, J. The power to sell property for nonpay-
 ment of taxes is strictissimi juris, and a failure to comply
 with the statutory requirements, even in minute particulars,
 is fatal. See, for example, *Alexander v. Pitts*, 7 Cush. 503;
Stanton v. Moore, 136 Mass. 32; *Spring v. Cambridge*, 199
 Mass. 1, 85 N. E. 160. The tax deeds in question in the
 case of *Reed v. Crapo*, 127 Mass. 39, *Barnes v. Boardman*,
 106 Mass. 106, 21 N. E. 308, 3 L. R. A. 785, and *Downey*
v. Crapo, 178 Mass. 465, 59 N. E. 1015, were cases where
 the title was attacked for defects of this kind.

There was no defect of this kind in the case at bar. The
 deed was duly made and the statutory requirements were all
 complied with. If the title here in question is void, it is
 because although the sale was valid the deed is not in
 conformity with the statute.

At common law a deed under a power is valid if it con-
 vey the property and the power to execute it is proved.
 See, for example, *Harrington v. Worcester*, 6 Allen,

that the form of a tax deed in Massachusetts is a matter
 which has been regulated by statute for more than a cen-
 tury. *Stats. 1785, c. 70, sec. 7; Rev. Stats., c. 8, sec. 31; Gen.*
c. 12, sec. 35; Pub. Stats., c. 12, sec. 38; Stats. 1888,
sec. 43; Rev. Laws, c. 13, sec. 43. It has been estab-
 lished by law for a long time that a tax deed is void which
 does not contain the statements prescribed by the statute.

One of the facts which must be set forth in a tax deed is
 the cause of sale. It has always been—see *Statutes of 1785, chapter 70,*
sec. 7—a statement of "the cause of sale": *Rev. Laws,*
c. 13, sec. 43. It was held in *Harrington v. Worcester*, 6
 Allen 576, that by this is meant a statement of such facts

as show that there was a legal cause of sale. The plaintiff's contention is that the tax title here in question is bad, because (1) the deed does not state that the assessment for state, county and city taxes assessed upon Maria L. S. de Vaudreuil, as owner of the land conveyed by the deed, was assessed by the assessors of the city of Worcester, and because (2) it is not there stated ⁶⁶⁸ that this was included in the tax list committed by the assessors with their warrant to the collector in accordance with Revised Laws, chapter 12, section 67.

The deed is in the form authorized by Statutes of 1901, chapter 519. It is identical with that form with one exception, to wit: It begins with a statement that the grantor was collector of taxes for the city of Worcester. But the form authorized by Statutes of 1901, chapter 519, ends with a statement to that effect. The repetition of that statement at the beginning of the deed is of no consequence. Statutes of 1901, chapter 519, was repealed in terms by Revised Laws, chapter 227. The question of the validity of the deed here in question therefore depends upon its being a "suitable" one within the provision of Revised Laws, chapter 13, section 87, that "other suitable forms may also be used."

In determining whether this deed sets forth a legal cause of sale with sufficient accuracy, no reliance can be put on the use of the word "duly." The deed must state facts and not the collector's opinion as to facts, or (as it is usually put) a tax deed must state facts and not conclusions of law: *Bender v. Dungan*, 99 Mo. 126, 12 S. W. 795; *Moore v. Harris*, 91 Mo. 616, 4 S. W. 439; *Spurlock v. Allen*, 49 Mo. 178; *Duncan v. Gillette*, 37 Kan. 156, 14 Pac. 479; *Henderson v. White*, 69 Tex. 103, 5 S. W. 374; *Maddocks v. Stevens*, 89 Me. 336, 36 Atl. 398; *Cooley on Taxation*, 3d ed., 998, 999; *Blackwell on Tax Titles*, 5th ed., sec. 773. The tax deed in question in *O'Grady v. Barnhisel*, 23 Cal. 287, followed the words of the statute.

Again, in determining what is a suitable form (apart from a form allowed by statute) it is proper to consider what forms have been used in practice. The form most commonly used in Massachusetts is that set forth in the report in *Adams v. Mills*, 126 Mass. 278, to wit: "Whereas the assessors of taxes of ———, in the list of assessments for taxes which they committed to me to collect for the year ———, duly assessed ——— as owner of the real estate in said city, which is hereinafter described, the sum," etc. It appears from the report of *Pixley v. Pixley*, 164 Mass. 335, 41 N. E. 648, and from the original papers in *Lunenburg v. Heywood Chair Co.*, 118 Mass. 540, *Reed v. Crapo*, 127 Mass. 39, *Knowlton v. Moore*, 136 Mass. 32, and *Langdon v. Stewart*, 142 Mass. 576, 8 N. E. 605, that the deeds in

those cases were in the same form. The deed in *Harrington v. Worcester*, 6 Allen, 576, and the form authorized by Statutes of 1888, ⁵⁶⁹ chapter 390, section 96, form 14, and by Revised Laws, chapter 13, section 87, form 14, are not materially different.

The singular thing about these deeds and all the forms of tax deeds set forth in the statutes is that although the issuance by the assessors of their warrant to the collector is the foundation of a legal right to collect the taxes committed to him, and so is the foundation of a legal cause of sale, no form and no deed that has come to our attention states in terms that the assessors issued their warrant to the collector. (For the form of such a warrant see Statutes of 1785, chapter 50, section 6.) Under these circumstances it could not be held that the statement of a legal cause of sale in the deed here in question is insufficient, because it is not stated in terms that the assessors issued their warrant to collect this tax.

While the power of selling land for nonpayment of taxes is *strictissimi juris*, and for that reason the statutory requirements of a valid sale must be complied with in minute particulars, the terms in which a tax deed must be drawn are not *strictissimi juris*, and it is not necessary to state the facts which must be set out in a tax deed with the precision of a common-law indictment. No right of the owner is affected or secured by the statement in the tax deed of "the cause of sale" in the sense in which that is true of the requirement that "the residence of the grantee" from whom the owner has a right to redeem must be stated in the tax deed. In the statement of "the cause of sale" a reasonable certainty in our opinion is sufficient. And having in mind what must be taken to be a sufficient statement of the issuance by the assessors of their warrant to the collector, we are of opinion that the statement in this deed, omitting the word "duly," is a sufficient statement that the tax here in question was assessed by the assessors, and that they issued their warrant to the collector to collect the same. It is to be noted as to the latter fact that now a warrant may be issued by the assessors to collect taxes at any one of three different times, namely, within a reasonable time after the original assessments are completed (Rev. Laws, c. 12, sec. 67); after assessments which were omitted in the original list have been made (Rev. Laws, c. 12, sec. 85); and after reassessments (Rev. Laws, c. 12, sec. 86). If a warrant were issued under Revised Laws, chapter 12, sections 85 or 86, the statement in the form authorized by Statutes of 1888, chapter 390, ⁵⁷⁰ section 96, form 14, and by Revised Laws, chapter 13, section 87, form 14, is not strictly accurate.

The plaintiff's mortgage contained a covenant that the premises were free of encumbrances. The tax deed here in question was a valid one and was in existence at the date of that deed. The defendant has a right to retain the sum paid for extinguishing it: See, also, Rev. Laws, c. 134, sec. 19.

Judgment for the defendant.

A Tax Sale is not Valid Unless All Substantial Requirements of the statute are shown to have been strictly complied with: Brown v. Wright, 17 Vt. 97, 42 Am. Dec. 481; Scales v. Alvis, 12 Ala. 617, 46 Am. Dec. 269; De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352. In the absence of an enabling statute, it is said to be incumbent upon one who claims title to land derived from a sale thereof for taxes to prove affirmatively that every mandatory provision of the law under which the sale was effected was strictly complied with: Blakemore v. Cooper, 15 N. D. 5, 125 Am. St. Rep. 574. See, also, Ayers v. Lund, 49 Or. 303, 124 Am. St. Rep. 1046.

A Controller's Deed for Taxes will not be adjudged void when in the form sanctioned by long years of usage, during which many recoveries have been had in the courts: Bank of Utica v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189. And a substantial compliance with the form prescribed by statute for the execution of a tax deed is sufficient: Ham v. Booth, 72 Kan. 429, 83 Pac. 24. But the statutory form must be substantially pursued (Rector v. Maloney, 15 S. D. 271, 88 N. W. 575), and according to some authorities strictly followed: Pitkin v. Reival, 104 Mo. 505, 16 S. W. 244.

LYDON v. CAMPBELL.

[204 Mass. 580, 91 N. E. 151.]

MORTGAGE—Payment.—Where a Grantee, Who has Assumed a mortgage on the property, pays the mortgage debt in full, taking instead of a discharge, an assignment of the mortgage, running to his daughter, he recording the assignment and retaining possession thereof, and she paying nothing therefor, the note and mortgage are extinguished. (p. 704.)

WILL.—Parol Evidence is not Admissible to Show the Intention of a testator when he, on paying a mortgage which he had assumed as grantee, took an assignment of the mortgage, running to his daughters, and devised the land subject to the mortgage to his sons. (p. 704.)

WILL.—The Situation of a Testator When He Made His Will and thereafter, and the circumstances then existing and known to him, are material to be considered in interpreting his language, and may be shown in evidence. (p. 705.)

WILL.—Charging Mortgage upon Devised Land.—Where a man, in paying a mortgage debt, took an assignment of the mortgage, running to his daughters, and in his will devised the land to his sons expressly subject to the mortgage, the mortgage debt is a charge on the land in favor of the daughters, and by accepting the

the devisees subject themselves to the liability of having it set aside by proper proceedings against them. (p. 705.)

WILL.—When the Intent of the Testator is Clear, and is not repugnant with any rule of law, it is to be given full effect. (p. 705.)

WILL.—Charge on Devise.—A Charge of a Mortgage Debt imposed on a devise includes interest after his death at the rate stipulated in the note. (p. 706.)

by Caroline F. Lydon, wife of Michael J. Lydon, and Mary P. Campbell, the daughters of Patrick Campbell, deceased, against John L. Campbell and James H. Campbell, the latter being a son of the decedent and the brother of the plaintiffs. The bill alleged that the will of Patrick Campbell bequeathed to the plaintiffs and to the defendant H. Campbell two thousand five hundred dollars as contained in a certain note, with interest thereon, which note had been secured by a mortgage on the property devised by that will to the defendants. That the legacy claimed by the plaintiffs was by the will charged upon land therein devised to the defendants, subject to such charge, and devised in the will as "all that part and parcel of real estate and all appurtenances thereto belonging situated at the corner of A and Second streets in that part of Boston called South Boston and now numbered 88 and 90 on said Second street." That the defendant accepted the devise claimed title by virtue thereof. That the plaintiffs demanded payment from the defendants of their legacy, but the defendants refuse to pay it.

Fifth and sixth clauses of Patrick Campbell's will are as follows: "Fifth. I further give, devise and bequeath unto my loved daughters Mary Blanche Campbell and Caroline Campbell to have and to hold to them and their heirs as tenants in common all that part and parcel of real estate with the appurtenances thereto belonging situated on Dorchester Avenue and now numbered 574 and 576 on said Dorchester Avenue, in that part of Boston called South Boston, but subject to the mortgage thereon in their favor and said Mary shall pay unto said Caroline the sum of one thousand dollars and thereupon the said Mary and said Caroline shall join in discharging the aforesaid mortgage which mortgage is recorded with Suffolk Deeds liber 100 folio 49.

Sixth. I give, devise and bequeath to my two sons John and James to have and to hold to them and their heirs and assigns all that part and parcel of real estate and all appurtenances thereto belonging situated at the corner of A and Second streets in that part of Boston called South Boston and now numbered 88 and 90 on said Second street, subject nevertheless to the mortgage thereon, which mortgage and other charges and incumbrances affecting the

same at my death, my two sons aforesaid are to assume and to pay."

The property referred to in the last clause was purchased by the testator in 1875, subject to a mortgage for three thousand five hundred dollars, which he assumed and agreed to pay. In 1892 there remained unpaid on the mortgage two thousand five hundred dollars, which he then paid to one Richards, trustee, the assignee and holder of the mortgage, and took from him an assignment of the mortgage, the consideration of which was expressed to be two thousand five hundred dollars in favor of the plaintiffs and the defendant James H. Campbell, then minors. The assignment was recorded, but remained in Patrick Campbell's possession until his death in 1898. In a suit by Michael J. Lydon to foreclose the mortgage in 1906, it was decided, the case being reported in 198 Mass. 29, 84 N. E. 305, that the mortgage debt was extinguished, even if the assignment was made with intent to keep the mortgage alive, and the bill to foreclose was accordingly dismissed. The present case came on for hearing before Judge Dana, who reported it upon the pleadings and the agreed facts for the determination of the supreme court, such a decree to be entered as justice and equity required.

H. Parker and H. H. Fuller, for the plaintiffs.

J. F. Lynch, for the defendants.

⁵⁸⁴ SHELTON, J. It is settled that when Patrick Campbell paid the amount remaining due upon the mortgage which by the terms of the deed to him he had assumed and agreed to pay, that payment extinguished the mortgage. The assignment which he took from the holder of the mortgage and which ran to the plaintiffs, but for which they had paid nothing, took effect only as a release. His payment was a payment of his own debt, made his own by his agreement to assume and pay it. The note and mortgage both stood as if they had been given by himself, and they were extinguished by his payment: *Lydon v. Campbell*, 198 Mass. 29, 84 N. E. 305. But that circumstance is not decisive of the claim made in this action.

We do not consider the parol evidence which was offered to show the actual intention in the mind of Patrick Campbell when he procured the making of this assignment, and when in the sixth clause of his will he devised the land to his sons, the defendants, "subject nevertheless to the mortgage thereon, which mortgage . . . my two sons aforesaid are to assume and to pay." This evidence was not competent for the purpose for which it ⁵⁸⁵ was offered: *Warren v. Gregg*, 116 Mass. 304; *Farnham v. Barker*, 148

04, 19 N. E. 371; *Best v. Berry*, 189 Mass. 510, 109 Rep. 651, 75 N. E. 743. But the situation of the when he made his will and thereafter, and the circumstances then existing and known to him, are material considered in interpreting his language, and may be in evidence: *George v. George*, 186 Mass. 75, 71 N. E. 14; *Wilkner v. National Sailors' Home*, 155 Mass. 458, 29 545. He had paid the debt secured by this mortgage but he had procured it to be apparently kept alive assigned to the plaintiffs. On the face of the papers he had caused to be executed, and in appearance, not in reality, the note and mortgage were continued hence with an unpaid balance due upon them, and the plaintiffs as nominal assignees thereof. This the state of affairs as known to him when he made and continuously thereafter until his death. And as apparently no other mortgage upon this estate, it also must be taken to have been known to him. These circumstances he devised the land to the defendants, with the express statement in the devise that it was subject to the mortgage which they were to assume. It is impossible to read his language without being convinced that he intended to make the estate devised to the defendants subject to a charge of two thousand and no hundred dollars, the amount apparently due upon the mortgage, in favor of the plaintiffs, to be paid by the defendants: *Loring v. Sumner*, 23 Pick. 98; *Smith v. Allen*, 5 Allen, 194. His assumption of the debt had made it his own debt within the principle of *Lathrop, J., in Woods v. Gilson*, 178 Mass. 511, 60 N. E. 53. When the defendants accepted the devise, they subjected themselves to the liability of having it enforced in their proceedings against them. Whether they could be personally liable for the amount, we need not consider: *Nudd v. Powers*, 136 Mass. 273. As the intent of the testator is clear and is not inconsistent with any rule of law to be given full effect: *Bacon v. Gassett*, 13 Allen, 1; *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75; *Price*, 190 Mass. 317, 76 N. E. 1043.

There is nothing in the fifth clause of the will, construed in connection with the facts which it was agreed that the defendant John L. Campbell could show, and which were set out for ⁵⁸⁶ the reason already stated, which is at variance with our conclusion. On the contrary, that conclusion is strengthened by the fact that the testator dealt with his property and with a former mortgage upon that property, just as he did with that which is before us. It is probable that both of these dispositions were made by him to bring about what he deemed a proper distribution.

tion of his property among his children: *Sibley v. Maxwell*, 203 Mass. 94, 89 N. E. 232.

As the charge upon the estate is for the amount apparently due upon the note, it must include also interest upon that amount since the death of the testator, at the rate stipulated in the note. It is only since that time that the charge has been in existence. And as this is a charge upon the whole estate in the same manner and to the same extent as was the original mortgage, the plaintiffs are entitled to a decree ordering that the land shall be sold for their benefit, unless the defendants shall redeem it by paying the amount of the charge. The defendant John L. Campbell alone should be charged with costs, as the other defendant does not appear to have contested the claim of the plaintiffs.

Ordered accordingly.

Payment of a Debt Secured by Mortgage on real estate extinguishes the lien without any satisfaction of record or in writing: *Fried v. Yahr*, 126 Wis. 291, 110 Am. St. Rep. 924.

As to the Effect of a Devise of Land Subject to a Mortgage, see *French v. Vradenberg*, 105 Va. 16, 115 Am. St. Rep. 838, and cases cited in the cross-reference note thereto. The personal liability of devisees for charges imposed by the will is the subject of a note to *Steele v. Korn*, 129 Am. St. Rep. 1056.

MERRILL v. FISHER.

[204 Mass. 600, 91 N. E. 132.]

SALVORS.—A Ship is Derelict, in the Maritime Sense of That Word, when it is abandoned without hope of recovery or without intention of returning. The intention is the intention at the time the property is abandoned. If at that time it is such as to constitute an abandonment, and salvors have taken possession, an intention subsequently formed to return and resume charge is not material. (p. 708.)

SALVORS.—To Constitute a Vessel Derelict, It is Sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery. But a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment. (p. 708.)

SALVORS.—Derelict—Abandonment of Stolen Yacht—Where boys steal a yacht from her moorings, sail it about for several days, and then wholly abandon it in the face of an impending storm, she becomes a derelict. (p. 710.)

SALVORS.—Right to Possession and Compensation.—Salvors who board a derelict have exclusive possession and control and remunerated for salvage services. (p. 710.)

SALVORS—Right to Possession and Lien.—In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence. But in an ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary. So unless a vessel is derelict the salvors have not the right, as against the master, to the exclusive possession of it, even though he should have left it temporarily, but they are bound on his returning and claiming charge of the vessel to give it up to him. (p. 710.)

SALVORS—Jurisdiction to Enforce Lien.—The lien of salvors, although generally enforceable only in a court of admiralty, will be recognized in the courts of common law, and the right to possession arising therefrom will be there protected. (p. 710.)

Replevin for a sloop yacht called the "Pocahontas." The yacht belonged to Merrill, and was stolen from her moorings by two boys, who sailed her about for four days. At the end of that time they anchored at night in a cove in Vineyard Sound, because they had been warned that a storm was approaching. During the night the wind increased and the yacht dragged across the Sound to Gray's Beach, on the north shore of the island of Martha's Vineyard. Here the anchor caught, holding the yacht about sixty feet from the beach, and the boys went ashore in the yacht's tender.

The following is the defendant's answer:

"And now comes the defendant in the above-entitled cause, and for answer says that he did not take nor detain the goods of the plaintiff, to wit, one sloop, formerly called the 'Pocahontas,' unlawfully, and without justifiable cause, as is alleged in the plaintiff's writ.

"And the defendant further answering says that on or about the tenth day of November, 1907, George Rogers and Lewis Rogers, both of West Tisbury, in said county of Dukes, and Edward H. Luce, of said Tisbury, found the said sloop, formerly called the 'Pocahontas,' abandoned and in great peril on the high seas, to wit, in Vineyard Sound, and that they saved the said sloop and took her to a safe harbor and placed her and hauled her up safe from the peril of the seas, upon the ship ways of him the defendant, and made and appointed the defendant their agent and servant as keeper and custodian of said sloop. That the said George Rogers, Lewis Rogers and Edward H. Luce have, and had at the date of the plaintiff's writ, a lien upon said sloop as salvors as aforesaid, and that the defendant held, and was entitled to hold, said sloop as agent and keeper for said salvors under said lien at the time said writ was served."

On the evidence presented to him, and without any motion being made, the judge ordered a verdict for the plaintiff, and directed the jury to assess damages in his favor for the re-

tention of the yacht. The defendant excepted, and submitted to the judge a proposition "that on the following questions there was, as matter of law, evidence for the consideration of the jury under proper instructions from the court:

"1. Did a marine peril exist?

"2. Were services voluntarily rendered by the alleged salvors?

"3. Did such services, if so rendered, result in whole or in part in success?

"4. Did the alleged salvors obtain the right to exclusive possession of the yacht 'Pocahontas'?

"5. If such exclusive possession was obtained by the alleged salvors on their claim of salvor's lien, was their right to exclusive possession lost by their laches?"

The judge refused to submit any of these questions to the jury; and the defendant alleged exceptions.

J. A. O'Keefe, for the plaintiff.

G. F. Moulton, for the defendant.

⁶⁰² HAMMOND, J. Upon the undisputed facts the yacht was in maritime peril at the time she was boarded by the Rogers brothers and Luce, and their services were voluntary and successful. Hence it was a clear case of salvage service, and the salvors had a lien upon the yacht for reasonable compensation. Indeed, we do not understand the plaintiff to contend to the contrary.

Was the yacht derelict in the maritime sense of the word? Property is derelict within this sense "when it is abandoned without hope of recovery or without intention of returning": Ware, J., in *Elizabeth & Jane*, Fed. Cas. No. 4356, 1 Ware, 41; or, as stated by Scott, J., in *The Aquila*, 1 Rob. Adm. 37: "It is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery . . . a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment": See, also, *Cossman v. West*, 13 App. Cas. 160; *The King v. Two Casks of Tallow*, 3 Hagg. Adm. 294; *The Bee*, 1 Ware, 332, Fed. Cas. No. 1219; *Tyson v. Prior*, 1 Gall. 133, Fed. Cas. No. 14,319; *The Boston*, 1 Sum. 328, Fed. Cas. No. 1673; *The Emulous*, ⁶⁰³ 1 Sum. 207, Fed. Cas. No. 4480. The intention is the intention at the time the vessel is abandoned. If at that time it is such as to constitute an abandonment and salvors have taken possession, an intention subsequently formed to return and resume charge is not material: See the cases cited in 24 Am. & Eng. Ency. of Law, 2d ed., 1217, note 5.

Upon the question whether, when the thieves Croucher and McDonald left the yacht, they abandoned her without hope

no intention to return, or simply left her for the purpose of getting assistance to rescue her, the evidence is strong. It is unnecessary to repeat it in detail. The evidence in support of the contention that the yacht had not been wholly abandoned by the thieves came principally from McDonald; and his testimony, if believed, would sustain the contention of the plaintiff. On the contrary, George H. McDonald, one of the salvors, testified that when the thieves came to his house they said they were shipwrecked sailors and that they wanted "to get in and get dry"; that in reply to questions from him after they had been admitted they said they had left the yacht "on the rocks along the beach"; that they did not know where, but she was on the beach and the sea was breaking over her and they thought she was on the bottom. . . . They said they had left the beach full of water, as they supposed then, and she was bumping against the rocks." He further testified that he said to them, "Do you want to go back and look for the boat?" and that their reply was, "No, we have got all we want of it; we have got all we want of the boat. We have enough with her. We had a bad time last night and do not want to go back to her." He further testified that after McDonald had breakfast they "wanted to know how far it was to Vineyard Haven"; that he told them as well as he could and that in reply to a question from him as to whether they were going back to the boat they said, "No. They did not want anything more of the boat. All they wanted was to get out like to get a shotgun out of the sloop."

In addition to this direct testimony as to what the thieves had the intention with which they left the yacht there is evidence to be found in the undisputed facts tending to support the contention that they left with no hope and no intention to return. The wind was then blowing a gale from the north. Driven by the gale the yacht had drifted from Tarboro, Cape Cod, dragging her anchor miles across the sound, and was caught within about sixty feet of the lee shore, on the north side of Martha's Vineyard. McDonald testified that the anchor was first caught when about three hundred feet from the shore and held about an hour, after which the yacht swung around and struck a boulder and the anchor was caught again, and that then they went ashore in the yacht's boat. They had no lawful interest in the yacht. They sought assistance to save her, and had not much, if any, money to pay for repairs. They were upon an island among the most intelligent and likely to be curious about the boat and its occupants. The circumstances of the disaster might have attracted publicity, publicity to detection, and detection to punishment. Without alluding to other circumstances pointing in the same direction, it is sufficient to say that upon all

the evidence the jury properly might have found that the thieves had wholly abandoned the yacht, and that she was a derelict at the time the salvors boarded her.

If she was derelict, then the salvors had the right of exclusive possession. The law on this subject is well stated by Sir Barnes Peacock in giving the opinion of the privy council in *Cossman v. West*, 13 App. Cas. 160, as follows: "In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command, he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary. . . . So unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him." And in the cause then before him he said: "The vessel being a derelict, the salvors had the exclusive possession ^{and} control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services."

In the present case, therefore, there was evidence that the salvors were entitled to the exclusive possession until remunerated for their services. Indeed, this does not seem to have been disputed by the thieves, and perhaps not at first by the plaintiff, the lawful owner of the yacht. And the lien, although generally enforceable only in a court of admiralty, will be recognized in the courts of common law and the right of possession arising therefrom will be there protected: *Hartfort v. Jones*, 1 Ld. Raym. 393; *Baker v. Hoag*, 7 N. Y. 555. 59 Am. Dec. 431; *Studley v. Baker*, 2 Low. 205, Fed. Cas. No. 13,559.

The disagreement was simply as to the amount of the compensation to be paid to the salvors. After the thieves had left and the plaintiff had arrived upon the scene, it was agreed that the defendant, who at that time was in possession of the yacht as the agent of the salvors, should continue to keep the yacht. While there was some conflict in the evidence as to the precise terms of this arrangement made with the defendant by the consent of the salvors and the owner, there was evidence that he was to keep it until the claim of the salvors "was settled satisfactorily." Even if this must be construed to mean that it was to be kept for only such time

ld be reasonably required for the settlement, we do not hat it could be ruled as matter of law that as contended plaintiff the time had expired, and that at the time tion of replevin was brought the lien of the salvors en lost by laches, or by their failure to prosecute by roceedings. There had been some negotiations about imms, and the salvors had hoped to reach a settlement t recourse to legal proceedings; and under the some- peculiar circumstances we think that the question r there had been undue delay on their part was a n of fact for the jury.

llows that the orders directing a verdict for the plain- d that his damages be assessed were wrong.

ptions sustained.

Right to Salvage is the subject of a note to Forster v. Juniata Co., 55 Am. Dec. 508. A sunken vessel or cargo is subject ge, and the salvor has a lien upon it for compensation pro- e place where the rescue of it is effected is within admiralty ritime jurisdiction: Baker v. Hoag, 7 N. Y. 555, 59 Am.

Lien Given by the Maritime Law for Salvage may be recognized ected by a common-law court, in replevin by the owner of against the salvor, without proof of a request or promise Baker v. Hoag, 7 N. Y. 555, 59 Am. Dec. 431. For other ies discussing the jurisdiction of state courts to take cog- of cases involving maritime liens, see State v. Voorhies, 39 . 499, 4 Am. St. Rep. 274; Gindele v. Corrigan, 129 Ill. 582, St. Rep. 292; The Victorian, 24 Or. 121, 41 Am. St. Rep. 838; d Lumber Co. v. Eike, 113 Ala. 555, 59 Am. St. Rep. 147; Forge etc. Co. v. The Winnebago, 142 Mich. 84, 113 Am. 566.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

ROSEN v. ROSEN.

[159 Mich. 72, 123 N. W. 559.]

CONTRACT—Meaning of Words Used.—Where There is No Ambiguity in a contract and the writing speaks for itself, its language must be construed according to the usual and ordinary meaning of the words used. (p. 714.)

USURY—Illegal Interest in Disguise.—Every Written Agreement to pay interest in excess of the legal rate, however well the unlawful interest may be disguised, is a violation of law and usurious. (p. 715.)

USURY.—Where a Partner Purchases the Interest of his copartner under a contract that payments are to be made at specified times, "together with the sum of two thousand dollars for the use of said money during said period," the agreement is usurious and unenforceable, if such additional sum amounts to more than the legal interest on the principal for the period named. (p. 715.)

Maybury, Lucking, Emmons & Helfman and Walters & Walters, for the appellant.

Bernard B. Selling, for the appellee.

⁷² McALVAY, J. The parties to this suit and Myer S. Fink, who were copartners conducting a merchandise business under the firm name of A. D. Rosen & Co., desiring to dissolve the copartnership, and the defendant desiring to purchase the interests of plaintiff and Mr. Fink and the goodwill of the business, entered into a written agreement on November 16, 1905, which provided in detail the method by which the value of the assets and the amount of the liabilities should be ascertained, the running ⁷³ expenses of the business provided for, and the respective shares of the partners computed and determined. By this writing defendant agreed to purchase on January 1, 1906, the interests of the other partners and the goodwill of the business "at full face value as shown by the books of the firm of A. D. Rosen & Co. on that date as hereinbefore provided for without any deduction whatsoever." The contract, among other things, provided: That

each retiring partner should remain in the store and have access to the books until paid in full. The defendant who purchased was limited as to the amounts he could withdraw from the business, and was prohibited from discontinuing the business or encumbering the property. Accounts receivable and collections were to be assigned to Mr. Fink, out of which he was to pay the debts of the old firm, the salaries and expenses of the new business, and then the amount due him as his share. Mr. Fink was to draw a salary of \$250 per month to be charged as an expense of defendant's business from January 1, 1906, to May 1, 1906, the date when the payment for his interest was to be made, and until he was paid in full. Plaintiff was "to take charge of the office work of defendant and see the trade" of defendant from January 1, 1906, until he was paid in full, at a salary of \$125 per month, to be charged as an expense of defendant's business. This contract was a very long one, covering ten printed pages, containing twenty-seven numbered paragraphs with numerous subdivisions. It is drawn with great care, and counsel on both sides on the trial claimed there was no ambiguity in its terms.

No further statement of the terms of the contract need be made, for the purposes of this case, than to quote the paragraph over which this dispute arises. This is paragraph 11, and reads as follows:

"The said Louis Rosen is not to receive anything except his salary until Myer S. Fink has been paid in full in cash. The said Louis Rosen is to be paid one-half of the amount coming to him under this agreement on or before July 1, 1906, and the remaining one-half by December 31, 1906, together with the sum of \$2,000 for the use of said Louis Rosen's money during said period; but said Aaron D. Rosen shall have the option of paying said Louis Rosen less than one-half of said interest on July 1, 1906, in which case said Aaron D. Rosen shall pay \$4,000 on December 31, 1906, for the use of said Louis Rosen's capital."

Plaintiff's interest in this property, as duly ascertained under the terms of the contract, was agreed upon on the trial, and amounted to \$15,187, and also that defendant had paid plaintiff prior to July 1, 1906, \$5,555.88 and prior to December 31, 1906, a total of \$13,782.69, and on January 7, 1907, the sum of \$506.75.

Plaintiff, who testified that he was an equal partner, had some dispute with defendant relative to certain items, which he claimed had not been paid, and brought this suit to recover under this contract for such items, and for the sum of \$2,000 claimed by him under the terms of paragraph 11 of the contract. During the trial an adjustment was made of all matters in suit except the above claim for \$2,000. Defendant with his plea gave notice of payment

in full, and that the contract was usurious. The court refused to direct a verdict for defendant on the ground that the contract was usurious, and did direct a verdict for plaintiff for the sum of \$2,000, with interest. This is assigned as error by defendant, who, upon review by this court, asks a reversal of the judgment entered against him. There is but one question in the case: Was this contract usurious?

The facts in the case are not in dispute. These parties have reduced their agreement to writing, and it is admitted that there is no ambiguity in the paragraph under consideration. The writing then speaks for itself, and its language must be construed by the court according to the usual and ordinary meaning of the words used. Paragraph 11, after providing that plaintiff is not to receive anything except salary until Mr. Fink has been paid in full in cash, fixes the terms of payment "of the amount ⁷⁵ coming to him under this agreement," one-half on or before July 1, 1906, and the remaining one-half on or before December 31, 1906, "together with the sum of \$2,000 for the use of said Louis Rosen's money during said period." Defendant is then given "the option of paying said Louis Rosen less than one-half of said interest on July 1, 1906," in which case he "shall pay \$4,000 on December 31, 1906, for the use of said Louis Rosen's capital." This purchase was consummated January 1, 1906. After that date the business was conducted as defendant's business. The payments to plaintiff were to be made in six months and one year, together with \$2,000 "for the use" of his money during that period. We can conceive of no simpler or plainer statement which could possibly be made to indicate that this \$2,000 was to be in payment for the use of this money. These words selected with care may be said to be self-construing. Explanation and argument cannot add to, or take from, the clear meaning expressed.

The contention of plaintiff that agreements cannot be held usurious except in cases where the transaction is a loan of money or extension of pre-existing debt, while true under many statutes, does not apply in this state, for the reason that our statute (section 4857, 2 Compiled Laws) is broader, and includes any and all contracts and assurances. It reads:

"Sec. 2. No bond, bill, note, contract or assurance made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract

insurance, if it shall appear that a greater rate of interest has been directly or indirectly reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

The authorities in those states where the statutes like ours include all contracts and assurances are harmonious in holding that every written agreement to pay interest in excess of the legal rate, however well the unlawful interest may be disguised, is in violation of law and usurious: *Per v. Tappan*, 9 Wis. 361; *Compton's Exrs. v. Compton*, 5 La. Ann. 615; *Evans v. Negley*, 13 Serg. & R. 218. The contract provides without qualification that this \$2,000 is to be paid when the last payment was due for the use of the money during said period. This is the clause which fixes the usurious nature of the agreement.

It cannot be said, as claimed by plaintiff, that the contract fixed two prices, one for cash and the other for a time for the reasons:

1) That by the terms of the contract defendant agreed to pay the full face value, without any deductions whatever, in the manner provided in the contract, which contract included all the property of every kind, and the value of plaintiff was found to be \$15,187, no second or other price being mentioned or contemplated.

2) That the contract itself, as already stated, characterizes and designates that the \$2,000 was to be paid "for the use of the money."

Exactly this question has not previously been before this court. In a case somewhat similar (*Anderson v. Smith*, 10 Mich. 69, 65 N. W. 615, and same case, 103 Mich. 446, 10 N. W. 778), the court held that a stipulation to pay \$100 in the terms there given was usurious: See, also, *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Green v. Green*, 134 Mich. 462, 96 N. W. 583; *Stack v. Detour L. & Co.*, 151 Mich. 21, 114 N. W. 876, 16 L. R. A., N. S., 14 Ann. Cas. 112.

In our opinion defendant has shown such a defense that, as a matter of law, the court should have directed a verdict in its favor on the ground that the contract was usurious. The judgment of the circuit court is reversed and set aside, and as the only question is one of law, and a new trial would be of no purpose, a judgment will be entered in this case in favor of defendant, with costs of both courts.

For the plaintiff, *C. J., and Grant, Moore and Brooke, JJ.*, conceded.

As to What Contracts are Usurious, see the notes to *Bank of Newport v. McLean*, 46 Am. St. Rep. 178; *Sylvester v. Swan*, 81 Am. Dec. 736.

In determining this question, the substance and effect of the contract, not its form, are material: *Falls v. United States etc. B. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194; *Meroney v. Atlanta B. & L. Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841; *Home Building etc. Assn. v. McKay*, 217 Ill. 551, 108 Am. St. Rep. 263; *Ford v. Washington Nat. Bldg. Assn.*, 10 Idaho, 30, 109 Am. St. Rep. 192.

ORTON v. ORTON.

[159 Mich. 236, 123 N. W. 1103.]

DIVORCE—Refusal Because of Prior Divorces of Plaintiff.—

The application of a woman for a divorce will not be denied because she has previously been divorced twice and on the second occasion for her own fault. (p. 717.)

Lehman, Riggs & Lehman, for the complainant.

236 MONTGOMERY, J. This is a suit for divorce on the ground of extreme cruelty on the part of the defendant. The proofs were taken in open court, and the bill dismissed, the complainant refusing to accept a decree for a limited divorce. The circuit judge found the extreme cruelty established by the proof, a conclusion in which we fully concur. It appears that the complainant had been twice married before. Her first marriage was dissolved ²³⁷ by a decree of divorce upon a bill filed by her. The second marriage was dissolved on a bill filed by her husband. To that suit no defense was made, and a decree was entered granting an absolute divorce on August 19, 1907. Some four months later she married the defendant. The only question presented is whether, where a just cause for divorce is shown, the fact that the party applying for the divorce has been previously married and divorced, the former divorce having been on the ground of plaintiff's own fault, is to bar her from a divorce from the second marriage.

We assume that the first decree of divorce determined that she was not in fault and that her husband was. The second decree of divorce determined that she was in fault; but there were no restrictions placed upon her remarrying. Her status was fixed by that divorce as that of a single woman. We think it cannot be said that in a subsequent marriage she occupies a different relation than does any other married woman. It is true that the court might well scrutinize carefully her application for the purpose of determining whether a real ground of divorce has been made out. That, it appears, the circuit judge did to his own satisfaction, and became satisfied that she was entitled to relief, but seems to have proceeded upon the view that

she had been unfortunate in previous matrimonial ties, or had been guilty of fault herself in her second marriage, she has debarred herself from the remedies which are open to other people. We think, on the contrary, that a second divorce fixed her status, and she had the same right to marry as though she had never been previously married, and she is entitled to equal protection in that marital relation as though this were her first venture. If the facts were less clear, the fact that she had had these experiences might be taken into account in determining whether a second had been made out; but there seems to be no question that she has established a case entitling her to divorce as is to be treated as is any other married woman. The decree should be reversed, and the decree of divorce granted.

Mr. C. J., and Ostrander, Hooker, Moore, McAlvay and Mr. JJ., concurred.

Justice Grant Dissented. In his opinion, after setting forth the facts adopted, with express approval, the following opinion of the majority of the court: "I became convinced, from the consideration of these facts and circumstances, that the matrimonial and divorce career of the complainant was shocking, and abhorrent to public morals, and that any further appeal on her part to the conscience of a court of equity should be viewed with suspicion. As I was satisfied that complainant had made out a case entitling her to some relief, I offered to grant her a divorce from bed and board forever as provided in section 3 of the Compiled Laws. This relief was refused on the ground that it was not appropriate, nor the relief sought. Thereupon I announced that a divorce from the bonds of matrimony would be refused for the reason that the circumstances of the case were not such that it would be discreet and proper to grant it: 3 Comp. Laws, sec. 8623, amended in 1907 (Act No. 324, Pub. Acts 1907). My reason for refusal was that this woman, who appeared to be forty-five or fifty years of age, with prior matrimonial experience, did not present the case of an innocent woman being wronged in her marriage, but rather fault on her part. She took her husband for better or for ill, and any proper and adequate care and investigation on her part would have shown her that her latest matrimonial venture could not be a happy one. Divorce laws were not passed for such as she, but to grant her an absolute divorce would give too much encouragement to that modern suggestion known as trial marriage, and would tend to destroy the accepted theory of the permanency of the marital relation."

Justice Grant then called attention to the statutory provision that the courts have power to grant divorce "whenever, in the opinion of the court, the circumstances of the case shall be such that it will be discreet and proper so to do." Of this provision he said: "If the law means anything, it means, in my opinion, that the courts are clothed with power to use a discretion in granting or refusing divorce. It eliminates the rule of preponderance of evidence and vests the courts to examine the character of the parties, the

circumstances attending the marriage, the record of the parties in divorce suits, and authorizes the courts to refuse a decree in cases where it is apparent the complainant is an adventurer or adventurer in contracting the marriage relation. The record in this case shows the complainant to be such an adventuress. She has contracted marriage without any regard to its sacred relations or the solemn duties which that relation imposes upon the parties, and as lightly as she would make a contract involving property of little value. Divorced from one husband on her complaint, divorced from her second husband on his complaint charging infidelity to her marriage vows, divorced in August, married in December to a man after slight acquaintance, and applying for divorce in January—such is her record. Her present husband, from whom she now seeks divorce, appears to have been a worthless fellow addicted to intoxication. If she did not know this, an inquiry by her would have disclosed the fact; and as the circuit judge said, 'would have shown her that her last matrimonial venture could not be a happy one.'"

The Principal Case is the only one, on the question involved, that has been called to our attention. That the view of the law taken in the majority and prevailing opinion is sound, we have no doubt. The theory put forth in the dissenting opinion that a woman may be denied a divorce from her third husband simply because she displayed poor judgment in marrying him, and because through her fault she had been divorced from her second husband, is so destitute of logic and justice that we are at a loss to understand how it could have found lodgment in the judicial mind.

FORBES v. GORMAN.

[159 Mich. 291, 123 N. W. 1089.]

LESSEE—Right to Place Advertising Signs on Walls.—The lease of a building, or of one story thereof, conveys to the lessee the absolute dominion over the leased premises, including the outer as well as the inner walls. Hence he can put any advertising sign thereon which does no injury to the freehold, and the landlord retains no right to permit the signs or advertisements of other persons to be there placed. (pp. 720, 721.)

LESSEE—Assignment of Right to Place Signs on Walls.—A privilege given the lessee, in a lease of the basement and first floor of a building for business purposes, to maintain signs on the top of the building if they do not interfere with the rights of other tenants in the building, is personal to the lessee to advertise his business, and cannot be conferred by him on another for the purpose of advertising a different business. (p. 720.)

Codd & Hall and Earl F. Drake, for the complainant.

Navin, Sheahan & Bourke, for the appellant.

202 GRANT, J. The bill in this case alleges that complainant was the owner of a building in Detroit, known as the

r Building," situated at the corner of Lafayette and an avenues; that on June 30, 1902, she leased to one Higer the first floor and basement of said building for five years, "to be occupied for the sale of clothing, gents' wearing goods, hats, caps, boots, and shoes, and such as are usually handled and sold in said lines of business; that said lease contained the following provisions: 'That said second party covenants that he will not assign or sublet this lease, or sublet said premises, or any part thereof, for any business more hazardous or reasonably objectionable than that hereinbefore mentioned, without the written consent of the first party. . . .

It is agreed between the parties hereto that said second party shall be privileged to place and maintain an electric or other sign or signs on the outside of said building, over the premises occupied by them, and on the top of said building, during the existence of this lease, and any renewal thereof, provided, however, that said ²⁹³ sign or signs shall not be so placed as to interfere with other tenants in said building, in the use and occupation thereof leased to them." That said Higer assigned said lease to the defendant on March 6, 1905; that said Gorman, at some date prior to the complainant, made a contract with the defendant Walker & Co., a corporation, purporting to convey to Walker & Co. the right to place upon the top of said building a conspicuous electric sign of "Wilson Whisky"; that said Gorman assumed to rent space upon the roof of the building for that purpose, and received pay therefor; that defendant Gorman refused to inform complainant of the terms of said contract or the amount of compensation he received from Walker & Co.; that said lease to said Higer contemplated and permitted him, or his assigns, to place upon the top of said building a sign in connection with the business of said Higer, or his assigns, but for no other purpose. The complainant filed this bill to obtain an accounting of the amounts paid or due under the alleged and suppressed contract between the defendants, claiming that the said amounts were due to her. Defendant Gorman answered, admitting the material allegations of the bill except as to the compensation placed upon the lease by the complainant, and refused to produce upon the hearing his contract with the defendant Walker & Co. He further alleges that the sign was placed upon the building with the consent of complainant's agent. The case was heard upon pleadings and proofs taken in open court, and a decree entered for the complainant.

It was agreed by counsel for both parties that the "privilege" mentioned in the lease to Higer was a mere license. Counsel for the defendants, in opening their case to the court, stated their position to be that the privilege granted to

erect a sign or signs "was not a part of the lease or subletting or anything else, but that its erection was sanctioned by Mrs. 294 Forbes through her agent, and that she is therefore estopped to complain." Walker & Co. is a corporation organized for carrying on an advertising agency. The sign has no connection with the defendant Gorman's business. The contract between the defendants recited that the defendant Gorman was the lessee of the main floor and roof of the building. It was executed with all the formalities of a lease, and was to continue two years, with the privilege of a third year, at a rental of four hundred and fifty dollars per annum.

The first and decisive question presented is, What is the nature of the privilege or license granted by the lease? If defendant's contention be sustained, the lessee acquired the entire use and control of the roof of this building, provided only that he should not interfere with the occupancy of the tenants of the floors above the basement and first story leased by him, and he could sell and convey the right of advertisement to other parties, and thus cover the entire roof with signs. We think the only construction that can be placed upon this provision of the lease is that the right to maintain such a sign or signs was a personal privilege granted to the lessee, or his assignee, to advertise the business to be carried on by the tenant. It was a privilege incidental to his business. The very language of the lease refutes the idea that the landlord was leasing the roof of this building to the lessee for the purpose of profit aside from that which might result from advertising his own business. The lessee was given no dominion over the roof; was under no obligation to keep it in repair. He simply secured the privilege of putting a sign on it. The lease of a building, or of one floor or story thereof, conveys to the lessee the absolute dominion over the premises leased, including the outer as well as the inner walls. Such lessee obtains the right, in the absence of restrictions, to use such premises, including the walls, for all purposes not inconsistent with the lease. He acquires the right to the use of the outer walls, and can put any sign or signs thereon which work no injury to the freehold. The landlord in such a lease retains no ²⁹⁵ right to permit signs or advertisements of other parties to be placed upon the outside walls of the leased building. Otherwise, he might permit the sign of a competitor in business to be placed upon the wall. Such use would be repugnant to the plain terms of the lease: *Lowell v. Strahan*, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401. It was there held that the outer wall was a part of the premises leased. A similar case is *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388. It is there said: "The outside wall of a building leased or conveyed passes by the lease or deed

as much as the inside of the same wall. . . . The outer side of the wall is but one side of the same wall that has an inner side; and the removal of the wall removes both sides. If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it, not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with the lawful and reasonable enjoyment of the property."

There is another class of cases wherein the owner of buildings or lands, by express contract, rents to the contractee the use of fences, or the outside walls of buildings, for the express purpose of advertising. Such cases are *R. J. Gunning Co. v. Cusack*, 50 Ill. App. 290; *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758, 4 N. E. 356. These and similar cases do not touch the question in the case now before us, a question which counsel concede has not before been presented to this court. Neither is any case cited from other courts "on all-fours" with this: See, also, 14 Cyc. 1206; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124. It seems to us unreasonable to construe this lease as conveying to the lessee of the lower story the sole use of the roof of the building for his own profit. The use of the roof for any purpose was not essential to the full enjoyment of his lease. He was only permitted, if he chose to exercise it, the privilege of putting up a sign, or signs, in connection with his own business.

²⁹⁶ No question arises upon the right to put signs, for any purpose, on the outside or inside walls of that part of the building leased to the defendant. No reference is made to such use of the walls in the lease. That right, as above stated, follows from the grant, conveyed by the lease. It in no manner affects the separate and distinct privilege to place a sign or signs upon the roof, which is not leased to the lessee of the basement and first floor.

There is no room in this case for the application of the doctrine of estoppel, even if such right could be obtained by parol. Neither the complainant nor her agent had any knowledge of the intention to erect this sign until it was in process of erection. Her agent, in passing the building, discovered what was being done. He at once applied to complainant's attorney for the construction of the lease, and was informed that defendant Gorman had no right to erect or permit the erection of the sign. Defendant Gorman was so informed. He did not inform complainant of his intention, or of his contract with the defendant Walker & Co., but acted in opposition to her rights under the lease. And when her agent accidentally discovered the sign in process of erection,

Gorman did not inform him that he claimed the right, under his lease, to permit the erection of this sign, or that he was to receive any compensation from Walker & Co. for it. He is not in position, therefore, to raise the question of estoppel. The decree is affirmed, with costs.

Blair, C. J., and Ostrander, Hooker, Moore and McAlvay, JJ., concurred.

The Lease of a Store in a Building Gives the Lessee the Right to use the outer walls of that portion of the tenement, including the store, for the purpose of posting bills and notices: Riddle v. Littlefield, 53 N. H. 503, 16 Am. Rep. 388.

A Lessee's Agreement to Allow a Third Person to Place Signs upon the outside wall of the leased building, for a certain time, in consideration of an annual payment, creates a license merely, and is therefore not a breach of a covenant not to underlet any part of the premises: Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422.

PEOPLE v. POOLE.

[159 Mich. 350, 123 N. W. 1093.]

HOMICIDE—Instruction Inflaming Jury.—An instruction in a homicide case in the following language is objectionable as tending to inflame the minds of the jury: "This awful deed was committed in the broad light of day in the open streets of the city of Ypsilanti, in bold and wicked defiance of all human and divine law. . . . So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible or brutal death can scarcely be conceived. It shocked the senses of the entire community. There remains but little that you or I can do. We cannot restore life to this stricken woman; but we may do our share toward the guarding and protecting of human life hereafter." (pp. 724, 725.)

MANSLAUGHTER—Instruction on Irresistible Impulse.—An instruction improperly defines the condition of mind that reduces a homicide to manslaughter which states: "If from the evidence in this case you find that he was in a state of such excitement that his reason was dethroned, that he was driven along by an uncontrollable and irresistible impulse so that he was no longer morally or legally accountable for his conduct, so that he did not realize his crime or what he was doing or where he was, and had gone some distance from this scene before he was able to recover himself and his senses." (pp. 724, 725.)

MANSLAUGHTER—Reason Disturbed by Passion.—In order to reduce a homicide to manslaughter, the reason need not be entirely dethroned or overpowered by passion, so as to destroy intelligent volition. But reason should, at the time of the act, be disturbed or obstructed by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation, and from passion rather than judgment. (p. 725.)

WITNESS.—A Defendant Who has Testified in His Own Be-
havior in a homicide case may be cross-examined as to discrepancies
in his testimony and his prior statements at the time of arraign-
ment. (725.)

Sawyer, Jr., for the appellant.

E. Bird, attorney general, George S. Law and Charles
Gill, assistant attorneys general, and Carl Storm,
acting attorney, for the people.

ROOKE, J. Respondent was convicted of murder in
the second degree. He was, at the time of the commission of
the crime for which he was prosecuted, a man thirty-three years
old, had been married twelve years, and lived with his
wife and seven children in the city of Ypsilanti. The eldest
child (born out of wedlock) was fourteen years old. The
other two were twins about one year old. On the evening of
August 8, 1909, respondent went home from work at the
time. His wife was present and prepared the even-
ing meal. She, however, did not eat it with the family,
but remained in the house, going to a house about three blocks dis-
tance, where one Henry Martin was living. At about 9
o'clock in the evening, respondent's wife not having re-
turned, he went out to look for her. Not finding her at the
house of an immediate neighbor, he went to the house of
Mrs. Hamilton, who was a second cousin of his own, and
asked her to Henry Martin. Respondent did not find his
wife at the Hamilton home, so returned to his own home,
where he tracked his wife, in the new fallen snow, to
the house of Henry Martin's house. He knocked, but got no
answer, and, after waiting around for a short time, again
returned to his own home. At about 5 o'clock the next
morning he again visited Mrs. Hamilton and told her his
wife had stayed away all night. Mrs. Hamilton thereupon
advised him that an undue intimacy existed between ³⁵² his
wife and Henry Martin, and that his wife had told her that
she intended to marry her, and that she would go away
with him and take the twins. Respondent then returned to
his own home, gained admission, but did not find his wife.
Passing through the house, however, he opened the
door, and there saw fresh tracks in the snow. Follow-
ing the tracks for about four blocks, he overtook his wife, and,
talking with her a short distance and holding a brief
conversation with her, he drew a razor and instantly killed
her by cutting her throat. Respondent admitted the homici-
de, but claimed that the sole question for the determination of the
degree was whether respondent was guilty of murder in the
second degree, murder in the second degree, or manslaughter.
There are sixty-seven assignments of error. We will con-
sider first, those relating to the charge of the court. After

properly defining the various crimes of any one of which the respondent might be convicted, the learned circuit judge proceeded as follows:

"The crime which you are now considering was not committed in secret or in the dark. This awful deed was committed in the broad light of day, in the open streets of the city of Ypsilanti, in bold and wicked defiance of all human and divine law. You have heard the story of this crime from the lips of the prisoner and from others who were eye-witnesses thereto. You have been told what occurred at the time and the statements of the prisoner at the time. It is for you to bear in your minds and memory all of these facts and circumstances. So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible or brutal death can scarcely be conceived. It shocked the senses of the entire community. There remains but little that you or I can do. We cannot restore life to this stricken woman; but we may do our share toward the guarding and the protecting of human life hereafter.

"It appears without dispute that this prisoner, on the discovery of his wife, that she had left the Martin residence, followed her tracks along the streets of Ypsilanti for several blocks, and he finally overtook her, walked ³⁵³ with her some distance, and after some altercation drew his razor from his pocket and sent her instantly into eternity. He is here now pleading for mercy. If from the evidence in this case you find that he was in a state of such excitement that his reason was dethroned, that he was driven along by an uncontrollable and irresistible impulse so that he was no longer morally or legally accountable for his conduct, so that he did not realize his crime or what he was doing or where he was, and had gone some distance from this scene before he was able to recover himself and his senses, then, under such circumstances, the defendant in this case is guilty of no higher crime than manslaughter; but, gentlemen of the jury, if under the evidence in this case, you find that when this prisoner committed this deed there was anger, hatred, and malice in his heart, that he wickedly and willfully applied this weapon of death to the throat of his wife intending to take her life, and that he did it deliberately, knowing just what he was doing, and doing it because he wished to do it, then the defendant is guilty of murder.

"Now, gentlemen, under the evidence in this case, if you find the prisoner guilty, you can find him guilty of murder in the first degree, or murder in the second degree, or guilty of manslaughter, and it will be your duty, if you find him guilty, to find in your verdict the crime of which you find him guilty. In your deliberations there will be, I am sure.

ation or false sentimentality. To your sober and judgment are committed the rights of the people of e, as well as the rights of the defendant."

urged on behalf of respondent that the portion of ge above quoted is erroneous: (1) In that it tended e the minds of the jury; and (2) that it improperly a condition of mind which would render respondent f manslaughter only. With reference to the first is sufficient to say that we think the charge is open objection urged. Touching the second, it is clear t portion of the charge of the court, above quoted, a he defines a condition of mind at the time of the e which would justify the jury in bringing in a ver- manslaughter only, is entirely at variance with his nstruction to the jury ³⁵⁴ upon that point, as well ary to the decisions of this court.

case of *Maher v. People*, 10 Mich. 212, 81 Am. Dec. ase as to the facts much resembling the case at bar, rt declared the law on the subject under considera- ollows: "It will not do to hold that reason should be dethroned, or overpowered by passion, so as to de- telligent volition. (Citing cases.) Such a degree of disturbance would be equivalent to utter insanity, the result of adequate provocation, would render the tor morally innocent. . . . The principle involved uestion, and which we think clearly deducible from rity of well-considered cases, would seem to suggest, ue general rule, that reason should, at the time of the disturbed or obscured by passion to an extent which render ordinary men, of fair average disposition, act rashly or without due deliberation or reflection, n passion, rather than judgment." r as we have been able to learn, this rule has never parted from in this state.

record shows that, when arraigned, respondent ad- the homicide, and asked the court to determine what ad been committed. The testimony of respondent eupon taken, and the court then directed that a jury e to determine what crime had been committed, if any. e trial respondent was again sworn in his own behalf. e course of his direct examination he detailed the tion held with his wife, immediately preceding the e. On cross-examination the prosecutor was per- over objection, to go into his testimony upon the same given before the court at the earlier hearing. Re- t assigns error upon this ruling of the court. We hink the objection well taken. Having testified (at e before the jury) as to what was said by himself and immediately before the homicide, it was competent

for the prosecutor to show that he had given a different version ³⁵⁵ of the conversation under oath upon his first examination.

The other assignments of error have been considered, but need no discussion.

Because of the errors pointed out, the judgment is reversed, and a new trial ordered.

Blair, C. J., and Ostrander, Hooker and Moore, JJ., concurred.

**THE CONDITION OF MIND OF THE SLAYER WHICH REDUCES
MURDER TO MANSLAUGHTER.**

- I. Efforts of Early Lawmakers, 726.
- II. Definitions, 727.
- III. Distinctions, 727.
- IV. Classifications, 728.
- V. Elimination for Purpose of Discussion, 728.
- VI. The Absence of Malice, 728.
- VII. Blood-hot Passion, 730.
- VIII. Provocation, 732.
- IX. Time for Cooling, 733.

I. Efforts of Early Lawmakers.

The study of mental condition in relation to crime forms one of the most serious parts of the curriculum of the criminologist, and has for ages called the attention of jurists, with a view to marking sharply the dividing line between murder and manslaughter. From the earliest records—the Mosaic law—the law of retaliation, in addition to the injunction in the Decalogue, demanded a life for a life, with only little regard for the finer distinctions which result from the variety of mental attitude of the one committing the homicide. So far as English law is of use in enabling the inquirer to trace the history of the present distinction, we know that even in the time of Canute statutes were promulgated prohibiting under heavy penalty the crime of murder. In those days the open, willful killing of a man through anger or malice was not called murder, but voluntary homicide—the term “murder” being limited to the secret killing of another, as its etymological signification explains. It is derived from the word “moerda,” which signifies secret killing in the Teutonic language. With some slight modifications this continued to be the law in England until the statute of 23 Henry VIII, chapter 1, section 3, took away the benefit of clergy, and the distinction between “willful murder, of malice prepensed” and manslaughter, or as it was sometimes called chance medley, became more marked, the latter term being used to designate all other felonious homicides. From that time on the distinction assumed definite shape, and when the felonious killing was of “malice prepensed” or “malice aforethought,” the crime was murder, and when the mere felonious killing without those words was used, the offense was manslaughter. These terms have suffered multitudinous interpretations until they are in these days narrowed down to the one main distinction between the two offenses. But that very distinction has to be carefully

d, for, what is malice? In the courts it is a mixed question of law and fact, and it is always the inference to be drawn from the circumstances of what was in the prisoner's mind at the time of committing the offense. Hundreds of years have passed since words were first used to mark the line between the two offenses; and the line has been continued, because we must assume no better ones have been found to supplant them; in that number of years there have been cases each year which have not yet resulted in providing a new setting of words making these old terms more plain or more precise. They and the cases all refer to the mental condition which exists at the time either by proof or by presumption. That mental condition which divides the one offense from the other is the subject matter of the law, and to note, albeit where it ends in murder and begins in manslaughter, is by no means an easy task to delineate.

II. Definitions.

In order that our inquiry may proceed in an orderly fashion, let us consider the modern definitions of the terms, for it is with them we have to deal. From a multitude of definitions we select that which best serves each offense which will best serve as the foundation for our inquiry. Murder is the killing of a reasonable being with malice aforethought, express or implied—that is, with a deliberate intention and a premeditated design; and the law presumes all homicide to be committed with malice aforethought, amounting to murder, until the contrary appears from circumstances of alleviation, excuse or justification. *Clark v. State*, 117 Ala. 1, 67 Am. St. Rep. 157, 23 South. 671; *State v. Zellers*, 7 N. J. L. 220; *Whiteford v. Commonwealth*, 18 Am. Dec. 721, 18 Am. Dec. 771.

Manslaughter is the unlawful killing of a human being, without malice aforethought, express or implied: *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264; *Clarke v. State*, 117 Ala. 1, 67 Am. St. Rep. 157, 23 South. 671; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *State v. Zellers*, 65 S. C. 207, 95 Am. St. Rep. 795, 43 S. E. 656; *United States v. King*, 34 Fed. 302.

III. Distinctions.

A comparison of these definitions will give us that the difference between the crimes is, that one is committed with and the other without malice aforethought, express or implied. The distinction is well stated in the authorities. "Manslaughter is principally distinguished from murder in this: that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet it is committed without malice, either express or implied, which is the very essence of murder; and, as the law is presumed to be wanting; and, the act being imputed to the frailty of human nature, the correction ordained for it is proportionately lenient." The above was well quoted in the opinion in *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, in which Chief Justice C. J., used with effect other quotations from the same work: *Pleas of the Crown*.

State v. Harrigan, 9 Houst. 369, 31 Atl. 1052, the charge of murder was given to the jury deals with the double subject of murder and manslaughter, and his remarks on the latter subject call for reproduction. Manslaughter is the lowest grade of felonious homicide, and

differs from murder in this: that voluntary manslaughter arises from the sudden heat of the passions, and is the unlawful killing of another without malice, either express or implied. It may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act. Generally, it is the result of an actual combat; but the law, in recognition of human weakness and infirmity of temper, makes some allowance for a sudden gust of passion or transport of rage, caused by an actual assault, or a blow, or other great personal indignity. The act of killing, under such circumstances, is considered to have been done on adequate or sufficient provocation and will be manslaughter only."

IV. Classifications.

We now see that manslaughter is capable of division into two main classes or degrees. The first of these is the killing of one by the act, procurement or commission of another when committed without a design to effect death: (a) by a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another: *People v. Webster*, 68 Hun, 11, 22 N. Y. Supp. 634; or (b) in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon. Included in subdivision (a) would be the killing of an unborn quick child or of a woman, pregnant or not, in the course of any effort to procure her miscarriage. Manslaughter in the second degree is divided into three subclasses when committed without a design to effect death: (a) by a person committing or attempting to commit a trespass or other invasion of a private right, either of the person killed, or of another, not amounting to a crime; (b) in the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; (c) by any act, procurement or culpable negligence of any person which could not be placed in the category of murder or manslaughter in the first degree: *People v. Welch*, 68 Hun, 11, 26 N. Y. Supp. 694.

V. Elimination for Purpose of Discussion.

For the purposes of this note we select the subdivision (b) from each of the degrees of manslaughter and propose to consider the condition of mind which reduces murder to manslaughter where one person has killed another in the heat of passion, irrespective of whether the slaying was done with or without a dangerous weapon, and whether or not by means either cruel or unusual. The subject of unintentional homicide in the commission of an unlawful act is discussed in the note to *Johnson v. State*, 90 Am. St. Rep. 571, and of homicide by inattention or neglect of duty in the note to *Westrup v. Commonwealth*, 124 Am. St. Rep. 322. A word in passing as to the terminology. It has suggested itself to us that homicide by inattention or neglect of duty or culpable neglect would much preferably be classed under homicide by criminal neglect than remain, as it is, a branch of manslaughter of so little kin to the main subject as to be apt to confuse by its inclusion.

VI. The Absence of Malice.

We need no further authorities for the proposition that the absence of malice is the disjunctive between murder and manslaughter; and

without exception and carried to the length that on a trial for murder, if malice is shown, there can be no conviction for manslaughter: *Jackson v. State*, 74 Ala. 26. In every case, however, of intentional homicide malice is implied; that is to say, when once it is established that a person has been intentionally killed, the law presumes that malice existed in him who caused the death, and on him rests the necessity of showing circumstances of excuse or palliation to rebut the implication, because the law properly presumes that a person intends to produce the results which are the usual consequences of such acts as he has performed: *United States v. Outerbridge*, 5 Saw. 620, Fed. Cas. No. 15,978. It was said by the supreme court of Texas that malice aforethought when attempted to be proved has been given a more comprehensive meaning than the old law of ill-will or revenge, and has been extended so as to include all the states of the mind under which the killing of a person takes place without any cause, which will in law justify, excuse, or mitigate the homicide: *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 101. We may here dismiss from consideration express malice, for the law presumes that it is rarely, if ever, proven on the trial of a cause. The sentence lies in the heart of the slayer and he alone knows its contents: *United States v. Meagher*, 37 Fed. 875. The rule as to implied malice is thoughtfully rendered by the learned judge Lacombe in *United States v. King*, 34 Fed. 302, as follows: "Malice is to be inferred from all the facts in the case. If malice is found, it must be taken as an inference from everything that is proved, taken together and considered as a whole. Every fact, no matter how small; every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time as they consider the use of the deadly weapon; and it is only as a conclusion from all those facts and circumstances that malice, if it exists at all, is to be inferred. . . . If there is no malice, and the homicide is not excusable, then it must be manslaughter." This rule, taken in connection with the modern definitions of manslaughter, seems to result in this, that the word "malice" is used in a very widely wide sense to cover anger, hatred, revenge and every unlawful and unjustifiable motive. It is a thing done with an evil intent, where the fact has been attended with such circumstances as show in them the plain indication of a heart regardless of social duty and fatally bent on evil: *Commonwealth v. York*, 9 Met. 93, 23 Am. Dec. 373; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 101. The principle need not be elaborated upon nor the authorities multiplied. In a late case, *Harris v. State*, 2 Ga. App. 487, 58 S. E. 2d 101, Mr. Justice Russell says: "Murder, you will note, is the unlawful killing with malice. Manslaughter is the unlawful killing without malice. In both cases the killing is unlawful and intentional. The distinguishing intent to kill is the distinctive element that differentiates murder from manslaughter. In all cases of voluntary manslaughter there must be some actual assault upon the person killed, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstance to justify the killing on the ground of passion, and to exclude all idea of deliberation or premeditation, either express or implied." This admirably sums up the points to make and mark the distinction that it is the absence of malice, rather than the proof of the absence of malice, which invests the homicide with consequences so much less grave than if it were

charged as murder: *Harrison v. State*, 144 Ala. 20, 40 South. 563; *Bluitt v. State*, 161 Ala. 14, 49 South. 854; *People v. Williams*, 75 Cal. 306, 17 Pac. 211; *Dennison v. State*, 13 Ind. 510; *State v. Spangler*, 40 Iowa, 365; *Watkins v. Commonwealth*, 123 Ky. 817, 97 S. W. 740; *Ewing v. Commonwealth*, 129 Ky. 214, 111 S. W. 352; *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Smith v. State*, 58 Miss. 867; *Reed v. State*, 75 Neb. 509, 106 N. W. 649; *Commonwealth v. Curcio*, 216 Pa. 380, 65 Atl. 792; *Commonwealth v. Paese*, 220 Pa. 371, 123 Am. St. Rep. 699, 69 Atl. 891, 17 L. R. A. N. S., 795, 13 Ann. Cas. 1081; *Scott v. State*, 49 Tex. Cr. 386, 93 S. W. 112; *Pratt v. State*, 50 Tex. Cr. 227, 96 S. W. 8.

VII. Blood-hot Passion.

The recognition of the various propositions we have endeavored to state, as succinctly as is due to the vastness of an important subject, prepares the way for the consideration of an equally important factor in the branch of homicide under review. The circumstances about the killing of another without malice with regard to the mental condition of the slayer are to regulate the measure of punishment which the state calls for in exchange for the life lost—whether the life was taken in the heat of passion—of uncontrollable emotion—whether a sufficient interval had elapsed after the real or supposed provocation to allow the regaining of equanimity—the cooling time as it has now come to be called—these must be passed for analysis commensurate with the force of their bearing on the result not only to the slayer but to society in general. By “heat of passion” is not meant passion or anger which comes from an old grudge or grievance, or no immediate cause of provocation, but it means passion or anger suddenly aroused at the time by some immediate reasonable provocation by words or acts of deceased at the time: *State v. Seaton*, 105 Mo. 198, 17 S. W. 169; *State v. Baldwin* (N. C.), 68 S. E. 148; at common law a heat of passion meant a heated state of the blood caused by a lawful provocation. The passion or excitement of the mind which mitigates a homicidal act is divided by the courts into two phases. One reduces the act to murder in the second degree and the other reduces it to manslaughter. The two phases referred to are the passion which is produced by a just provocation and that which is produced by a lawful provocation. Now, what is the difference? Opprobrious epithets, and insulting gestures have been held just provocation and where the passion or excitement of mind produced thereby materially interferes with the reason and judgment, an act done under such influence cannot be called deliberate nor committed in cold blood. This in Missouri reduces the homicide to murder in the second degree. “Lawful” as applied to provocation is synonymous with legal, adequate and reasonable, and as a general rule, with very few exceptions, it takes an assault or personal violence to constitute this provocation which reduces the homicide to manslaughter: *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830; *State v. Berkley*, 109 Mo. 665, 19 S. W. 192; while the later case says that the heat of passion referred to in the statutes means any heat of passion recognized by law, whether produced by a just cause or provocation, or a lawful, adequate or reasonable cause: *State v. Berkley*, 109 Mo. 665, 19 S. W. 192. Two of the latest cases on the point of opprobrious epithets are *Wheatley v. State* (Ark.), 125

14, and *State v. Bethune* (S. C.), 67 S. E. 466, which follow in deciding that such words do not reduce the homicide to manslaughter.

In thus dealing with the necessary definitions, it remains to see how they have been applied in those cases covering this particular crime of manslaughter. An exhaustive and very valuable opinion in *State v. Hoke* of North Carolina in *State v. Baldwin* (N. C.), 68 S. E. 100, commands attention. The learned judge, after discussing *Banks*, 143 N. C. 652, 57 S. E. 174, and its bearing on malice in the element of murder, proceeds: "Manslaughter is the unlawful killing of another without malice, and, under given conditions, this may be established, though the killing has been both unlawful and intentional. Thus, if two men fight upon a sudden quarrel, and on equal terms, at least at the outset, and in the progress of the fight he kills the other, kills in the anger naturally aroused by the fight, this ordinarily will be but manslaughter. In such case, though the killing may have been both unlawful and intentional, the crime is manslaughter if aroused by provocation which the law deems adequate, sufficient to displace malice, and is regarded as a mitigating circumstance reducing the degree of the crime." The learned judge has in this comprehensive opinion in part on that of Judge Gaston in *Hill*, 20 N. C. 629, 34 Am. Dec. 396. The principle to guide the jury if one after being grievously assaulted, and in the state of passion which the assault has excited, kills the assaulter without malice, the crime is manslaughter only. And why? "Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an imputable character, but because it presumes that passion disturbed the use of reason, and made him regardless of her admonitions": *Hill*, 20 N. C. 629, 34 Am. Dec. 396. And right here let us say that this pronouncement must not mislead the reader into thinking that the law regards the defendant in such case as non compos mentis even temporarily. It is not so, nor is he regarded as not responsible for his acts. The precise light in which he is regarded is that at the time of the offense he was in possession of judgment, the exercise of which was impeded by the violence of his excitement in proportion to that qualified extent for that qualified reason. The degree of passion is to be judged for itself in each case. It is required to be so overmastering as to shut out knowledge or deliberation. Manslaughter, sometimes epigrammatically if not accurately called a lesser crime than murder by charity of the law, is really an indulgence—a concession to human frailty—and says nothing of the fit of anger—during the short period when the man is "in the fit" and cannot wait to hear the admonition of his reason—one to his opponent or victim or assaulter, as the case may be, and not be attributed to set or malign purpose. And as though the strength of the law were destined to be interminable, here again comes the consideration, for two such men may have met, a quarrel, a death follow and there may have been an old grievance between them. Is that to rebut the rebuttal of malice? The cases do not negate this proposition unless the continuity of the crime is clearly shown: *State v. Johnson*, 47 N. C. 247, 64 Am. Dec. 100. There seems to be no inclination in recent cases to depart from the accepted definition of passion as being the state of mind

when it is powerfully acted upon and influenced by something external to itself; the state of any particular faculty, which, under such conditions, becomes extremely sensitive or uncontrollably excited (Webster). So that while the word "passion" usually refers to a state of the mind brought about by anger, it, properly speaking, expresses that condition of the mind when it has lost its self-control and becomes the passive instrument of the actuating cause or feeling, and makes the actor incapable of estimating the vital importance of his act, or, in the words of Judge Marshall in *Johnson v. State*, 129 Wis. 146, 108 N. W. 55, 5 L. R. A., N. S., 809, 9 Ann. Cas. 923, "incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition. . . . It is said that a transport of passion which deprives one of the power of self-control is, in a modified or restricted sense, a dethronement of the reasoning faculty, a divestment of its sovereign power, but an entire dethronement is a deprivation of the intellect for the time being." This has been practically the principle which has guided the courts throughout the states in laying down the law on the subject of blood-hot passion: *Reese v. State*, 90 Ala. 624, 8 South. 818; *Martin v. State*, 119 Ala. 1, 25 South. 253; *McBryde v. State*, 156 Ala. 44, 47 South. 302; *Brewer v. State*, 160 Ala. 66, 49 South. 336; *Williams v. State*, 161 Ala. 52, 50 South. 59; *Perrymore v. State*, 73 Ark. 278, 83 S. W. 909; *People v. Freel*, 48 Cal. 436; *State v. Rhodes*, Houst. Cr. Cas. 476; *State v. Brown*, 5 Penne. (Del.) 339, 61 Atl. 1077; *Pelt v. State* (Fla.), 50 South. 832; *Stokes v. State*, 18 Ga. 17; *Battle v. State*, 92 Ga. 465, 17 S. E. 861; *Bentfrow v. State*, 123 Ga. 539, 51 S. E. 596; *Howard v. State*, 2 Ga. App. 830, 59 S. E. 89; *Murphy v. State*, 31 Ind. 511; *State v. Decklotts*, 19 Iowa, 447; *Handly v. Commonwealth* (Ky.), 24 S. W. 609; *Hocker v. Commonwealth*, 33 Ky. Law Rep. 944, 111 S. W. 676; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *People v. Poole*, 159 Mich. 350, ante, p. 722, 123 N. W. 1093; *State v. Gassert*, 4 Mo. App. 44; *People v. Johnson*, 1 Park. Cr. Rep. 291; *State v. Baldwin* (N. C.), 68 S. E. 148; *Commonwealth v. Drum*, 58 Pa. 9; *Casey v. State*, 54 Tex. Cr. 584, 113 S. W. 534; *Franks v. State*, 54 Tex. Cr. 512, 113 S. W. 941; *Johnson v. State*, 129 Wis. 146, 108 N. W. 55, 5 L. R. A., N. S., 809, 9 Ann. Cas. 923; *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981.

VIII. Provocation.

Next in order of inquiry comes the natural question, Why was the slayer in such heat of passion as was cause of the crime? The answer is what in law is called generally the provocation considered with regard to its degree. It is needless to say that the provocation sufficient to reduce a charge of murder to manslaughter must be reasonable and be coexistent with the absence of malice. Passion alone is not sufficient—the inquiry reaches to the cause of the passion—and that cause may be sufficiently powerful to prevent the self-control which would have saved the commission of the fatal act. It must be passion justly excited by legal provocation. In other words, to reduce the major to the minor offense, there must be a concurrence of both passion, such as anger, rage, sudden resentment, or terror, and adequate cause to produce such passion: *Hatchell v. State*,

Cr. 380, 84 S. W. 234. In the last-named case is to be found a fine compendium of the law, so clear that the supreme court of it that it was an admirable presentation of that phase of law and complete in itself. Without repeating ourselves, after setting the jury as to sudden heat of passion and its adequate cause the instruction said that they, the jury, "could look not only to the cause at the time of the homicide, but they could view said cause from all the circumstances in evidence bearing on that provocation and "that any condition or circumstance, or any combination of conditions or circumstances, which is capable of creating some one of the conditions of mind above referred to, may be adequate cause, and, in determining whether or not adequate cause existed to the anger, rage, sudden resentment, or terror, the jury will look to the evidence in the case, previous relations of the parties to each other and the relative strength and size of the parties." This reasoning is adopted and indorsed emphatically in *People v. ...* 159 Mich. 350, ante, p. 722, 123 N. W. 1093, the court adding so far as it was able to learn the rule had never been departed from in Michigan. The precise nature of the provocation differs perhaps in every case and can only be generally classified as assault or injury to the person, threatening or insulting language and conduct, defamation, adultery, personal injuries to others or threats of, insult to or defamation of others, trespass or other injury to property, seeking or inciting provocation, and the necessary variety of these causes which are the result of the different acts of different men of different minds.

The object of this subdivision of the note is to emphasize the necessity that exists to establish provocation—a sufficient provocation—based on the cause adequate to reduce the murder charge to manslaughter and the principles above set out are those which now uniformly guide the courts: *Smith v. State*, 103 Ala. 4, 15 South. 843; *Wiley v. State* (Ark.), 125 S. W. 414; *State v. Moore* (Del.), 74 Del. 112; *State v. Miele* (Del.), 74 Atl. 8; *Pelt v. State* (Fla.), 100 So. 832; *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782; *Battle v. State*, 133 Ga. 182, 65 S. E. 382; *Crockett v. Commonwealth*, 100 Ky. 8 S. W. 674; *Nye v. People*, 35 Mich. 16; *State v. Shippey*, 10 Mo. 223, 88 Am. Dec. 70; *State v. Wilson*, 98 Mo. 440, 11 S. W. 500; *State v. Goldsby*, 215 Mo. 48, 114 S. W. 500; *State v. Bethune*, 67 S. E. 466; *Norris v. State*, 42 Tex. Cr. 559, 61 S. W. 493; *State v. State*, 56 Tex. Cr. 39, 118 S. W. 535; *Johnson v. State*, 129 N. W. 46, 108 N. W. 55, 5 L. R. A., N. S., 809, 9 Ann. Cas. 923.

IX. Time for Cooling.

Now come to consider the final phase of the mitigating circumstances to rebut the charge of murder. We have shown the necessity of absence of malice, that the act was committed in a sudden heat of passion, and that that passion must not have been sporadic, but sustained by an adequate cause in connection with slayer and defendant. There yet remains to discover what limit the law has set to the duration of that heat of passion, or, to put it quite accurately, what limit the law has assigned the period of time between the provocation received and the striking of the death blow so that the slayer, to his advantage, may claim it as a sanctuary, so to say, from the pursuing consequence of his crime. The subject has been

before the courts many times and the most helpful of the authorities is *State v. Hazlett*, 16 N. D. 426, 113 N. W. 374, not only for the thoroughness with which the question is discussed, but for the dissenting opinion of Mr. Justice Spalding from the opinion of the court. The law as then declared was, that where a homicide has been committed in the heat of passion upon provocation, the jury, in determining whether there was sufficient cooling time for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal, reasonable man, but from the standpoint of the defendant in the midst of all the facts and circumstances. It is a question which mainly depends both upon the facts and the man himself. We find an adoption of this proposition in *State v. Grugin*, 147 Mo. 39, 71 Am. St. Rep. 553, 47 S. W. 1058, 42 L. R. A. 774, together with an extract from Wharton's *Criminal Law*, eighth edition, volume 1, section 480, cited in the opinion as follows: "Men's temperaments also vary greatly as to the duration of provocation, and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal, 'reasonable man,' but by that of the party to whom malice is imputed. . . . Hence, whether there has been cooling time, so as to impute to defendant malice, is to be decided, not by an absolute rule, but by the conditions of each case." Mr. Justice Spalding in his dissenting opinion says that the reasonable time within which the law presumes that the blood has cooled, and the angry passions aroused by the provocation have subsided, is the time within which an ordinary, reasonable man would have cooled under like circumstances, and he cited, among other authorities, *Ryan v. State*, 115 Wis. 488, 92 N. W. 271. After all, the difference is not so great as it might appear, if it is borne in mind that the jury to whom the instruction is addressed are not likely to be affected prejudicially by their attention being directed to the distinction. They are not expected to discuss it as a logical proposition per se. They receive it in an atmosphere of "reasonableness" and no efforts of theirs to differentiate between the conduct of the ordinary reasonable and the ideal reasonable man acting under circumstances which have brought the defendant to trial will be likely to endanger the safety of the prisoner or the rights of the people.

Summarizing the principle, then, from the cases, we find that cooling time is a question of reasonable time under the circumstances; that is, if between the provocation and the death-causing act there was not sufficient time for a reasonable man in the defendant's place and circumstances to cool—if there has been no diversion of the mind, no distraction which might have averted the mind from the fatal channel, the line between murder and manslaughter has been crossed by the charitable forbearance of the criminal law and its solemn acknowledgment of human weaknesses: *Harrison v. State*, 144 Ala. 20, 40 South. 568; *Brewer v. State*, 160 Ala. 66, 49 South. 336; *People v. Bush*, 65 Cal. 129, 3 Pac. 590; *People v. Fossetti*, 7 Cal. App. 629, 95 Pac. 384; *Wickham v. People*, 41 Colo. 345, 93 Pac. 478; *State v. Jones*, 2 Penne. (Del.) 573, 47 Atl. 1006; *Gladden v. State*, 12 Fla. 562; *Hawkins v. State*, 25 Ga. 207, 71 Am. Dec. 166; *Perry v. State*, 102 Ga. 365, 30 S. E. 903; *Henning v. State*, 106 Ind. 386, 55 Am. Rep. 756, 6 N. E. 803, 7 N. E. 4; *People v. Poole*, 159 Mich. 350, ante, p. 722, 123 N. W. 1093; *State v. Towers*, 106 Minn.

105, 118 N. W. 361; *State v. Hazlett*, 16 N. D. 426, 113 N. W. 374; *Commonwealth v. Aiello*, 180 Pa. 597, 36 Atl. 1079; *Commonwealth v. Paese*, 220 Pa. 371, 123 Am. St. Rep. 699, 69 Atl. 891, 17 L. R. A., N. S., 795, 13 Ann. Cas. 891; *Holcomb v. State*, 54 Tex. Cr. 486, 113 S. W. 754; *Jay v. State*, 56 Tex. Cr. 111, 120 S. W. 449.

MOORE v. WHITE.

[159 Mich. 460, 124 N. W. 62.]

WAY OF NECESSITY—When Exists from Landlocked Tract.

Where two tracts of land, now owned by different persons, were originally entered as one parcel by their remote grantor, and one tract borders on a highway while the other is landlocked, the owner of the latter has a way of necessity over the former to the highway. (p. 738.)

WAY OF NECESSITY—Offer to Sell Different Route.—Where persons are entitled to a way of necessity over the land of another, an offer by the latter to sell them a right of way over other of his lands, to which route they have no claim, does not affect their right to the easement. (p. 738.)

WAY OF NECESSITY—Manner of Enforcement.—The owner of a landlocked tract, who is entitled to a way of necessity over adjoining land, is not required to apply under the statute for the condemnation of a private road. (p. 738.)

WAY OF NECESSITY—Manner of Location.—The owner of the servient estate has the right to locate a way of necessity, but in case he refuses, the owner of the dominant estate, acting reasonably, may do so. (p. 738.)

WAY OF NECESSITY—Rights and Duties of Parties.—One who claims a way of necessity may make it passable and is required to keep it in repair and provide gates at the ends. The owner of the fee is not prevented from using the way by passing to and fro over it, but such use must not in any way impair the use of the way owner. (p. 738.)

Charles E. Sweet, for the complainant.

M. L. Howell, for the defendants.

⁴⁶¹ McALVAY, J. A bill was filed in the circuit court for Cass county by complainant against defendants to restrain them from entering upon and crossing his premises, and from tearing down fences for that purpose. It appears from the bill of complaint and answer that defendants claim a way of necessity over complainant's land. The facts are that a common grantor in the chain of title of the parties entered the lands which are situated on section 23, town 6 south, range 16 west. The description is the east half of the northeast quarter of said section. This land was entered as one parcel in 1837 by John Collins. He sold the north half to James Moore, complainant's ancestor, in 1846, and the south half to George McCoy, defendant Ruth White's ancestor, in 1861. Both parties to this suit derived title

For several years the defendants have continuously crossed complainant's land, a part of the distance along the east line of the complainant's forty acres directly north of them, and a part of the way over complainant's land next east of it. The record shows that on account of a low and wet place the east line cannot be followed all the way through. Complainant denies that defendants have a way of necessity or any right of way across these premises, and claims that they are trespassers. He was, and still is, willing to sell a right of way along the south line of the northeast quarter of the section. They have no claim to such a route, and decline to purchase, but at one time offered sixty dollars for an acre of land along the line they claim, which was refused. Complainant has forbidden defendants from crossing any part of his land. He put up a wire fence which defendants tore open, so as to allow them to go out and in across this land. On petition the ⁴⁶³ highway commissioner laid out a highway through the center of the section north and south, which would give defendants an outlet. Complainant appealed to the town board, which reversed the action of the commissioner. Defendants have not sought to lay out a private road under the statute.

The case was heard upon pleadings and proofs, and a decree was granted complainant according to his prayer for relief. Defendants have appealed, and ask this court to reverse the decree, claiming that they have a way of necessity, created by implication, over the land lying north of their land, and which was entered with it as a single entry. That this way of necessity was created when there was a severance of this landlocked tract by the owner from the balance of his entry is also claimed. The record does not show that there has ever been an abandonment or waiver of this right claimed by defendants. Until recently these two parcels of land have been covered with standing timber. The number of years they have lived upon the land we do not discover, but one witness for complainant testified that for the first two years defendants occupied their land they were accustomed to go out over complainant's land while they were also using the way out to the east road. Another of his witnesses testified that there was no established road through there, but he had heard that a right of way was claimed. Complainant's son testified that they had gone that way continuously for four years by permission granted. There appears to have been no occasion for controversy while this wild land was open and unfenced. When, however, fences were built by complainant and torn down, and defendants failed to get a public highway and could not agree with complainant upon some adjustment, and insisted upon the right to cross complainant's land, this controversy readily arose.

The authorities, as far as we have examined them, support the proposition that, under circumstances similar to the one in the case at bar, a way of necessity arises in ⁴⁶⁴ favor of the landlocked tract over the adjoining land of the owner: 23 Am. & Eng. Ency. of Law, 2d ed., p. 13, and notes. Such way, being one of strict necessity, is granted by implication, and under like circumstances will be reserved by implication: 14 Cyc. 1, 172 et seq., and notes and cases cited. A well-considered case in which this doctrine of the creation of ways of necessity by implication and reservation is discussed is *Miller v. Hoeschler*, 126 Wis. 263, 105 N. W. 790. It is reported and annotated exhaustively in 8 L. R. A. N. S., 327. The circumstances of the case at bar are such as bring it within the rule of strict necessity from which no authority examined dissents.

It was not necessary in this case for defendants to apply under the statute for the condemnation of a private road. If this way of necessity existed, it was a vested right which entitled defendants to this way over the land in question immediately north of their premises, and necessarily over no other land. The fact, therefore, that the complainant offered to sell a right of way over other land is not material. Complainant has absolutely refused to recognize any right whatever in defendants to an easement across this land. This way has never been located. The record shows that in former years plaintiff, in going out over this land, did not always follow the same path or road. This they had a right to do. No way had ever been defined. There were no fences or lines to indicate a located way: *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

Under present conditions, when lands are inclosed and premises used for pasture or otherwise, to allow defendants to go over the entire tract wherever they pleased would be inequitable. The right is held to be in the owner of the servient estate to locate such a way of necessity. He has refused to exercise this right and defendants have done so, and such location is not claimed to be an abuse of such right. It will not be necessary to cut a road through this timber or to fence it in. Defendants have a ⁴⁶⁵ right to make it passable for the uses necessary to its full enjoyment, and nothing more. They must keep it in repair, and provide such gates at both ends as will prevent animals from straying in and complainant's stock from escaping from the premises. The owner of the fee is not prevented from using such way by passing to and fro over it; but such use must not in any way impair or conflict with the use of the way owner.

It follows that we conclude that defendants have by law a way of necessity over these premises, with which complainant may not interfere, and that the decree of the circuit court

reversed, the injunction dissolved, and the bill dismissed and that a decree be entered in this court in favor of defendants according to this opinion. That a way of egress be declared in defendants along the line located by plat, unless complainant, within ninety days after notice, shall conveyance, grant and convey a perpetual way to defendants, their heirs, representatives and assigns, twenty feet wide on the south side of the northeast quarter of section 16, extending the full width thereof, giving egress and passage to defendants at all times from their land to the way on the east, and that defendants will be required to maintain gates at the ends of said road or way, and not be required to maintain gates elsewhere along the line or fences on either side thereof; but such gates and fences if considered necessary by complainant, his heirs, representatives or assigns, shall be constructed and maintained by him or them; this condition and proviso being upon the offer made by counsel for complainant upon argument of the case. Defendants will recover costs in this court.

W. C. J., and Grant, Moore and Brooke, JJ., concurred.

of Necessity Arising by Implication in favor of a landlocked owner are discussed in the notes to *Powers v. Heffernan*, 122 Am. St. Rep. 209; *Pettingill v. Porter*, 85 Am. Dec. 675. The right of necessity passes with each successive transfer of the title. It cannot be denied on the ground that such a way could be procured by condemnation under the statute, and it is no answer to its denial that the person over whose land it is claimed should have designated its location, for if he did not the owners of the dominant tenement could designate it: *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 100.

Rights and Obligations of Parties to a Private Way are discussed in the notes to *Dudgeon v. Bronson*, 95 Am. St. Rep. 318.

GLYNN v. CORNING.

[159 Mich. 474, 124 N. W. 514.]

WILL OF NONRESIDENT—Place of Probate.—The will of a decedent who left property in this state cannot here be admitted to probate before its validity has been established in a proceeding in the courts of his domicile. (pp. 741, 742.)

W. C. J., for the appellant.

W. C. J. and Holland, for the appellee.

OSTRANDER, J. Edward Corning died testate November 26, 1908, at Saginaw, Michigan. His will was executed December 7, 1907, at Saginaw. He made his will after consulting counsel in Saginaw. His will recited:

"I, Edward Corning, born at the William Corning homestead in the village of Webster, Monroe county, State of New York, and taking my present residence from ⁴⁷⁵ my brother's home, No. 150 East 47th street of the city of New York, State of New York, do make, publish, and declare this as and for my last will and testament."

The provision appointing the executors reads as follows:

"I hereby appoint my said sister, Anna Corning, and Thomas J. Swanton, of the said city of Rochester, N. Y., as my executors of this my will for the State of New York, and my sister, Anna Corning, and Edward W. Glynn, of Saginaw, East Side, Michigan, as executors of this my last will for the State of Michigan."

After its execution, he deposited his will with his attorneys in Saginaw. After his death they gave the will to the executor, Glynn, who presented it for probate in the probate court of Saginaw county, Michigan. His coexecutrix, Anna Corning, objected to the probate of the will in this state for two reasons:

1. "Because the deceased was a nonresident of the state of Michigan, and his domicile and home were in the state of New York at the time of the date of said will, and also at the time of his death."

2. "The said deceased did not own any real or personal property which was at the time of his death located in the state of Michigan."

The probate court admitted the will to probate, holding that the deceased left property in Saginaw county, and that this fact gave the court jurisdiction. The contestant, Anna Corning, took an appeal to the circuit court, alleging the same reasons for her appeal. The evidence shows that Mr. Corning lived in Saginaw continuously for about a year previous to his death, and for about two months prior to the execution of the will. The evidence discloses that the deceased had property in Saginaw county, among which was a mortgage executed to him upon land in that county. The case was tried in the circuit court before a jury, to whom were submitted two special questions:

1. Was Edward Corning at the time of his death an inhabitant of Saginaw county?

- ⁴⁷⁶ 2. Did Edward Corning own any estate at the time of his death in Saginaw county?

To the first question the jury found that Mr. Corning was not an inhabitant of Saginaw county at the time of his death. To the second question they found that he did have property in Saginaw county at the time of his death. The court thereupon entered judgment confirming the probate of the will. No contest was made over the validity of the will.

The question presented is whether the will of a person domiciled in another state, who died leaving an estate within this state, may be admitted to probate here before its validity is established in a proceeding in the courts of the domicile of the testator. The precise point seems to be for the first time now presented for decision in this court. Like the most of the American states, Michigan has an elaborate and very complete system for the administration of estates of decedents. It is to the statutes and to certain general and universally recognized principles supporting local jurisdiction that we must look for an answer to the question. It may avoid confusion to point out, at the outset, that the jurisdiction of the courts of each state to determine the domicile of a testator is not involved. Such jurisdiction is admitted, or if it is not admitted, is, nevertheless, undoubted. And the right to administer the particular estate is not involved. There can be no doubt concerning the power of the probate court of Saginaw county to administer the estate of this decedent, found within the state, wherever the owner died and whether he did or did not leave a valid will. Whether in any case the effect of admitting a foreign will to be probated may amount to an estoppel, *inter partes*, is not a question presented: See, generally, *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. Rep. 407, 27 L. ed. 1049; *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. Rep. 603, 44 L. ed. 741; *Scripps v. Wayne Probate Judge*, 131 Mich. 265, 100 Am. St. Rep. 614, 90 N. W. 1061. Power to admit wills to probate and to grant administration of estates is conferred ⁴⁷⁷ upon probate courts generally by 1 Compiled Laws, section 650, which reads: "The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estate of all persons deceased, who were at the time of their decease inhabitants of, or residents in, the same county, and of all who shall die without the state, leaving any estate within such county to be administered; and to appoint guardians to minors and others in the cases prescribed by law, and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law."

It is further provided in 3 Compiled Laws, sections 9282-9284, for admitting, in this state, wills of those who were domiciled abroad, and for the manner of disposing of estates of testators domiciled abroad whose wills are so admitted to probate here. These and other provisions of the statutes must be read together. It is plain that the legislature has recognized the right of the courts of the domicile of a testator to conclusively determine the validity of the will, and quite as plain that the courts of the domicile of this testator have made no such determination. It has been re-

peatedly held that the issue here upon the offering of a domestic will for probate is "will or no will." We have then these two methods provided by the legislature for admitting wills of deceased persons to probate: One, to try out every issue upon which validity of the instrument depends; the other, to accept the determination of all of these issues by the courts of the domicile of the testator. There is no method pointed out for admitting a will here as valid to the extent of appointment of an administrator of the estate, leaving the question of its validity to be determined at the domicile of the testator. It is not conceivable that the courts of this state will inquire about and finally decide that a certain instrument is, or is not, a valid will, subject to having the determination reversed by the courts of any other state. Assuming the right of each state to assert complete jurisdiction in rem over all property of decedents found within the state, including ⁴⁷⁸ the right to determine, through its tribunals, the validity or nonvalidity of a foreign will, it is equally the right of each state, acting through its legislature, to accept as conclusive the judgment of the courts of the domicile of the testator as to the validity of his will and to permit his property found in the state to be disposed of according to the provisions of the will. I find in the statutes sufficient evidence of a state policy which denies to the probate court of Saginaw county the jurisdiction which it assumed when it admitted the particular will to probate. Holding these views, it is not important to refer to and review decisions of courts of other states in which a different view is expressed.

The judgment of the circuit court for the county of Saginaw is reversed, with costs to appellant, and the record is remanded, with directions to the probate court to refuse probate of the will.

Montgomery, C. J., and Hooker, Moore, McAlvay, Brooke, Blair and Stone, JJ., concurred.

Courts may Grant Original Probate upon Wills of Deceased Nonresidents leaving property in the state, according to some authorities, but the exercise of this jurisdiction can affect only the property within the state: *Estate of Clark*, 148 Cal. 108, 113 Am. St. Rep. 197, and note. To entitle a foreign will to probate here, according to *State v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, it must appear that it was duly proved, allowed and admitted to probate in the court of the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity to the laws of this state; and that the record is authenticated as required by section 905 of the United States Revised Statutes.

IN RE KENNEDY'S ESTATE.

[159 Mich. 548, 124 N. W. 516.]

ILL.—Evidence to Rebut Testamentary Intent.—An instrument purporting to be a will, and executed with the statutory formalities, is conclusively presumed to have been executed *animo testandi*, and no evidence is not admissible to show that it was executed for any collateral purpose and that the testator did not intend it to operate as a will. (pp. 746, 750.)

ILL.—No Publication of an Instrument is required in Michigan to give it effect as a will. (p. 750.)

ILL.—Revocation.—A Testator Who has Parted With the Instrument of his will may revoke it by making another will. (p. 750.)

ILL.—That a Subscribing Witness has No Recollection of having signed a will duly attested in form raises no question for the jury. (p. 751.)

ILL.—Undue Influence.—Declarations of a Testator that he was bound to make a will are not competent evidence of undue influence. (p. 751.)

and Fitzgibbon and John B. McIlwain, for the appel-

h & Walsh, for the appellee.

BLAIR, J. Thomas Kennedy died in the spring of 1897. In 1897 he signed a paper in the form of a will. The paper was drawn by John L. Black, and he and his nephew, R. Black, are the witnesses. This paper was allowed in probate court as the last will and testament of Thomas Kennedy. An appeal was taken to the circuit court by the heirs of deceased. The case rested on the testimony of the subscribing witnesses, whereupon the circuit judge rendered a verdict sustaining the document as the last will and testament of Thomas Kennedy, deceased. The contestants brothers, appeal and contest on the ground that the paper was not executed to operate as a will and not as required by the statute.

John L. Black testified that he was an attorney at law, from 1890 to January 1, 1897, had been judge of probate; he drew the will in question, February 11, 1897; that, on Kennedy's request, he locked the door so that they could not be interrupted.

He remembers that will being signed by Thomas Kennedy. He cannot sign it.

In the presence of yourself and Clare R. Black? I cannot remember about Clare, but I remember myself did not know Clare was a witness to it until I saw him in probate court. As a matter of memory, I could not tell all who it was that signed it besides myself. He writes in a different hand but have no doubt but that is his signature.

I recall that Thomas Kennedy signed the will in my presence and that I signed it in his presence, at his request. I was well acquainted with Mr. Kennedy. He was in good bodily and mental condition at the time he signed it; no question about it in my mind. . . .

"Q. Just state to the jury what he said he wanted.

A. Why, he wanted some paper; he was having trouble out there with the boys, as he put it, and they were making him a good deal of trouble and insisting upon knowing what he was going to do with his personal property, and I think at the same time he told me that he had already disposed of his real estate; that is the way I understood him, and he said they kept at him and kept hounding him all the time and that he wanted me to draw some kind of a paper that would be a peacemaker, that he could take out home. I told him at that time, 'Mr. Kennedy, you don't have to make any kind of a paper, you are too old a man to make any kind of a paper,' and he said to me, as I remember it, 'You don't know the conditions out there as well as I do,' and we talked it over one way and another. First we talked about a bill of sale, and I told him, if I remember right, some kind of a paper he had in mind that it was going to be a dangerous paper, and then he talked about putting it in the form of a will. I said that would be better because 'You can destroy it any time.' So I drew him up a paper, the paper that is here, and he signed it. . . . He said it was not a will; that at some future time he would draw a will.

"Q. Did you have any talk at that time with him about keeping it in your safe? A. Yes, I insisted; I said, 'Mr. Kennedy, leave that with me, don't take it out there; and if you don't want it, why, if anything should happen you, I could destroy it for you,' but he said, 'No; he would have to take it out there as a peacemaker.' . . . He went over pretty near the history of his life with me because I was at him for being so foolish as to sign a paper that he didn't want to sign. . . .

"Q. He told you he had made some disposition of his real estate at that time? . . . A. Well, he told me in a general way that he had made a disposition and that he wanted that put in the will that he had made a disposition of his real estate, in that paper there that he had made a disposition of his real estate during his lifetime.

"Q. And you put that clause in here? A. I put that clause in."

That the ink of Clare R. Black's signature was of a lighter hue than that used by Mr. Kennedy and himself; that he did not sign the paper as an instrument intended to become operative as a will, and, so far as he knew, neither did Clare R. Black; that from the time he drew the paper

the time Mr. Kennedy left the building with it he was entirely with him; that Clare R. Black might have had the will as a witness in the presence of Mr. ⁵⁵¹ Kennedy and himself and he might have taken the will into Mr. Black's office and he have signed there.

But you told me a minute ago that the will and yourself—that you were with the will all the time until a man took it away that day? A. Yes, sir.

For you do not remember taking it away from the man in next door? A. No, I do not; and I don't remember of Clare coming in there either."

Mr. R. Black, a practicing attorney, testified to the genuineness of his signature:

Now, Mr. Black, you state now that you have no memory of ever being called upon to witness any other except that one of Mr. Atkinson's prior to your becoming a member of the bar? A. No, sir.

If you had been called into the office of John L. and it had been made known to you either by Mr. Kennedy or by Mr. Kennedy that Mr. Kennedy was making a will and he had signed it or was going to sign it and he wanted you and Mr. Black to witness it or wanted you to witness it with Mr. Black to witness it, and you did so join him in witnessing it; what do you say whether you have remembered it? A. I believe I would have.

What do you say now as to whether any such transaction as that occurred in February, 1897, in connection with the execution of the document presented here as a will?

A. As to whether I went in there and Mr. Kennedy asked me to sign this as his witness and told me what to sign?

That he was making a will and wanted you to sign as a witness, or Mr. Black in his presence and you did as a witness to his making his will; what do you say whether any such transaction as that occurred? Well, from memory I would say, 'No.' "

The court directed a verdict for the proponents, instructing them that the will had been executed in pursuance of the formal requirements of the statute and that parol testimony that the testator did not intend that the instrument should operate as a will was not receivable.

"The presumption is that this paper was executed, subscribed and attested or witnessed as it purports to be on its face, and the mere fact that Mr. Black, one of the witnesses, fails to remember the circumstances under which he subscribed and attested this will, cannot under the law be a state be allowed to defeat it.

The court instructs you that these statutory formalities of execution have been complied with in this case as

shown by the evidence. That is, the paper claimed to be a will is in writing, it is signed by Mr. Thomas Kennedy, it was attested and subscribed in the presence of the testator by two or more competent witnesses; hence you must assume that the paper here claimed to be a will was executed in the form and manner as prescribed by law.

"The contestant also claims, as heretofore stated, that Mr. Kennedy at the time he executed this paper did not intend to make a will, but signed the paper merely to satisfy his relatives, the family of John Cavanaugh, Mr. Cavanaugh being the beneficiary under the will, and this being the family with whom Mr. Kennedy was living. Mr. John L. Black testifies that Mr. Kennedy said to him just before the paper was prepared, signed and witnessed that he, Mr. Kennedy, did not intend the paper for a will, but merely to satisfy the sons of John Cavanaugh who were hounding him about his property. The court says to you that this testimony cannot be received and considered to invalidate the paper and render it of no effect as a will. Parol testimony of this kind when it arises, separate and apart from any question of fraud, undue influence, mental competency or of ambiguity in the paper proposed as a will, cannot be permitted to overcome the presumption that the testator in executing a solemn instrument like a will, intended the paper not for a will but to serve some collateral and extraneous purpose. To admit such testimony to defeat a will in a case like this would to some extent tend to defeat the right which every sane and competent person has under our laws to make a final disposition of his property by will and to have his or her wishes in regard to property carried out after death. The momentous consequence of permitting parol evidence to thus outweigh the sanction of a solemn act is obvious. It would have a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said and what he put in solemn written form. Hence, gentlemen of the jury, it is the duty of the court in this case to direct a verdict in favor of the proponent of the will."

553 The will gave all of his personal property to his sister's husband, John Cavanaugh. The important question presented by this record is, whether the court erred in holding, as a matter of law, that evidence was not admissible to show that the alleged will was executed for a collateral purpose and that the testator did not intend it to operate as a will disposing of his property. Stated in another way, the question is: Is an instrument purporting to be a will and executed with all the statutory formalities conclusively presumed to have been executed *animo testandi*? This question is one of first impression in this court. As stated by the cir-

cuit judge, the question is wholly separate and apart from any question of fraud, undue influence, or mental competency in the procurement of the will or of ambiguity in the meaning of its provisions. The evidence conclusively shows that the testator was of sound mind, was laboring under no mistake of fact, knew precisely what he was doing, and intended to do precisely what he did do, viz., to execute, according to the forms prescribed, a paper on its face disposing of his estate, with knowledge that he could revoke it at any time. Accepting the testimony of the scrivener, it must be presumed that he exhibited the will to his brother in law as his genuine will for the purpose of securing peace in the family and securing those attentions which he required.

"Q. You understood from him that he was making his home at the Cavanaugh's? A. I did; yes. Mrs. John Cavanaugh was his sister.

"Q. What reason did he give for making his home there? A. If I remember right, that his father and brothers were keeping bachelor's hall or something of that kind, and it was handy for him over there; that he could get his clothes cared for and one thing and another with his sister, and he made his home there and lived with them. I don't know how long he had been living there, but if I remember right, he told me that he taught school out in Emmett, too, and had made his home there while he was teaching school. Then he came in here and remained a great many years when he was here as deputy county ⁵⁵⁴ treasurer. He made his home then at Mr. Walsh's hotel. He had either left the county treasurer's office or was about going to leave, I don't remember just which, and he was going back to make his home with the Cavanaughs, or had made it, when this trouble arose out there, whatever it was; he wouldn't tell me the details of it.

"Q. So that just before this will had been made he was here to town for eight years? A. For eight to twelve; somewhere along there."

The testimony of the scrivener also discloses that Mr. Kennedy intended at a future time to make a will, but never spoke to him again about the paper in question or the making of another will. For over eleven years Mr. Kennedy retained this will in his possession, so far as this record discloses, and died leaving it unrevoked. There can be no doubt that a presumption of testamentary intention arises from the deliberate execution, by a competent person, of a paper in the express form of a will in strict pursuance of the provisions of our statute regulating the execution of wills. Whether this presumption is a disputable one is the serious question in this case.

Respectable authorities are cited by counsel for contestants, some of which are directly in point, holding that parol evi-

dence is receivable in such cases. The case of *Lister v. Smith*, 3 Swab. & T. 282, is such a case. In that case the question was whether a certain codicil was entitled to probate. It was regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of the family to give up a house which she then occupied, and that, to force her to do so, he made pretense of revoking by codicil a bequest which he had made by will in favor of this woman's daughter, and that the paper in question was made with that sole object: that the testator gave his attorney instructions to prepare it with that intention, and informed him before it was drawn that he never wished it to operate at all; further, that the attorney pointed out the folly of executing such an instrument⁵⁵⁵ and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator with express directions that he was not to part with it and that it was in no event to operate or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution. The court said: "The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument. And such, no doubt, is the law. There must be the *animus testandi*"; citing *Nichols v. Nichols*, 2 Phille. 180; *Trevelyan v. Trevelyan*, 1 Phille. 149; *Swinb.*, pt. 1, s. 3; *Sheppard's Touchstone*, 404; *Pym v. Campbell*, 6 El. & Bl. 370.

The court, however, recognizing the serious consequences which might flow from this holding, remarked: "But here I must remark that the court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credi-

. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of a solemn act. This weight it becomes the duty of the court to appreciate, and to guard with jealousy the sanctity of a solemn act. In the present case, however, the court finds the evidence so cogent, that it is ⁵⁵⁶ prepared to act upon the finding of the jury that the codicil was executed as a testamentary operation. But I am far from saying that the court will in all cases repudiate a testamentary paper merely because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered, as well as the result at which the court have arrived, and the court must be satisfied that it is sufficiently cogent to its end."

In the case of *Swett v. Boardman*, 1 Mass. 258, 2 Am. Dec. 101, the court, acting by council for contestants, is to the effect that some evidence of publication of a will is necessary, and that it was sufficient to prove by parol that at the time of executing an instrument proposed as his last will and testament the testator did not know or suppose that he was executing a will. In the case of *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069, the court, acting by counsel for contestants, merely holds that where a will is not read by nor to the testator, and it has been proved by another person from instructions given by the testator and is then signed upon an assurance that it expresses what the testator desires, if the language inserted is not the language of the instructions, and if it does not make in legal effect the provisions which the testator apparently desires, it is not a will: See, also, 30 Am. & Eng. Ency. of Law, 2d ed., 101, and cases cited; 1 Underhill on Wills, sec. 39.

"The momentous consequences of permitting parol evidence to outweigh the sanction of a solemn act," referred to by the court in the case of *Lister v. Smith*, 3 Swab. & T. 282, are still more momentous under the laws of this state, since, under the rule of evidence prevailing with us, no more cogent evidence is required to establish the fact of lack of testamentary intention in the making of an instrument than to establish any other fact which may be submitted to a jury for its determination, and the court has no greater authority to control the verdict or influence it in such a case than in any other. Recognizing fully the high character of the authorities sustaining the contestants' ⁵⁵⁷ position, we are inclined, as this is an open question in this state, in view of the serious consequences of the contrary view, to hold, as was held by the supreme court of Alabama in the case of *Wheeler v. Murrell*, 108 Ala. 366, 18 South. 831, that: "It is doubtless, one of the purposes of the statute, in requiring testamentary dispositions of personal property should

be executed with the same formalities required in devises of land, to remove them from the doubt and uncertainty in this respect which attended them while the rule of the common law prevailed. There is no other mode of giving a valid expression to the animus testandi than that which the statute prescribes. Whatever forms the expression may assume, whatever solemnity may accompany it, the statute declares it ineffectual, unless the formalities it prescribes are observed. When these formalities are observed, if the writing be testamentary, if it imports a posthumous destination of property, the statute in itself and of itself attaches, and conclusively attaches, the animus testandi. The requisition of extrinsic or additional evidence of its existence is to add to the requirements of the statute; and to receive such evidence to repel the existence of the intent would be to receive evidence against the statute."

And again: "When a sane testator, not subject to coercion or restraint, intentionally executes, with the formalities required by the statute, a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports, the animus testandi, i. e., the mind to dispose, the firm and advised determination to make a testament, closing all inquiry as to the existence and manifestation of the intent."

Section 9262, 3 Compiled Laws, provides for the disposition of real property by will. Section 9265, 3 Compiled Laws, provides that every person of full age and sound mind may by his last will and testament in writing bequeath and dispose of all his personal estate. Section 9266, 3 Compiled Laws, provides that no will "shall be effectual to pass any estate, whether real or ⁵⁵⁸ personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses," etc.

Section 9270 provides: "No will nor any part thereof shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

No publication of the instrument is required in this state to give it effect, but the execution of an instrument in testamentary form with the statutory formalities completes the

execution of a paper in the form of a will under the provisions of our statute does not place the instrument beyond control of the testator, whether he retains possession of it himself or delivers it over to the persons for whose benefit it has been made or to another person for them. It remains at all times subject to his control. If he retains possession of it he may revoke it in one of the ways specified in the statute. If he has parted with the possession of the instrument he may revoke it by making a will. The certificate of revocation is as follows:

On this 11th day of February in the year one thousand
hundred and ninety-seven, Thomas Kennedy of the town
of Emmet, St. Clair county, Michigan, signed the fore-
instrument and declared the same to be his last will
and testament in the presence of us as witnesses and we not
interested therein at the request of said Thomas Ken-
nedy in his presence and the presence of each other, and where
we could see us sign our names, ⁵⁵⁹ did thereupon on said
mentioned day, subscribe our names thereto as witnesses
CLARE B. BLACK.

CLARE R. BLACK,

“Residing at Port Huron, Mich.

"JOHN L. BLACK.

"Residing at Port Huron, Mich."

the back of it, in the handwriting of Mr. Black, was: of Thomas Kennedy, of Emmett, St. Clair county, an." It is undisputed that John L. Black witnessed instrument in the presence of the testator. Clare R. testified:

Do you recall the circumstances of signing that?

Q. You haven't any present memory of going into that
You haven't any present memory of signing that
at all? A. No, sir. . . .

But you have no memory one way or the other on this now at this time? A. No, sir."

as apparent from his testimony that he had no recollection of the facts connected with his signing the will as a witness. His opinion, based wholly upon conjecture, is not sufficient to raise a question of fact for the jury, and the court did not err in so holding: *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810. The declarations of the testator that he was being hounded to make a will are the sole evidence of record of undue influence in the procuring of the will, and such fact they are not competent evidence: *Zibble v. Zibble*, 131 Mich. 655, 92 N. W. 348.

judgment is affirmed.

ker, Moore, McAlvay and Brooke, JJ., concurred.

The Admissibility in Evidence of Declarations of Testators to sustain or overthrow wills is the subject of a note to In re Colbert's Estate, 107 Am. St. Rep. 459.

The Testimony of Subscribing Witnesses to a Will in opposition to or in support of the instrument is considered in the note to Stevens v. Leonard, 77 Am. St. Rep. 459.

The Attestation of Wills is the subject of a note to Lane v. Lane, 114 Am. St. Rep. 209.

ZOLTOVSKI v. GZELLA.

[159 Mich. 620, 124 N. W. 527.]

AUTOMOBILE—Evidence of Excessive Speed.—The testimony of a witness that an automobile, which struck a boy, ran "a good deal faster than a horse trots; it went pretty fast," does not prove excessive speed, it not appearing that the statutory speed was exceeded and there being evidence that the car ran but little more than its length after striking the boy. (pp. 752, 753.)

AUTOMOBILE—Absence of Lights on an Automobile in the night-time is evidence of negligence in its operation on the street. (p. 753.)

AUTOMOBILE—It is Contributory Negligence in a Boy thirteen years old to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thought to look to see whether any vehicle is approaching. (p. 754.)

Sloman & Sloman, for the appellant.

Brennan, Donnelly & Van De Mark, for the appellee.

621 HOOKER, J. The plaintiff is a boy thirteen years old. He was playing tag in a public street, and, having tagged a companion, started to run across the street pursued by the older boy. As he crossed, he ran into or was struck by an automobile driven by the defendant. There was testimony tending to show that the car struck him. If so, it is clearly demonstrable that he ran directly in front of the car, and was struck, while his companion saw the car, and stopped before getting in the way of danger. The accident happened about thirty feet from the intersection of two streets, at a place well lighted by an arc and other lights. There is evidence tending to show that there were no lights on the machine. After the boy was struck, the machine ran but little more than its length. Only one witness, a woman, testified to the speed of the machine. She said it ran "a good deal faster than a horse trots. It went pretty fast." The negligence claimed is (1) excessive speed; (2) absence of lights on the car. The learned circuit judge held that the testimony would not justify the finding of excessive speed, either as exceeding the

ory limit or as unreasonable, and that the absence of lights on the machine did not contribute to the injury, because the boy did not look toward the automobile. The court so found that the plaintiff was guilty of contributory negligence, in that he ran immediately in front of the machine, and he directed a verdict for the defendant, and the plaintiff has appealed.

The court are of the opinion that excessive speed was not proved; i. e., that it does not appear that the statutory limit was exceeded, nor is there testimony which shows excessive or unreasonable speed. We think, however, that proof of the absence of lights on the car was testimony tending to show contributory negligence under our decisions, in view of the safety requirements.

The evidence indicates that the boy was careless in not looking for the car. If, as the learned circuit judge said in his opinion, the boy testified in answer to a question that was put to him that he did not look but was intent on his play, that would establish his contributory negligence. This proof is not to be found in the record, but it does not appear that all of the testimony is in the record, and we must take the statement of the circuit judge as true. But aside from that, all of the testimony shows that the plaintiff carelessly ran immediately in front of the machine. The defendant who was chasing said:

"I did not see the automobile only just as it struck Paul. That is all I can say. I know that I had been standing on the side of the street, and all at once Paul tagged me and ran across the street as fast as he could because I was chasing him, and I intended to catch him. I wanted to make sure."

And just the instant he got out in the road the automobile was there, too? A. Yes, sir.

It stopped instantly? A. Yes, sir.

It didn't run three feet? A. No; it didn't run three feet at all. As soon as it run over him, he stopped."

The boy and the machine reached the same point in the street at the same instant. Neither boy saw the machine⁶²³ but the one behind the plaintiff had his attention called to it by its striking the plaintiff, who was just running enough in advance of him to get hit.

The only question is one of law. Was it contributory negligence in a thirteen year old boy to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thought to look out whether such a machine or any other vehicle was approaching? In *Henderson v. Detroit Citizens' St. Ry.*, 10 Mich. 368, 74 N. W. 525, an eight year old boy ran into the front end of a street-car. In that case his view was

more or less obstructed by a coal wagon or another car going in a direction opposite to that of the car that he ran into, and which wagon or car he ran behind in his approach to the track. Mr. Justice Montgomery said: "It was but common prudence in crossing such a thoroughfare to look not only for the car, but for any vehicle which might be coming. Injury would have occurred from collision with an ordinary wagon just as surely as from running into this car, and from the testimony of the lad himself he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?" See also, *Ecliff v. Wabash etc. Ry. Co.*, 64 Mich. 196, 31 N. W. 180.

While the injury to this child necessarily arouses the sympathy of all observers, it does not warrant the imposition of damages upon one who is not shown to have been blamable in the premises. A verdict in this case would be, as the judge well said, a bestowal by the jury of "charity from another man's pocket."

The judgment is affirmed.

Montgomery, C. J., and Ostrander, Moore and McAlvay, JJ., concurred.

The Law of the Automobile is the subject of a note to Christy v. Elliott, 108 Am. St. Rep. 212. As to the degree of care toward pedestrians which one must exercise in operating an automobile in a highway, see McIntyre v. Orner, 166 Ind. 57, 117 Am. St. Rep. 359; Navailles v. Dielmann, 124 La. 421, ante, p. 508, and cases cited in the cross-reference note thereto.

As to How Far Children can be Charged With Contributory Negligence, see the recent cases of McEldon v. Drew, 138 Iowa, 390, 123 Am. St. Rep. 203; Henderson v. Continental Refining Co., 219 Pa. 384, 123 Am. St. Rep. 668; Tucker v. Buffalo Cotton Mills, 76 S. C. 539, 121 Am. St. Rep. 957; Serano v. New York etc. R. R. Co., 185 N. Y. 156, 117 Am. St. Rep. 883; Lee v. Jones, 181 Mo. 291, 103 Am. St. Rep. 596; Mitchell v. Illinois Cent. R. R. Co., 110 La. 630, 96 Am. St. Rep. 472. If a girl, nine years of age, playing a game in a public street, runs across it without thinking of teams which may be thereon, and is struck and knocked down by a horse attached to a wagon, she, by the ordinary standard of care used by children of her age, must be deemed to have been negligent, and cannot recover for her injury: Young v. Small, 188 Mass. 4, 108 Am. St. Rep. 457. See, also, *Star Brewery Co. v. Hauck*, 222 Ill. 348, 113 Am. St. Rep. 420; *Covington etc. Mfg. Co. v. Drexilius*, 120 Ky. 493, 117 Am. St. Rep. 593.

MOODY v. MACOMBER.

[159 Mich. 657, 124 N. W. 549.]

WILL.—An Instrument in the Form of a Deed, providing that “this deed is not to become operative until the death of the grantor,” is testamentary in character and revocable by a subsequent will. (p. 757.)

WILL.—The Delivery of a Will Conveys No Estate to a devisee. (p. 757.)

EXECUTORS.—Ejectment may be Maintained by an executor. (p. 757.)

B. F. Reed, for the appellant.

Geer, Williams & Halpin, for the appellee.

⁶⁵⁸ **BROOKE, J.** Plaintiff herein brings ejectment against defendant to recover possession of a farm. It appears that prior to August 12, 1885, plaintiff's decedent was the owner in fee simple of the premises described. On that date he executed an instrument in the form of a deed to his wife, Louisa A. Sutton, covering said premises, and containing the following provision:

“This deed is not to become operative until the death of the grantor, named herein, at which time, and from then on, it is to have full force and effect.”

Upon the same day plaintiff's decedent executed two other conveyances to his wife, covering other property, each containing the foregoing clause, and one of them containing the blanket provision, “and all other real estate of which I may die seised.” He also, on the same day, executed a bill of sale of certain personal property to his wife, which contained the provision, “and all the personal property of which I may die seised.” Louisa A. Sutton, the wife, executed an instrument to her husband on the same day, covering a store she owned in Lapeer, which contained the same provision found in the deed from her husband to her. All these deeds and the bill of sale were placed in an envelope, in a tin box, containing private papers of both Sutton and wife, which was kept in the safe at the store of Loder & Sutton. Sutton later retired ⁶⁵⁹ from the partnership, but the box was found in the safe at the time of his death. Prior to his death, plaintiff's decedent sold a part of the home and the “Sanilac eighty,” both of which were covered by the deeds to his wife. In the fall of 1902 plaintiff's decedent made a will, by the terms of which his wife took a life estate in the entire estate, the residue being disposed of among certain of the relations of the parties. This will was probated by plaintiff, and the real and personal property, coming into

his hands as executor, was turned over by him to the widow, in accordance with the terms of the will. On April 10, 1907, Louisa A. Sutton executed a deed of the premises here in dispute to defendant, in consideration of "one dollar and other consideration." This deed was deposited with an attorney, and attached thereto was a letter of instructions providing for the delivery of the deed at Mrs. Sutton's death, and the payment to her of three hundred dollars per year during her life. She died about one year later. Plaintiff then brought this action. A verdict was directed for plaintiff, and defendant has removed the case here by writ of error.

But two questions are presented:

1. Does the deed in question convey a present interest, or is it testamentary in character, and therefore revoked by the will of 1902?

2. Has the plaintiff, as executor under the will, such an interest in the farm in question as will enable him to maintain ejectment?

Gardner on Wills, at page 24, states the rule as follows: "The essential difference between a deed and a will is that a deed must pass a present interest in the property, although the right to possession and enjoyment may not accrue until some future time, while an instrument which passes no interest until after the maker's death is a will. Regard must be had to the intention of the maker viewed in the light of the language of the instrument, and the circumstances surrounding the parties and attendant upon its execution"; citing cases.

1 Underhill on Wills, section 37, in discussing the question, uses language to the same effect. See, also, Borland on Wills, section 8, and cases cited.

Applying the foregoing rule to the case at bar, we find that there is no ambiguity in the language used: "This deed is not to become operative until the death of the grantor named herein."

These words can have but one meaning, viz., that no interest passed to the grantee thereunder until the happening of the event described. It is manifest that the instrument cannot be inoperative, as provided by its terms, and at the same time operative, to convey a present interest to be enjoyed by the grantee, at the death of the grantor. Nor is the meaning of the language quoted enlarged, restricted, or in any wise changed by the words following the quotation. If we look to the circumstances surrounding the parties at the time of the execution of the instrument (which is unnecessary in this case), in order to ascertain the intent of the parties, there can be no doubt that both Sutton and his wife believed that, in executing deeds to each other to become operative at death, they

were making a testamentary disposition of their several estates. The fact that John B. Sutton, in his lifetime, deeded away two parcels described in the deeds to his wife is significant as to his understanding of the effect of the instrument. The language contained in one of the deeds, "and all other real estate of which I may die seised," is also important as indicating a testamentary intention on the part of the grantor.

Another important fact, as bearing upon his intention, is that in 1902 he made a will by the terms of which his wife was given a life estate only. Similar provisions have frequently been construed by this court. In the late case of *Leonard v. Leonard*, 145 Mich. 563, 108 N. W. 985, ⁶⁶¹ the language construed was: "This deed is not to become operative until after the death of the parties of the first part hereto," where this court said: "The words used cannot be said to apply simply to the enjoyment and possession of the property, but to the entire force and effect of the instrument, and are repugnant to the creation of a present interest": See, also, *Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98; *Lautenshlager v. Lautenshlager*, 80 Mich. 285, 45 N. W. 147; *Ferris v. Neville*, 127 Mich. 444, 89 Am. St. Rep. 480, 86 N. W. 960, 54 L. R. A. 464; *Lincoln v. Felt*, 132 Mich. 49, 92 N. W. 780; *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458; *In re Dowell's Estate*, 152 Mich. 194, 115 N. W. 972. The instrument, though in form a deed, was in fact a will. We find no evidence in the record of the delivery of the instrument, but whether it was delivered or not is of no consequence if, in fact, it was testamentary in character. The delivery of a will conveys no estate to a devisee therein named.

Can the executor maintain ejectment? The language of the will is as follows:

"I hereby nominate, constitute and appoint Paul B. Moody, executor of my last will and testament, with full power and authority, upon the decease of my said wife, Louisa A. Sutton, to make such disposition of any and all of the property of which I may die seised and possessed, as may be necessary to carry out the provisions of this instrument."

The statute gives to the executor the right to the possession of all real and personal estate of the deceased: 3 Comp. Laws, sec. 9354. The right of an executor to maintain ejectment under this statute has been upheld: *Kline v. Moulton*, 11 Mich. 370; *Barlagé v. Detroit etc. Ry. Co.*, 54 Mich. 564, 20 N. W. 587. One entitled to the possession of land merely may maintain ejectment: *Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390; *Shaw v. Hill*, 79 Mich. 86, 44 N. W. 422. But we are of opinion that the language of the will above quoted is ⁶⁶² broad enough to convey title to

the land in question coupled with a power of sale, though the land is not specifically described.

The judgment must be affirmed.

Montgomery, C. J., and Hooker, McAlvay and Blair, JJ., concurred.

The Distinction Between a Deed and a Will is considered in the note to Ferris v. Neville, 89 Am. St. Rep. 486, and in the subsequent cases of O'Day v. Meadows, 194 Mo. 588, 112 Am. St. Rep. 542; Griswold v. Griswold, 148 Ala. 239, 121 Am. St. Rep. 64. "The essential characteristic of a will is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory and revocable. By its execution the author has parted with no rights nor divested himself of any interest in or control over his property, and no rights have accrued to, and no estate has vested in, any other person. The death of the maker for the first time establishes the character of the instrument. It then ceases to be ambulatory, acquires a fixed status, and operates as a transfer of title. An instrument which is to operate in the lifetime of the donor, and to pass an interest in his property before his death, even though its absolute enjoyment by the donee is postponed till the death of the donor, is a deed or some instrument other than a will. It is essential to a will that it should be made to depend upon the death of the maker to consummate it, up to which time it is inoperative and revocable": 1 Ross on Probate Law and Practice, 2.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

STATE v. PARR.

[109 Minn. 147, 123 N. W. 408.]

LICENSE—Peddlers and Merchants—Class Legislation.—Chapter 248, Laws of 1909, entitled "An act to tax the occupation of and to license hawkers, peddlers and transient merchants, and defining said occupations," is unconstitutional as a police regulation, being class legislation, and is prohibited by sections 33 and 34, article 4, of the constitution. (pp. 760, 764.)

LICENSE—Peddlers—Inequality of Classification.—The act is also unconstitutional as a tax measure, in that the tax imposed on the occupation of peddling does not fall equally and apply uniformly on all members of the class, as required by the amendment to article 9 of the constitution. (pp. 760, 764.)

LICENSE—Definition of Peddler.—The Minnesota act of 1909, imposing a license on peddlers and merchants, declares a person to be a hawker or peddler who travels from house to house for the purpose of selling by sample or for future delivery. An actual sale is not necessary. (By the editor.) (p. 761.)

LICENSE—Distinction Between Permanent and Temporary Merchants.—Permanent merchants are those who have a permanent place of business, and transient merchants are transitory or temporary traders who have no intention of locating permanently. (By the editor.) (p. 762.)

LICENSE—Discrimination Between Merchants.—While a statute imposing a license may properly make a distinction between transient and permanent merchants, it should not discriminate between the latter. (By the editor.) (p. 763.)

LICENSE—Discrimination According to Locality.—A statute imposing a license on merchants, which makes an arbitrary division of the state into counties so that merchants in one county may have a great advantage over those of another county, according to location, cannot be upheld. (By the editor.) (p. 763.)

LICENSE—Exemption of Venders Who Produce Articles.—A statute provides improper classification which, in imposing a license upon certain venders, exempts those who sell articles of their own make or production. (By the editor.) (pp. 763, 764.)

(Syllabi by the court except when stated to be by the editor.)

George T. Simpson, attorney general, Earl Simpson, county attorney, O'Brien & Stone and Young & Stone, for the appellant.

Webber & Lees, for the respondent.

A. J. Daley, by consent, filed a brief in favor of the relator.

¹⁴⁷ LEWIS, J. Relator, having been arrested for violating the provisions of chapter 248, page 293, Laws of 1909, sued out a writ of habeas corpus, alleging that his imprisonment was unlawful, for the reason that the law was unconstitutional.

Section 1 defines hawkers and peddlers as follows: "Every person traveling from house to house for the purpose of offering for sale ¹⁴⁸ any article of merchandise, either for immediate or future delivery or according to sample is hereby declared to be a hawker and peddler." The same section defines a transient merchant to be a person, corporation or copartnership exposing and offering for sale at retail in any city or village, goods, wares and merchandise, unless the carrying on of such business is in pursuance of an intention to maintain and carry on the same permanently.

Section 2 provides how a license may be taken out by hawkers and peddlers, and establishes the rate to be paid upon the basis of fifty dollars for a wagon or other vehicle drawn by two or more horses, or other beasts of burden, or propelled by any mechanical power, twenty-five dollars for a wagon or other vehicle drawn by one horse or other beast of burden, and ten dollars when carrying on the business by means of a push or hand cart, or on foot by means of pack, basket or other way of carrying merchandise on foot.

Section 4 provides that a transient merchant is required to pay into the state treasury the sum of one hundred and fifty dollars upon application for a license, and by section 5 no person, copartnership, firm or corporation shall carry on the business of transient merchant in more than one place in this state at the same time.

Section 6 reads: "Nothing in this act contained shall be construed as prohibiting or in any way limiting or interfering with the right of any city, village or other municipal corporation or governmental subdivision of the state to regulate or license the carrying on within such municipality of the business of hawker or peddler or transient merchant in any case where authority has been or shall hereafter be conferred upon it so to do, but the requirements of this act shall be in addition thereto."

Section 9: "The provisions of this act shall not apply to persons engaged in interstate or foreign commerce, nor to the sale of articles which at the time of such sale are the subjects of interstate or foreign commerce, nor to the salesmen of

wholesale merchants or manufacturers in selling to retail merchants, nor to the solicitation by permanent merchants or their employes of orders from customers resident in the same or the adjoining county as such permanent merchant, nor to any sale made by virtue of any judgment, order or ¹⁴⁹ process of any court or upon the foreclosure of any mortgage or pursuant to any law of this state or of the United States, or in the enforcement of any contract right or lien, nor to the sale by any individual of any article grown [or] produced by him."

Section 10: "No license under this act shall be required of any person for carrying on his business or calling in any city of this state having a population of fifty thousand, or over, when he has been duly licensed thereto by such city."

At the time of the passage of this act it had been held in *State v. Wagener*, 69 Minn. 206, 65 Am. St. Rep. 565, 72 N. W. 67, 38 L. R. A. 677, that the distinction attempted to be made by chapter 107, page 192, Laws of 1897, between peddling by any manufacturer, mechanic, nurseryman, farmer and butcher, and the peddling of the same article by the purchaser from such parties, did not constitute a proper basis for classification. It had also been decided in the case of *City of St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554, 88 N. W. 984, that the common council of the city of St. Paul had no authority to prevent the agent of a wholesale dealer from selling and delivering goods to dealers only. And in *State v. Jensen*, 93 Minn. 88, 100 N. W. 644, it had been decided that an ordinance of the city of Minneapolis, requiring peddlers to take out a license, applied to farmers and producers growing and selling their own produce, as well as to peddlers who purchased their stock.

The constitutional amendment (section 18, article 1) had also been adopted. It reads: "Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor."

Chapter 248, Laws of 1909, was doubtless drawn with reference to these decisions and the amendment, and, while objections heretofore under consideration may have been cured, new features were introduced, which present a new phase of the subject of classification. The subject matter of the act is divided into three heads: Hawkers and peddlers, transient merchants, and permanent merchants. As stated in *City of St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554, 88 N. W. 984, a peddler is one who carries his merchandise with him, traveling from place to place and from house to house, exposing his goods ¹⁵⁰ for sale and selling them. The 1909 act declares a person to be a hawker or peddler who travels from house to house for the purpose of selling by sample, or for future delivery. An actual sale is not necessary. It is not clear, from the language of section 1, that it was intended to

do away with the itinerant element of the peddling business, and to make the law apply to all persons who take orders from house to house, including merchants who have fixed places of business. If no change was made in this respect, then section 1 defines a hawker or peddler as follows: 1. He has no fixed place of trade, but travels from place to place and from house to house; 2. He is a hawker or peddler, although he sells by sample, and does not carry his wares with him; 3. He is a hawker and peddler, even if he does not make an immediate sale, but enters into an executory contract for a future sale for future delivery. Accepting this construction, is the classification proper?

Permanent merchants are those who have a permanent place of business, and transient merchants are transitory or temporary traders who have no intention of locating permanently. This distinction is marked, and is determined by the manner in which the selling of goods is conducted. It is a matter of common knowledge that the practice of opening a temporary place of business for the purpose of selling goods under the excitement created by extraordinary advertising naturally tends to induce the ignorant and unwary to purchase goods of a questionable character and at exorbitant prices. That there should be some reasonable regulation of this sort of traffic has now become well recognized, and laws to that effect have been adopted in many of the states. The act of 1909 expressly prohibits transient merchants from conducting business in any village or city in the state; but there are no restrictions against locating and selling outside the corporate limits of such municipalities. A transient merchant may locate in the country, or adjacent to a village or city, and without a license sell his goods in any quarter of the state, save cities and villages, by sample, or by taking orders for future delivery. He is not a hawker or peddler, because he has a fixed place of dealing, from which he conducts operations. So considered, the act discriminates against permanent merchants, who are ¹⁵¹ restricted in the solicitation of orders from their customers to the territory designated.

But if we take the other view, and hold that section 1 does away with that well-established and peculiar characteristic of peddlers, viz., of having no fixed place of business, and that all merchants, transient and permanent, who solicit orders for future delivery, by sample or otherwise, are included within the term "hawkers and peddlers," then we are met with the objection that transient and itinerant merchants are discriminated against in favor of permanent merchants, because the latter are at liberty to pursue that method of extending business within certain limits without a license, whereas the former are absolutely prohibited. Undoubtedly the legislature may legitimately make a distinction between

dealers who have no fixed place of business and those merchants who become identified with some particular locality as permanent citizens, and we are not prepared to condemn this act simply because it discriminates in favor of permanent merchants, even by granting them limited privileges to "peddle." However that may be, there should be no discrimination between permanent merchants.

Any interference with the competition which naturally exists among merchants in their effort to secure business is a doubtful policy, unless made necessary in the exercise of police control. In this instance the regulation of the method of soliciting business seems not to be the primary object. The state is divided into many divisions, in each of which the merchants located therein are at liberty to solicit trade for future delivery. But the doors are closed to all other merchants of the state. The basis of classification is residence within a prescribed division of the state, the immediate effect of which is to protect such resident merchants from competition from the outside, or to deny them the privilege of entering more promising territory than their own and adjacent counties. The object of this class of legislation is to regulate the business of selling goods from house to house—peddling, as it is commonly known—so that it will not become a public nuisance. Does this scheme tend to accomplish that result? To use the illustration employed at the argument: Is it any less a nuisance to the householders of Winona county, ¹⁵² and adjoining counties, to be solicited for orders by a Winona house furnishing company, than to be similarly solicited by a Minneapolis furnishing company?

One of the fundamental rules controlling legislation of this character is that it must act uniformly upon all within the class: *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Lavallee v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974; *State v. Ritt*, 76 Minn. 531, 79 N. W. 535; *Murray v. Board of Commrs. of Ramsey County*, 81 Minn. 359, 83 Am. St. Rep. 379, 84 N. W. 103, 51 L. R. A. 828; *State v. Justus*, 90 Minn. 474, 97 N. W. 124. This law does not act uniformly upon all merchants who solicit orders for future delivery. The division into counties is arbitrary. Merchants of one county may have a great advantage over those of another county, according to the advantages of location.

By the amendment (section 18, article 1) farmers and gardeners are privileged to sell the products of the farms and gardens occupied by them. The provision in section 9 of the act under consideration exempts persons who sell articles grown or produced by them. The act is broader than the constitution. The exemption is conferred, not only on those who grow "produce" on farms and gardens, but also on those who produce any article. The natural meaning of this

is that any article made or produced by any person may be sold without a license. This question was directly passed on in *State v. Wagener*, 69 Minn. 206, 65 Am. St. Rep. 565, 72 N. W. 67, 38 L. R. A. 677, and it was held to be an improper classification.

Thus far we have considered the license feature only of this act. It is entitled "An act to tax the occupation of and to license hawkers, peddlers and transient merchants, and defining said occupations." While removing some of the former restrictions on the methods of taxation, the amendment to article 9 of the constitution (chapter 168, page 216. Laws of 1905) specifically prescribes that taxes shall be uniform upon the same class of subjects. The legislature is not required to provide for the taxation of occupations; but if such a course is pursued, and any occupation is selected for that purpose, then the burden must fall equally upon the members of the class: *Mutual Benefit Life Ins. Co. v. County of Martin*, 104 Minn. 179, 116 N. W. 572. The occupation or class designated by the act is that of ¹⁵³ peddling. Some peddlers are taxed, while others are exempt, and for the reasons above stated the law cannot be sustained as a tax measure any more than as a police regulation.

This decision has been reached without regard to the provisions of section 10. Not being able to agree as to the scope and effect of that provision, and a consideration of the questions therein involved not being necessary to a decision, we refrain from a discussion thereof.

Affirmed.

The Constitutionality of Licenses and Occupation Taxes is the subject of a note to *Hager v. Walker*, 129 Am. St. Rep. 249.

STATE v. DE GROAT.

[109 Minn. 168, 123 N. W. 417.]

CORPORATION—Mandamus to Call Stockholders' Meeting.

Mandamus will lie to compel a resident of this state, the secretary of a domestic corporation, to call a stockholders' meeting pursuant to a by-law of the corporation. Whether such writ can be allowed when the corporation is foreign, *quære*. (pp. 767, 770.)

FOREIGN CORPORATION—Mandamus to Call Stockholders' Meeting.

Judgment for a peremptory mandamus should not be granted, upon the relation of a foreign holding corporation, to compel the secretary of another holding and foreign corporation to call a meeting of its stockholders for the purpose of taking action necessary to bring about a change in the articles of incorporation of two other foreign corporations. (pp. 767, 769.)

FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.—Courts will not exercise visitatorial powers over foreign corporations, or interfere with the management of their internal affairs. (By the editor.) (p. 768.)

(Syllabi by the court except when stated to be by the editor.)

A. L. Agatin, for the appellant.

Harlan P. Roberts, for the respondent.

¹⁷³ O'BRIEN, J. The relator, the Lake Shore Telephone and Telegraph Company, is a Wisconsin corporation, and the owner of a majority of the capital stock of the Zenith City Telephone Company, a corporation also organized under the laws of Wisconsin, and which owns nearly all the ¹⁷⁴ stock of the Zenith Telephone Company, a corporation organized under the laws of Maine, and operating a telephone system in Duluth, Minnesota, and holding as owner a majority of the stock of the People's Telephone Company, a Wisconsin corporation operating a telephone system in Superior, in that state. The legality of these stock holdings is not questioned.

For the purpose of making its control of the three last-named companies effective, the relator delivered to the president and secretary of the Zenith City Telephone Company a written demand, pursuant to the by-laws of that company, that a special meeting of the stockholders be called. Instead of complying, a special meeting of the directors of Zenith City Telephone Company was held, at which it was resolved not to accede to the request. Thereafter proceedings in mandamus to compel the calling of the meeting were instituted against F. H. De Groat, a citizen of St. Louis county, in this state, and secretary of Zenith City Telephone Company. After a trial, judgment was rendered that a peremptory writ issue, commanding De Groat, as secretary, to call a meeting of the stockholders of Zenith City Telephone Company for the consideration of the following business:

"First. The instruction of the directors of the Zenith City Telephone Company to take such steps, by way of amendments to the articles of incorporation and by-laws of the various corporations hereinafter set forth, so that the annual meetings of the stockholders of said corporations shall be held in the following order: First, the annual meeting of the Lake Shore Telephone and Telegraph Company; second, the annual meeting of the Zenith City Telephone Company; third, the annual meeting of the Zenith Telephone Company; fourth, the annual meeting of the People's Telephone Company.

"Second. The giving of instructions to the directors of the Zenith City Telephone Company as to the policy to be

pursued in the management of the Zenith Telephone Company and the People's Telephone Company.

"Third. The transaction of any business of interest or importance to the stockholders of the Zenith City Telephone Company.

"Fourth. The giving of instructions to the directors of the Zenith ¹⁷⁵ City Telephone Company, or to any other person to call a special meeting of the stockholders of the Zenith Telephone Company, and of the People's Telephone Company, or either of them, for the purpose of amending the articles of incorporation of said companies, or either of them, to bring about the purposes set forth in the first item of business hereinabove set forth, or the making of any other amendments that may be deemed important; also the authorizing of any stockholder in the Lake Shore Telephone and Telegraph Company, or such other person as may be selected at said meeting of the Zenith City Telephone Company, to cast the vote upon the stock of the Zenith Telephone Company, held by the Zenith City Telephone Company, at any meeting of the stockholders of the Zenith Telephone Company hereafter held, whether said meeting be a special meeting or a regular annual meeting, to be hereafter held, it being understood that there will be presented at the special meeting of the stockholders of the Zenith City Telephone Company, a proposition that the stockholders of the Zenith City Telephone Company at that meeting authorize some other person than its own directors or president to vote the stock of the Zenith Telephone Company, owned by the Zenith City Telephone Company, at all subsequent meetings of the stockholders of the Zenith Telephone Company."

This appeal is from the judgment so entered.

1. The appellant claims that, under the provisions of section 4556, Revised Laws of 1905, the writ of mandamus will not lie to compel the performance of an act which is imposed as a duty upon one, not by the laws of a state, but only by a by-law of a corporation. The statute reads that the writ may issue "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." It was held by the supreme court of Connecticut (*Bassett v. Atwater*, 65 Conn. 355, 32 Atl. 937, 32 L. R. A. 575) that the office of secretary of a corporation and the performance of the duties of that office constituted, under the statute of that state, an office and trust, within the meaning of the statute regulating proceedings in mandamus, and that such secretary could be compelled to call a meeting of the stockholders of a corporation when a sufficient demand was made upon him, as provided in the by-laws ¹⁷⁶ of the corporation. The cases referred to in the note attached to this decision, as printed in 32 L. R. A. 575, seem to hold in harmony with it.

If the Zenith City Telephone Company were a domestic corporation, there would be no doubt as to the propriety of the remedy sought. Subdivision 8 of section 3171, Revised Laws of 1905, gives the district court authority to cause a meeting of the managing board, stockholders or members of a corporation to be held, when deemed necessary for the preservation of its property or protection of its interests. To this end it is clear that the district court could, in furtherance of the powers vested in it, compel the proper officer of a domestic corporation, subject to the visitorial powers of the state, to call a meeting of the stockholders; and, while its right to do so may not rest upon the existence of a by-law providing for a call, the fact that such a by-law in fact existed would be taken into consideration by the court in determining what its action should be. The writ of mandamus is not one of right, but is an extraordinary legal remedy, which the court may use in its discretion in furtherance of justice: *State v. U. S. Express Co.*, 95 Minn. 442, 104 N. W. 556. We do not think that, even in the case of a domestic corporation, the existence of a by-law providing for a meeting upon demand of a certain number of stockholders deprives the court of its discretion in directing a mandamus to compel an officer to call a meeting; but we have no doubt that the remedy is a proper one in the case of a corporation organized under the laws of this state.

2. If the act sought to be compelled amounts to the regulation of the purely internal affairs of a foreign corporation, the courts of this state will assume no jurisdiction of the subject: *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324. The relator insists that the desired action does not fall within this rule; that it, as the owner of the majority of the stock, has a clear right to insist that the secretary of the corporation, a citizen and resident of Minnesota, perform the duty imposed upon him by the by-laws; that this is not a regulation of the internal affairs of a corporation, as the court is not called upon to say what the ultimate action of the stockholders must be; that it is analogous to the situation ¹⁷⁷ where, although the court will not attempt to control the discretion of an officer, it will compel him to exercise the discretion with which he is vested. If calling a meeting of the stockholders of the Zenith City Telephone Company, a corporation organized under the laws of Wisconsin, is not an act regulating or dealing, or having to do solely with the internal management of that and the other corporations mentioned in the judgment, the contention of the relator is sound.

Both parties to this appeal appear to rely upon the decision of this court in *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324. That was

a case in which a citizen of Minnesota was permitted to maintain an action in the courts of this state to compel the issuance to him by the Western Union Telegraph Company, a foreign corporation, of certain shares of its stock in lieu of certain shares which it had duly issued to plaintiff's assignor, and which had been lost. It was a case in which, while the plaintiff's rights arose out of his membership in the corporation, he had, as against the corporation, an individual claim and demand. The opinion in that case affirmed the doctrine "that courts will not exercise visitatorial powers over foreign corporations, or interfere with the management of their internal affairs," and gave a number of instances of what would be such interference—amongst others, "who, of rival claimants, are its legal officers."

In *North State C. & G. M. Co. v. Field*, 64 Md. 151, 20 Atl. 1039, it was attempted to formulate a statement defining what was and what was not the regulation of internal affairs of a corporation: "That where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction."

This statement of the law was accepted by the supreme court of Pennsylvania in *Madden v. Penn Electric Light Co.*, 181 Pa. 617, 37 Atl. 817, 38 L. R. A. 638, and was evidently referred to by this court in the opinion in *Guilford v. Western Union Tel. Co.*, where, ¹⁷⁸ at page 341 of 59 Minn., page 325 of 61 N. W. (50 Am. St. Rep. 407), after summarizing that statement, it is said: "We think there are cases, and that this is one of them, where, although the rights of a party grow out of his membership in the corporation, yet, as the matter affects only his individual rights under the contract by which the stock was issued, therefore an enforcement of those rights will not be an interference with the internal management of the corporate affairs within the meaning of the rule." This modification is in harmony with the weight of authority. Thus a court will compel the officers of a foreign corporation, having in their possession within the state the books and records of the company, to open them in a proper case, for the inspection of a stockholder: *Richardson v. Swift*, 7 Houst. (Del.) 137. 30 Atl. 781; *State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780.

In *Selover v. Isle Harbor Land Co.*, 91 Minn. 451, 98 N. W. 344, this court held that an action might be maintained in Minnesota to compel a South Dakota corporation to issue

and deliver to the plaintiff, a citizen of Minnesota, a certain proportion of its common stock pursuant to the provisions of a valid contract to that effect.

In all of these cases the claimant's rights depended upon his membership or right of membership in the corporation, and his claim was directed against the corporation, and to a greater or less extent affected the rights of the corporation and its members. But in each instance he was asserting an individual property right, except, perhaps in those cases in which an inspection of the books has been compelled, and in those cases not only the officers having the custody of the books, but the books themselves, were within the state the courts of which exercised jurisdiction. The statement found in 19 Cyc. 1238, is in harmony with all these cases: "Upon the question what acts of a foreign corporation are within this rule, and what without it, the distinction has been taken that, where the act affects one solely in his capacity as a member, he must seek redress of his grievance in the courts of the state or county creating the corporation; but, where the act affects his individual rights, he may demand redress of any tribunal where jurisdiction may properly be acquired." It must be remembered, also, that the relator is ¹⁷⁹ not a citizen of Minnesota, seeking redress for an individual wrong or asserting an individual property right, but is a foreign corporation, asking that a court of this state exercise its discretion in granting it this extraordinary remedy to compel the officer of another foreign corporation to perform a duty imposed upon him by its by-laws.

In the writer's opinion, the relator in this proceeding is attempting to assert only the right which a member has in the management of the affairs of a corporation. Its right is in proportion to its stockholding, no greater and no less, and no different from that of any other member. It entirely grows out of and depends upon his membership in the corporation. The calling of a stockholders' meeting is the first step necessary in an attempt to change the time for the annual meeting of three foreign corporations, for instructing the directors of a foreign corporation as to the business policy to be pursued in its affairs, for amending the articles of incorporation of one or all of the three foreign corporations mentioned in the writ, and which it claims the right to control. These are regulations of internal affairs, in which each stockholder, as well as each corporation, is vitally interested, and each step in the proceeding is such regulation to a greater or less extent. It is only by arguing that the judgment of the court is not effective that the conclusion can be reached that the court is not called upon

to enforce, as between each other, the claims of rival stockholders in a foreign corporation.

In *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324, one of the contentions stated to be clearly beyond the power of the court was in a foreign corporation, "who, of rival claimants, are its legal officers." Here we have the contention as to which of rival claimants shall control its policy. If this was an action to test the appellant's right to hold the office of secretary, it would fall within the class of cases which this court said were beyond the power which the courts of this state would attempt to exercise, and to say in what manner he shall perform the duties of his office is equally outside the visitorial power of this state. The Zenith City Telephone Company was created and exists under the laws of Wisconsin, and is subject to the laws of that state. The election of a secretary, who resides in Minnesota, does not prevent the state authorizing the corporation from exercising ^{also} any visitorial or other power over the corporation which it possesses; nor can those powers be increased by the law or judicial procedure of this state.

3. A majority of the members of this court are unwilling to hold at this time that in no case will the courts of this state compel, by mandamus, a resident of this state, who is the secretary of a foreign corporation, to perform the ministerial duty of calling a meeting of the stockholders; but we all agree that the district court was without power to direct the transaction of the business by the various corporations set out in the judgment, particularly when this extraordinary power of the court is invoked by a corporation for the confessed purpose of controlling the affairs of other corporations foreign to this state, and which are not parties to this action.

Judgment reversed.

That Courts will not Interfere With the Internal Affairs of foreign corporations, see *McCloskey v. Snowden*, 212 Pa. 249, 108 Am. St. Rep. 867.

Mandamus to Private Corporations is the subject of a note to *City of Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 317. As to what duties will be compelled to be performed by mandamus, see the note to *Ward v. Commissioners of Beaufort County*, 125 Am. St. Rep. 492.

FLOODY v. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

[109 Minn. 228, 123 N. W. 815.]

LESSEE RAILWAY—Liability to Employés.—A railway company running its trains over the leased tracks of another company is not relieved of the duty it owes to its employés to use reasonable care to provide for the safe operation of its trains while upon such leased tracks. (p. 774.)

RAILWAY—Negligence of Employé of Depot Company.—A depot company, operating a union depot under the control and for the convenience of several railway companies, is the servant of the one for which it performs a particular act; and, if the act is negligently performed, the railway company is liable to its employé injured thereby. (p. 776.)

RAILWAY—Negligence of Switchman of Depot Company.—A switchman in the employ of a union depot company is not a fellow-servant of a switchman in the employ of a railway company running trains to the depot, as the term "fellow-servant" is used when the common-law rule is invoked that a master is not liable for injuries received through the negligence of the coemployé. Nevertheless the railway company may be liable to its servant for personal injuries received because of the negligence of the depot employé. (pp. 775, 776.)

RAILWAY—Negligence of Switchman of Depot Company.—The act of a switchman employed by the depot company in throwing the switch for the passage of a railway company's train is the act of the depot company, and may render the railway company liable to an injured employé. *Floody v. Great Northern Ry. Co.*, 102 Minn. 1, followed. (p. 777.)

RAILWAY—Evidence of Negligence of Switchman.—Evidence considered, and held sufficient to sustain a finding of negligence. (p. 777.)

(Syllabi by the court.)

James B. Sheean and Thomas Wilson, for the appellants.

Barton & Kay, for the respondent.

230 O'BRIEN, J. This case, in one form or another, has been before this court several times. The merits of plaintiff's claims were considered in *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A., N. D., 1196. In that case plaintiff had sued the Great Northern and Chicago, St. Paul, Minneapolis and Omaha Railway Companies, and obtained a verdict against the Omaha, judgment being directed in favor of the Great Northern.

A new trial of the action against the Omaha was directed by this court for errors of law and misconduct of a juror. Subsequently the district court vacated its order directing judgment in favor of the Great Northern. Plaintiff then served notice of dismissal, and commenced this action against the Omaha company and Edward S. Wood, the switchman upon whose claimed negligence the plaintiff bases his right to recover. It is not necessary to mention

other incidents, as no error because of any of them is assigned upon this appeal. This case came on for trial May 19, 1908, and the plaintiff had a verdict from the jury. The defendants appeal from an order denying an alternative motion for judgment or a new trial.

The appellant, the Omaha Railway Company, held a contract or lease from the Great Northern Railway Company giving it the right ²³¹ to use certain tracks belonging to the Great Northern in the city of St. Paul and adjoining the Union Depot grounds in that city. The original contract was entered into many years ago between the respective predecessors of these railway companies, and the evidence tends to establish the fact that the lease or contract has been liberally construed by the companies and understood to allow the Omaha the use to a greater or less extent of tracks belonging to the Great Northern which were not in existence at the time the contract was executed. Up to April 19, 1906, the Omaha company had, under this contract, used for the passage of its trains to and from the Union Depot two certain tracks, the property of the Great Northern. These tracks met the Union Depot tracks at the center of Third street, at the boundary of the depot grounds. No switch was necessary at this point, the rails being connected and forming continuous tracks. The trains while upon the depot grounds were, as to switching, under the direction of the depot company.

The Union Depot Company is a corporation maintaining a depot for the benefit and convenience of the various railway companies entering the city. It has its own officers and employes, one of whom was the defendant Wood. On April 19, 1906, the Great Northern company had completed upon its own right of way a track which entered the depot grounds about one thousand feet west of the point already described where its tracks used by the Omaha company connected with the depot tracks. It thereupon broke that connection, and placed what is known as a puzzle switch at the new point, and directed the Depot company to send over this new track trains which had formerly left the depot grounds at the center of Third street. The evidence tends to establish the fact that the switch itself was upon the Great Northern property, but was operated by the employes of the Depot company. The general superintendent of the Omaha company testified he never knew of this change, nor was there any evidence that anyone connected with that company, except its train employes, had actual knowledge of the situation. As its name implies, the puzzle switch is quite complicated. The particular one was difficult to operate, and, unless care was taken to firmly secure ²³² the lever, the rails were liable to be so placed as to cause the derailment of an engine or car entering the switch.

On the evening of May 9, 1906, the plaintiff, a switchman in the employ of the Omaha company, was lawfully upon a switch engine attached to one of that company's passenger trains leaving the Union Depot for Minneapolis. Wood, the switchman in charge of the puzzle switch, threw the lever for the purpose of adjusting it so as to send the train upon the new track of the Great Northern company, after which he signaled the train to advance, and the engine and forward trucks of the mail-car were derailed at the switch. The plaintiff was thrown or jumped from the engine, was caught under the wheels of the tender, and permanently injured.

The plaintiff claims that the defendant Wood was negligent in failing to force home and secure the lever. The appellant railway contends that the plaintiff is not entitled to recover against it: (1) Because the accident occurred upon the property of the Great Northern Railway Company at a place not included within the terms of the contract between it and the Great Northern; (2) that the sending of the Omaha train over the switch described was an unauthorized and wrongful act of the Depot and the Great Northern companies, and was done without the knowledge or consent of the appellant the Omaha company; (3) that Wood was not its servant, and, therefore, not a fellow-servant of the plaintiff, and the appellant is not responsible for his negligence. Both appellants contend that the evidence was not sufficient to sustain a finding that Wood was negligent.

Fairly construing the charge, the jury was instructed that under the evidence the location of the switch and new track was immaterial; the fact that the officers of the Omaha company had no knowledge of the change in the tracks was also immaterial, if the employes of that company operating its trains had such knowledge; and, finally, that if Wood's negligence caused the accident, the appellants were each responsible in damages to the plaintiff, because the plaintiff and the switchman were fellow-servants. By various requests for directions on the trial, exceptions duly taken, and assignments of error on this appeal, the appellants have challenged each of these instructions.

²³³ It is insisted that the testimony in the record on this appeal establishes different facts from those shown by the record upon the appeal taken after the first verdict: *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, 112 N. W. 875, 1081, 3 L. R. A., N. S., 1196. We think the testimony was clearer at this last trial, at least with reference to the location of the various tracks and switches. The parties are also different. We are, however, of the opinion that a reversal of the order appealed from here would be tantamount to overruling the decision of this court to which we have referred; but in view of the earnest and forceful presentation of the appellant's claims, we have determined to restate our views.

1. The appellant is a railroad company operating a large general system of railways. It is a matter of common knowledge that a company so situated has necessarily to make contracts with other companies involving the use of roadway, equipments and appliances by one belonging to the other. The ordinary employes of the company are not instructed concerning the details of such contracts, or required to inform themselves upon them, and if in the regular course of the running of its trains the appellant company acquired the right to, and did, use the tracks of other railway companies, and sent the plaintiff out upon these tracks, it is difficult to see how it relieved itself from any of the duties which it owed to the plaintiff as his master. The testimony showing the course of business adopted by the Omaha and Great Northern Railway companies for the joint use of the Great Northern tracks is not sufficient to show that the change made in the tracks by the Great Northern company was so unauthorized, or so far violated the contract between them, as they themselves had construed it, that the appellant company was under no responsibility to the plaintiff while its train was upon that track.

Since the original contract was so made between the railway companies which were the respective predecessors of the present parties to it, a large number of tracks have been constructed in and about the place referred to. It is almost inconceivable that the Great Northern company would, without notice to, and in violation of its contract with, the Omaha company, tear up one set of tracks and construct entirely new ones, unless it believed that, so long as it furnished sufficient trackage to the Omaha company to enable it to ²³⁴ run its trains to and from the Union Depot, it was complying with the spirit of the contract; and the fact that the new tracks were so used without protest for nineteen days prior to the accident is some evidence, at least, that the Great Northern company was right in so construing the contract. We do not think that notice of this change to the trainmen was, of itself, notice to the company; but if, in fact, the parties to the contract treated it in the manner we have suggested, actual notice of the particular change was not necessary. Upon the other hand, if the evidence does not support this view, the conclusion cannot be avoided that the proper officers of the Omaha ought to have known of the change. It knew that its trains were entering and leaving the Union Depot. The obligation was upon it to maintain a safe way for such trains. It did not perform the duty which it owed to its employes including the plaintiff, if for nineteen days it was possible without its knowledge to improperly divert its trains to tracks which it had no right, and was not willing, to use.

2. The switch where the accident occurred was operated by an employe of the Union Depot Company, under the

direction of that company, and was an instrumentality used in connection with the transaction of business conducted by the Depot company. We think, therefore, that the trial judge was justified in instructing the jury that it was immaterial whether the switch and tracks leading from it were located upon the grounds of the Depot or Great Northern companies.

3. The jury was instructed that the appellant company was responsible for any negligence upon the part of the switchman Wood; that he was a fellow-servant of the plaintiff. The fact that the trial judge stated that the plaintiff and Wood were fellow-servants is immaterial, if for any reason the Omaha company was so responsible. Having been directly instructed that the appellant was under that responsibility, it can hardly be presumed that the jury concerned itself with the legal definition of the relation existing between the two men. The propriety of this entire instruction must be determined by ascertaining whether or not the railway company is so responsible, notwithstanding the fact that Wood and the plaintiff ²³⁵ may not have been fellow-servants in every sense in which that term is used.

This brings us to what we understand to be the main contention of the appellant company. Counsel have cited a large number of cases holding that persons occupying the relative positions held by Wood and the plaintiff at the time of this accident are not fellow-servants. Most of those decisions were rendered in cases where the employé of one company was injured through the negligence of an employé of another company, and where the injured person sought to hold the master of the negligent servant. In all those cases it was held that those employés were not fellow-servants; that the one injured being lawfully upon the premises of the master of the negligent servant, the master was responsible, and could not escape such responsibility by claiming that his negligent employé and the person injured were fellow-servants: *Smith v. New York & H. R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305; *Phillips v. Chicago*, 64 Wis. 475, 25 N. W. 544; *Chicago T. T. R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990.

The authorities cited by appellants hold, and we agree, that these two men were not fellow-servants within the meaning of that term when the common-law rule, as to the nonliability of the master for injuries received by a servant through the negligence of a coemployé, is invoked to avoid liability. Fellow-servants, in that sense, are those who not only are engaged in the same general employment, but who also have a common master. The rule was based upon the theory that the servant in entering the master's employment assumed the risk of being injured through the negligence of another servant, whose conduct and demeanor he had a better opportunity of observing than had the master. Pri-

marily the master was liable for injuries suffered by any person through the negligence of his servants; but to this the courts added the doctrine that, if such injuries were received by a fellow-servant of the careless employé, it must be presumed that such carelessness was one of the risks assumed. The limited sense in which the term "fellow-servants" is thus used is indicated very clearly in Wood's Law of Master and Servant, sections 435, 436. It does not follow, however, because the plaintiff and the switchman were not ²³⁶ fellow-servants who would be presumed at common law to have assumed the risk of each other's negligence, that the appellant company, because of the statute abolishing the rule as to railroads, is not responsible for injuries caused by the negligence of Wood, when he was in fact assisting and taking part in the movement of its trains. The statute enlarges, but does not attempt to limit, the liability of the companies.

The Union Depot Company, while a separate legal entity, was shown by the testimony to be the common servant of all the railroads running passenger trains into the depot. It cannot be said to occupy the position of an independent contractor; for while it furnishes the depot and grounds and generally dictates upon which track a particular train shall go, each railroad company through its own employes retains control of some part of the operation of each train. That the Depot company was brought into existence by the railroad companies for their convenience, and is under the joint control of the railroads using it, is sufficient to show that it is not, in this case, to be considered an independent contractor, but rather in the common employment of the Omaha and the other railway companies: *State v. St. Paul Union Depot Co.*, 42 Minn. 142, 43 N. W. 840, 6 L. R. A. 234.

A corporation can only act through human beings. It was the duty of the Depot company to operate the switch in question, and it operated it through the switchman Wood. His act was the act of the Depot company, performed by him in the regular course of his employment, pursuant to the instructions he had received from his superior officers. His negligence was the negligence of the Union Depot Company. That company was the servant of the Omaha Railway Company, and the conclusion is unavoidable that under the circumstances of this case the appellant railway company is liable to the plaintiff for the injuries he received, if the accident was caused by the negligence of the switchman Wood: *Kastl v. Wabash R. Co.*, 114 Mich. 53, 72 N. W. 28.

Abundant authorities hold that, where the passenger of a company leasing trackage rights from another railway is injured through the negligence of an employé of the lesser

He may recover from the ²³⁷ lessee whose passenger he was: *Murray v. Lehigh Val. R. Co.*, 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539; *McElroy v. Nashua & L. R. Corp.*, 4 Cush. 400, 50 Am. Dec. 794. As applied to this case, we see no difference in principle between passenger and employé. While the degree of care required is different, the company in both cases undertakes to provide for the safe operation of its trains. The case of *Brady v. Chicago & G. W. R. Co.*, 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712, makes a distinction, and under that authority the plaintiff could not recover from the Omaha company; but this court refused to follow the *Brady* case upon the former appeal, and we adhere to that holding: *Kastl v. Wabash Ry. Co.*, 114 Mich. 53, 72 N. W. 28; *Wabash etc. Ry. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705; *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

4. The evidence was sufficient to sustain a finding that Wood was negligent. It was shown that the switch was difficult to operate; that great force was required to bring the lever home; that a metal dog, or catch, was attached, which was intended to fasten and hold the lever when placed; that if the lever was not forced home, and if not caught and held by the dog, the rails composing the switch were liable to become misplaced from the vibrations caused by passing trains. After the accident, the lever was found at an angle of about forty-five degrees. The switchman Wood testified that he had placed the entire weight of his body upon the lever for the purpose of forcing it home, and believed that he had done so; but he admitted that, although he knew of the existence of the dog or catch, he did not observe, and did not know, whether it had actually fallen into position, or caught, at the time in question. The switch was one requiring careful operation. Wood knew that its operation was difficult. He knew that it was supplied with means by which the lever could be fastened. Without satisfying himself that the lever had been so fastened, he signaled the train to advance, which it is presumed it would not have done in the absence of his affirmative action. The derailment of the engines was just what might be expected if the rails of the switch were not properly adjusted. This was sufficient evidence to sustain a finding of negligence upon the part of Wood.

Order affirmed.

The Liability of a Lessor Railway Company for the acts and negligence of the lessee company is discussed in the notes to *Lee v. Southern Pac. R. R. Co.*, 58 Am. St. Rep. 147; *Ohio etc. R. R. Co. v. Dunbar*, 71 Am. Dec. 295. As to the liability of a lessor railway to employés of the lessee, see *Travis v. Kansas City etc. R. R. Co.*, 119 La. 489, 121 Am. St. Rep. 526; *Lee v. Southern Pac. R. R. Co.*, 116 Cal. 97, 58 Am. St. Rep. 140. The liability of the lessor does not prevent the lessee from also being liable for the negligence of its employés: *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337.

WIRTH v. FAWKES.

[109 Minn. 254, 123 N. W. 661.]

EXECUTED SALE—Breach of Warranty—Remedy of Buyer.—

In the case of an executed contract for the sale of a chattel with warranty, there being no contract right or obligation to return it in case it does not prove to be as warranted, the buyer, in the absence of fraud, cannot rescind the sale and reject the chattel. His sole remedy is an action for damages for the breach of the warranty. (p. 779.)

EXECUTORY SALE—Breach of Warranty—Remedy of Buyer.

Where, however, the contract of sale is executory or conditional, the buyer, although the chattel is warranted, has the right to make a trial of it, reasonable as respects both time and manner, and to reject it if it does not fulfill the warranty or conditions, by so notifying the seller. He need not return it; but he will be deemed to have accepted it if he does not exercise his right of rejection within a reasonable time, or if he does any act in relation to it inconsistent with its ownership by the seller. (p. 779.)

SALE OF MACHINE—Acceptance by Vendee.—Evidence considered, and held that it conclusively shows that the plaintiff accepted an automobile sold to him by the defendant, and, further, that the trial court did not err in its instructions to the jury. (p. 780.)

(Syllabi by the court.)

Humphrey Barton, for the appellant.

Larrabee & Davies, for the respondent.

²⁵⁵ **START, C. J.** This action was brought in the district court of the county of Hennepin to recover from the defendant \$925, which the complaint alleged the plaintiff had paid to the defendant on the purchase price of an electric automobile, which the defendant agreed to sell to the plaintiff, and which was warranted to be perfect in every way and guaranteed to run twenty miles under one charge. The complaint further alleged, in effect, that the defendant, in an attempt to perform its part of the agreement, delivered to the plaintiff an electric automobile, and upon its being tested by the plaintiff it was found not to comply with the agreement, and thereupon the plaintiff returned the automobile to the defendant, who received it, and has refused either to deliver to the plaintiff an automobile of the kind specified in the agreement or to repay the purchase price. No fraud was alleged in the complaint.

²⁵⁶ The answer admitted and alleged that the defendant sold an electric automobile to the plaintiff for \$1,000, to be paid for \$600 in cash, and the balance, \$400, by a second-hand automobile, which was delivered to the defendant; that \$500 in money had been paid on the purchase price; that the defendant delivered the automobile purchased by the plaintiff to him, who accepted it and used it for more than a year; and further, that thereafter, and in June, 1907,

the defendant, at plaintiff's request, made repairs upon the automobile, which were not paid for, and the defendant has ever since retained possession of the automobile to protect his lien thereon. The answer also alleged a counterclaim in the sum of \$511.82 for repairs on the automobile, made at plaintiff's request. The reply put in issue the allegations of the answer and the counterclaim.

At the close of the plaintiff's evidence the trial court, on motion of the defendant, dismissed the plaintiff's case, on the ground that the undisputed evidence showed that the plaintiff accepted the automobile, and that it became his property, and therefore he had no right to rescind, but his remedy was an action for damages for the breach of the warranty. The defendant's counterclaim was submitted to the jury, and a verdict returned for the defendant in the sum of \$480.96. The plaintiff appealed from an order denying his motion for a new trial.

The principal question raised by the assignments of error is whether the trial court erred in dismissing the plaintiff's action. The remedies of a purchaser of chattels for a breach of his contract are well settled in this state. In the case of an executed contract for the sale of a chattel with a warranty, there being no contract right or obligation to return the chattel if it does not prove to be as warranted, the purchaser, in the absence of fraud, cannot rescind the sale and reject the chattel. His sole remedy is an action or counterclaim for damages for the breach of the warranty: *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. 149; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *Mulcahy v. Dieudonne*, 103 Minn. 352, 115 N. W. 636. If, however, the warranty is fraudulent, the purchaser may, within a reasonable time, rescind the contract, return the property, and recover back the purchase price, or ²⁵⁷ affirm the contract and maintain an action for damages: *Marsh v. Webber*, 16 Minn. 375 (418). Where, however, the contract of sale of a chattel is executory or conditional, the purchaser, although it be warranted, has the right to make a trial of it, reasonable as respects both time and manner, and to reject it, if it does not fulfill the warranty or condition, by so notifying the seller. He need not return it; but he will be deemed to have accepted it if he does not exercise his right of rejection within a reasonable time, or if he does any act in relation to it inconsistent with its ownership by the seller: *McCormick Harvesting Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846; *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 718; *Benjamin on Sales*, §12. What is a reasonable time is ordinarily a question of fact; but where only one conclusion can reasonably be drawn from the undisputed evidence, it is a question of law.

We have examined the evidence herein with the foregoing rules of law in mind, and have reached the conclusion that, if it be conceded that the evidence was sufficient to justify a finding that the contract of sale was executory, within the rule stated, yet it conclusively appears from the plaintiff's own testimony that he accepted the automobile, and that his remedy was an action for damages for breach of the warranty, if any there were.

He testified that the defendant took him out riding a few times in the automobile, and on July 2, 1906, it was turned over to him, and he then paid \$300 on the purchase price, and on the 19th of the same month he paid \$200 more thereon, the defendant representing to him that the machine would be all right; that he kept the machine, and used it from July to November, when it was in repair; and, further, that during this time repairs were frequently made upon it by the defendant, and that every day that repairs were so made a bill therefor was sent to him, which he never returned, and that finally the defendant refused to let him have the automobile unless he would first pay for the repairs thereon. His testimony in this connection is this:

"Q. Finally you went there one Sunday and wanted to get it, didn't you? A. Yes, sir.

"Q. And they wouldn't let you take it out, would they? A. No, sir; they would not.

"Q. And they said the reason why they would not let you take it out was that you ²⁵⁸ couldn't have it any more until you paid your bill for fixing that machine the previous year? A. Yes, sir.

"Q. That is the reason they gave you? A. Yes.

"Q. And in order to keep you from taking it out of the barn they had to close the door, did they not? A. Yes, sir.

"Q. And they had a fight with you to keep it in the barn, didn't they? A. Yes, sir."

No other conclusion can be drawn from the plaintiff's testimony, except that he accepted the machine, and thereby the title passed to him. We hold that the trial court correctly dismissed the plaintiff's action.

The plaintiff assigns several errors as to instructions of the trial court relevant to the defendant's counterclaim. The charge of the court, considered as a whole, was correct; for the defendant's claims for repairs were expressly limited by the court to such as were made by the defendant at the plaintiff's request. Such being the case, the jury were properly instructed that the question whether the machine was defective when it was delivered to the plaintiff could not be considered in this action.

Order affirmed.

The Right of a Vendee of Personal Property to Rescind the sale, and his duty in case of rescission to place the vendor in statu quo, are considered in Mundt v. Simpkins, 81 Neb. 1, 129 Am. St. Rep. 670, and see cases cited in the cross-reference note thereto.

As to What is a Sale of Personal Property, see the note to Fleet v. Hertz, 94 Am. St. Rep. 209.

Warranties of Equality Implied in Sales are discussed in the note to Gold Ridge Min. Co. v. Tallmadge, 102 Am. St. Rep. 607.

STRAMPE v. MINNESOTA FARMERS' MUTUAL INSURANCE COMPANY.

[109 Minn. 364, 123 N. W. 1083.]

INSURANCE—Limitation of Action on Adjustment.—Where a loss under an insurance policy is adjusted, and the insuring company agrees to pay a fixed sum on or before a day certain, a complaint alleging those facts bases the action upon the adjustment, and the limitation of time for bringing action contained in the policy does not apply. (p. 783.)

INSURANCE—Policy in State Where Company Unauthorized to Act.—An insurance policy, issued by an insurance company of this state upon property in a state in which the company is unauthorized to transact business, is not, in the absence of an express statute, void as to the insured. An action may be maintained in the courts of this state to recover for a loss under the policy. (p. 783.)

INSURANCE—Conflict of Laws—Full Faith and Credit.—Although the courts of the state where the loss occurred might refuse to entertain the suit, the courts of this state, in rendering judgment against the insurer, do not fail to give full faith and credit to the public acts, records and judicial proceedings of another state. (p. 784.)

(Syllabi by the court.)

James A. Peterson and A. H. McVey, for the appellant.

A. E. Horn, for the respondent.

366 O'BRIEN, J. The defendant is a corporation organized under chapter 186, Laws of 1885, for the purpose of insuring upon the mutual plan, amongst other hazards, damage by hail to growing crops. For some time prior to March 1, 1903, the defendant was duly authorized to transact such insurance business in the state of Iowa. Its license to do so expired upon February 28, 1903, and since then it has been refused admission to that state. On or about April 8, 1903, the defendant issued and delivered to the plaintiff by mail its insurance policy of that date, whereby in consideration of an annual assessment, the exact amount of which was to be subsequently determined, but which should in no case exceed a stated amount, it insured the plaintiff against loss or damage by hail to his growing crops upon certain lands situated in the state of Iowa, of which

state the plaintiff was a resident. The crops on those premises were damaged by hail July ³⁶⁷ 20, 1903, and the amount of the loss was adjusted by agreement of the parties on August 7, 1903. The written adjustment, after fixing the loss at one hundred and fifty-five dollars, which might be reduced under certain conditions, contained the following provisions: "To be paid, as provided by the policy and by-laws of this company, on or about December 1st after date. I, the policy-holder, am perfectly satisfied with the above adjustment. This adjustment is subject to the approval of the executive board of this company."

The by-laws of the company provided that if the net proceeds of any assessment, together with seventy-five per cent of the surplus fund, should be insufficient to pay all claims and expenses, the expenses of the company should be first paid, and the remainder divided pro rata among loss claims which should be payment in full. The policy provided for arbitration in case of disagreement, and "that no suit or action against this company for recovery of any claim for loss by virtue of this policy shall be sustainable in any court until after an award shall have been obtained fixing the amount of claim by arbitration in the manner above provided, nor unless such suit or action shall be commenced within sixty days after the loss shall have occurred.

In October, 1903, an assessment amounting to twenty-one dollars was levied against the plaintiff. He remitted the amount to the defendant, who returned it to the plaintiff on the ground that the policy was void, having been issued in the state of Iowa upon property in and to a resident of that state, while the defendant was unauthorized to transact such business in Iowa. The plaintiff subsequently remailed the amount of the assessment to the defendant, which claims never to have received the letter containing it. The court, upon sufficient evidence, found payment by plaintiff of the assessment.

The statutes of Iowa provide the conditions upon which foreign insurance companies may transact business in that state, and forbid the issuance of insurance policies by any corporation not complying with those statutes, and establish penalties for any such unauthorized act; and in addition section 1758, title 9, chapter 4, of the Iowa Code provides: "No action shall be maintained in any court in the state upon any policy or contract of fire insurance issued upon any property ³⁶⁸ situated in the state by any company, association, partnership, individual or individuals, that have not been authorized by the auditor of state to transact such insurance business, unless it shall be shown that the insurer or insured, within six months after the issuing of such policy or contract of insurance, has paid into the state treasury two and one-half per cent of the gross premium

paid or agreed to be paid for such policy or contract of insurance."

This action was commenced on July 20, 1904, was tried by the court without a jury, and judgment directed and entered in favor of the plaintiff for the sum of one hundred and fifty-five dollars and interest from December 1, 1903. The defendant appeals from this judgment, and has made forty separate assignments of error, which, however, have been grouped and may be considered as follows: 1. That there was no arbitration, nor was the action commenced within sixty days after loss; 2. The contracts were Iowa contracts, and, being void in Iowa, were unenforceable in Minnesota; 3. That inasmuch as the defendant could not have enforced the payment of assessments, the plaintiff cannot enforce the payment of loss; 4. That in rendering judgment against the defendant the court failed to give full faith and credit to the public acts, records, and judicial proceedings of another state.

1. The action in this case was upon the adjustment entered into between the plaintiff and defendant August 7, 1903. The policy required arbitration only when the parties disagreed as to the amount of the loss. They having agreed and adjusted the loss, there was nothing to arbitrate. In the adjustment agreement, the company agreed to pay the loss "on or about December 1," 1903. The plaintiff could commence no action before that date, and so could not have brought the action within sixty days from July 20th, the date upon which the loss occurred. The result of the adjustment was to put the plaintiff's claim, with respect to the time of bringing suit, entirely outside of the policy, and the only limitation upon the time for bringing action was the statutory one: *McCallum v. National Credit Ins. Co.*, 84 Minn. 134, 86 N. W. 892.

2. None of the provisions of the Iowa law to which we have been referred declare void a policy of insurance issued in that state by a company not authorized to transact business there. The effect ³⁶⁹ of section 1758 is that, if the insurer pays certain taxes within six months after the issuance of a policy, he may maintain an action upon it. If he does not pay such taxes, he can obtain no relief from the Iowa courts. The authorities cited by the defendant do not sustain his claim that, because the insurance company was prohibited from issuing its policies in Iowa, any policy so issued by it was void as against the insured. It is only where the laws of the state have expressly declared such contracts void that the innocent party to the transaction has been denied recovery: *Ashland v. Detroit S. Co.*, 114 Wis. 66, 89 N. W. 904; *Rough v. Breitung*, 117 Mich. 48, 5 N. W. 147; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 18 Fed. 239, 55 C. C. A. 93; *In re Comstock*, 3 Saw. 218,

Fed. Cas. No. 3078. This court has uniformly held that an action may be maintained upon a policy by the insured, although the company issuing the policy did so in violation of the laws of this state: *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943; *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205, 68 N. W. 1065.

3. The contention that the defendant could not have enforced the assessment against the plaintiff, and that, therefore, the plaintiff cannot maintain an action to recover for loss under the policy, is necessarily included in what has already been said. That identical claim was rejected in the *Seamans* case, above referred to, and under that authority the result is the same, even if the policy were actually delivered in Iowa.

4. The judgment against the defendant in no way violates the provision of the federal constitution requiring each state to give full faith and credit to the acts, records and judicial proceedings of every other state. The court did not refuse to give effect to any provision of the Iowa statutes, but simply held that a corporation of this state could not avoid liability by pleading its own wrong. The fact that the defendant corporation is a mutual insurance company, which collects its premiums in the form of assessments, is, to our mind, immaterial. The contract of insurance provided that it would pay all the damage sustained by the plaintiff from the happenings insured against. There is no claim made by the defendant that the proceeds of the assessment made by it during the year 1903 were not ³⁷⁰ ample to pay the plaintiff's claim in full. When the loss was adjusted, it agreed to pay the fixed amount, unless the proceeds of an assessment and seventy-five per cent of the surplus fund were not sufficient, after the payment of expenses, to pay all loss claims in full, and that in such case the available funds were to be applied pro rata. The defendant does not claim that the condition of its funds makes it necessary to make a ratable reduction in loss claims, so that, if the plaintiff was entitled to a judgment, he was entitled to one for the full amount of the loss as adjusted.

Judgment affirmed.

A Fire Insurance Policy Issued by a Company, organized under the laws of one state, upon property in another state, without a compliance with the laws of the latter state providing that foreign insurance companies which have policies on property in that state without complying with its laws are liable to a penalty, but imposing no duty or prohibition on the person so insured, is valid and binding on the company: Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 20 Am. St. Rep. 395; State etc. Ins. Assn. v. Brinkley Stave etc. Co., 61 Ark. 1, 54 Am. St. Rep. 191. See, however, Rose v. Kimberly, 89 Wis. 544, 46 Am. St. Rep. 855; Swing v. Munson, 191 Pa. 582, 71 Am. St. Rep. 772; Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919.

A Single Contract Falls Within the Ban of the Wisconsin Statute which declares contracts unenforceable when made by a foreign corporation that has not complied with the law of the state: Southwestern Slate Co. v. Stephens, 139 Wis. 616, 131 Am. St. Rep. 1074, and see cases cited in the cross-reference note thereto.

MUNSCH v. STELTER.

[109 Minn. 403, 124 N. W. 14.]

STATUTE OF FRAUDS.—A Verbal Contract for an Easement over the real estate of another, unexecuted and unaccompanied by any other circumstances, is contrary to the statute of frauds, and does not convey any interest in the land. (By the editor.) (p. 786.)

LICENSE TO ENTER LAND—Estoppel to Revoke.—Where an entry is made under a license, and the conduct of the licensor is such that it would be a fraud on the licensee to permit the licensor to revoke it, the doctrine of equitable estoppel applies. (By the editor.) (p. 786.)

LICENSE TO CONSTRUCT DITCH—Estoppel to Revoke.—When, pursuant to a verbal contract, the owners co-operate in the construction of a ditch for the purpose of draining their lands, the equitable doctrine of estoppel will prevent one of them from damming up the ditch to the detriment of the other. (p. 787.)

(Syllabi by the court except when stated to be by the editor.)

William G. Owens and Somerville & Hauser, for the appellants.

C. T. Howard, for the respondent.

404 LEWIS, J. Action to enjoin appellants from damming up a ditch constructed by the joint co-operation of respondent and appellants over a part of the lands of each for the purpose of draining, in part, the lands of both. The court found that the parties entered into an oral agreement for the purpose of draining and benefiting the lands of each, whereby it was mutually agreed to construct a ditch, commencing upon respondent's land and running for a considerable distance over appellants' land into an outlet consisting of a lake or slough; that it was agreed that each of the owners should pay one-fourth of the cost of constructing the ditch; that pursuant to the agreement the ditch was dug, and each of the owners paid one-fourth of the cost hereof, amounting to sixty-nine dollars each; that the ditch so constructed served the purpose of draining and materially benefiting the lands of all the parties, draining practically all of respondent's wet land and part of the land of each of the appellants; that about two years thereafter appellants, without the knowledge and consent of respondent, obstructed the ditch by damming it at a point on appellants'

land, which resulted in obstructing the flow of water from respondent's land, but did not interfere with the drainage of appellants' land.

The question before the court is whether the verbal agreement became executed to such an extent as to estop appellants from asserting that it was void under the statute of frauds.

It is elementary that a verbal contract for an easement over the real estate of another, unexecuted and unaccompanied by any other ⁴⁰⁵ circumstances, is contrary to the statute of frauds, and does not convey any interest in the real estate. But there is a wise exception, founded on the accepted rules of conduct, and where an entry is made under a license, and the conduct of the licensor is such that it would be a fraud on the licensee to permit the licensor to revoke it, the doctrine of equitable estoppel applies. The facts of this case bring it within this exception. In some of the leading cases on the subject the verbal contract was for the conveyance of specific real estate, and in such cases, when one party has executed the contract, equity will resist its repudiation: *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203. But the doctrine is not limited to contracts for the conveyance of specific real estate. In some jurisdictions mere acquiescence of the licensor in the expenditure of money or labor by the licensee in the execution of the license does not have the effect of preventing revocation: *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Entwhistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196, 71 N. E. 990; *Carleton v. Redington*, 21 N. H. 291; *Pitzman v. Boyce*, 111 Mo. 357, 33 Am. St. Rep. 536, 19 S. W. 1104; *Nowlin L. Co. v. Wilson*, 119 Mich. 406, 78 N. W. 338; *Thoenke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030. In other jurisdictions the courts have extended the doctrine of equitable estoppel to cases of that character (*Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; *Robinson v. Luther*, 140 Iowa, 723, 119 N. W. 146), to a limited extent: *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301, 83 Pac. 808, 7 Ann. Cas. 704.

So far as this court has spoken, mere assent by the licensor to the execution of the license does not avoid the operation of the statute of frauds. In *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149, the defendants claimed that, under a verbal agreement with plaintiff's grantor, defendants had the right to maintain the dam so long as their flouring-mill, connected with it, should be kept and operated as a custom mill. The court held that the defendants were not entitled to the relief sought, for three reasons: First, that the terms of the agreement relied upon by the

defendants were too general and indefinite; second, that defendants did ⁴⁰⁶ not rely upon such an agreement except in part; and third, that there was an adequate remedy at law by proceeding to secure the right of flowage. In *Wilson v. St. Paul etc. Ry. Co.*, 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378, the plaintiff had constructed a drain, at his own expense, from his land over the adjoining land of the defendant's grantor, and it was held that the drain had been maintained across the land by mere parol license of the owner, and that the latter might revoke the same and proceed to use the land as though the drain was not there, without giving any notice to the licensee. *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.*, 51 Minn. 304, 53 N. W. 639, has a closer bearing. An action was brought by the plaintiff to recover possession of certain land in the milling district of Minneapolis occupied by the tracks of defendant's railway. Defendant claimed the right to occupy the land under a verbal license from the plaintiff, and that the plaintiff waived any other compensation than the special benefits to plaintiff's remaining property resulting from the construction and permanent use of the railroad tracks in that locality. The court held that there was an entire lack of evidence to support such claim, or that the plaintiff requested and induced the defendant to construct the tracks where they were located, and stated that the most defendant could claim from the conversations referred to was that the tracks were built under a parol license from the plaintiff, and it was held that the licensee was conclusively presumed, as a matter of law, to know that such a license was revocable at the pleasure of the licensor, and if it expended money in connection with its entry on the land, it did so at its peril.

But for the purpose of this case we may concede that a licensor may stand by and witness the expenditure of money, or its equivalent in labor, in pursuance of a verbal license. Here, however, the appellants did more than that. They not only granted the right to respondent to go upon their land and construct a ditch, but joined in the enterprise and accepted the benefits of respondent's labor and expense in completing the system of drainage. An after-attempt to exercise the right of revocation by damming up the ditch, thus depriving respondent of all benefits from its construction while they ⁴⁰⁷ retain it for their own use, operated as a fraud upon him, and a court of equity will interfere to restrain it. *Vannest v. Fleming*, 79 Iowa, 638, 18 Am. St. Rep. 387, 44 N. W. 906, 8 L. R. A. 277, *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035, and *Gilmore v. Armstrong*, 48 Neb. 92, 66 N. W. 998, are cases similar in the facts.

The same principle controls the construction and maintenance of irrigation ditches: *Gooch v. Sullivan*, 13 Nev. 78.

There was some evidence tending to show that plaintiff had extended the drainage system beyond what was contemplated by the parties. There were no findings, and no requests for findings, with reference to this question, and it cannot be considered. But we are not to be understood as holding that a party to a transaction of this character may not in a proper action prevent the construction of additional ditches for the purpose of extending the drainage system beyond the limits originally contemplated.

Affirmed.

Justice O'Brien Dissented and said: "In my judgment, the most that can be said in favor of plaintiff's claim is that he had a license from the defendants to turn the surface water from his land into the ditch located upon the defendants' lands; a license revocable at the will of the defendants, without notice, and, having been so revoked, the plaintiff was not entitled to relief."

A Parol License to Enter upon Land is generally revocable at the pleasure of the licensor: *Hodson v. Kennett*, 73 N. H. 225, 111 Am. St. Rep. 607; *Miser v. O'Shea*, 37 Or. 321, 82 Am. St. Rep. 751. As to whether or not this rule is applicable where the licensee has expended money or labor in the execution of the license, the authorities are conflicting: See the note to *Lawrence v. Springer*, 31 Am. St. Rep. 715-719; *Entwhistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301; *Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255. According to *Yeager v. Tuning*, 79 Ohio St. 121, 128 Am. St. Rep. 679, a parol agreement by several adjoining land owners to erect and maintain telephone poles on their respective lands, and to contribute equally to the expense of stringing wires thereon, and of operating a telephone line, does not create an easement, but is merely a parol license revocable by any one of such owners, although in reliance thereon the poles have been erected and the line constructed. But according to *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301, a parol license to construct an irrigating ditch, when executed by the construction of the ditch, becomes in all essentials an easement for such length of time as the use itself may continue.

WUNDERLICH v. MERCHANTS' NATIONAL BANK

[109 Minn. 468, 124 N. W. 223.]

GARNISHMENT.—The Equitable Doctrine of Setoff may be applied by a court of equity in garnishment proceedings in all cases where the plaintiff presents no superior right. (p. 790.)

GARNISHMENT.—A Lien Acquired by Garnishment is, in the absence of some special and superior right in plaintiff, subject to all equities existing between the garnishee and the defendants. (p. 791.)

GARNISHMENT.—Setoff by Bank Against Depositor.—A bank summoned as garnishee in an action against one of its depositors may set off against the depositor's general account unmaturing notes held by it at the time of the service of the garnishee summons, when it appears that the depositor is insolvent. (pp. 790, 791.)

GARNISHMENT—Setoff by Bank Against Depositor.—It need not be shown that the depositor had at the time of the service of the summons been formally adjudged an insolvent in insolvency or bankruptcy proceedings. Insolvency, in fact, is all that is necessary to entitle the garnishee to the remedy. (p. 792.)

(Syllabi by the court.)

Charles J. Andre and E. H. Morphy, for the appellant.

John F. Fitzpatrick, for the respondent.

⁴⁶⁹ BROWN, J. In June, 1908, the Armitage-Herschel Company duly commenced an action against Jacob Barnet and Jacob Barnet Amusement Company to recover the sum of \$900. At the commencement of the action garnishment proceedings were instituted against the Merchants' National Bank, respondent on this appeal. The garnishee summons was served on June 30th, and the date for disclosure set for July 23, 1908. On that day the garnishee appeared and disclosed that on the date the summons was served defendants had on deposit with it, subject to check, the sum of \$1,138.99. At the same time, and as a part of the disclosure, the garnishee asserted and claimed the right to set off against this deposit account the amount of two promissory notes, of \$500 each, which the bank then held against the defendants, but which were not then due. One of the notes matured July 15th, before the disclosure, and the other thereafter, on July 30, 1908. No actual application of the deposit account had at the time the summons was served been made toward the payment of the notes, nor entries to that effect been made on the books of the bank. At the time the garnishee summons was served both defendants were insolvent, but had not been formally so adjudged in bankruptcy or insolvency proceedings. On August 15, 1908, defendant Jacob Barnet was duly adjudged a bankrupt, and a like adjudication was made against the Amusement Company on September 1, 1908, and the intervener herein was duly commissioned as trustee in bankruptcy for both. Judgment was rendered in the main action against the defendants on October 17, 1908, for the sum of \$1,001.45.

The lien of the garnishment, having been acquired within four months from the time defendants were adjudged bankrupts, was, as ⁴⁷⁰ to plaintiff, their trustee in the bankruptcy proceedings, an unlawful preference, and on the theory that it survived for the benefit of defendant's creditors, the intervener, as trustee, was by order of the court made a party to the action for the purpose of enforcing it. Plaintiff took no further part in the action. After being so made a party, intervener applied to the court below, upon the record and files in the cause, including the disclosure of the

garnishee, for judgment against the garnishee for the amount of the judgment against defendants in the main action. At the hearing on this application, which was presented upon appropriate supplemental pleadings, the garnishee again insisted on its right to set off the amount of the promissory notes held by it against defendants' deposit account. The trial court sustained this right, denying intervenor's application for judgment, and the latter appealed from an order denying a new trial.

The only question presented is tersely stated by appellant, as follows: May a bank summoned as garnishee in an action against an insolvent depositor, brought by a creditor of the latter, set off against the general deposit impounded by the garnishment a note held by the bank against the depositor which was not due when the garnishee summons was served?

The equitable doctrine of setoff had its origin in a very early day, and has always been applied by courts of equity, either with or without statutory authority, in all cases of mutual demands where the dictates of natural justice rendered it appropriate; no superior rights of third persons having intervened before suit: *Waterman on Setoff*, sec. 17; *Hawkins v. Freeman*, 2 Eq. Cas. Abr. 10; *Jeffries v. Evans*, 6 B. Mon. 119, 43 Am. Dec. 158; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710. Insolvency of one of the mutual debtors is the foundation for this relief, to the exclusion of the demands of third persons except in those cases where by special circumstances their rights are superior to those of the debtor invoking the remedy. "The natural equity," says *Waterman on Setoff*, section 438, "to have mutual but unconnected demands between two parties who have been dealing with each other set off, is, as a general rule, superior to the claim of any other ⁴⁷¹ creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of offset is claimed." And this, it seems, is the generally accepted doctrine of a majority of the courts of this country and England. In this state the right is preserved by statute and made applicable to all cases of assignments of non-negotiable choses in action (Rev. Laws 1905, sec. 4054), and has been applied without statutory sanction in insolvency proceedings: *Stolze v. Bank of Minnesota*, 67 Minn. 172, 69 N. W. 813.

Though the authorities are not in full harmony, the general trend of opinion sustains the right in garnishment as well as in insolvency or bankruptcy proceedings. Here defendants were depositors in garnishee bank, were insolvent, and the bank held their promissory notes to an amount equal to their deposit account. In this state of the facts, the bank was summoned as garnishee in an action against the depositors, and from the beginning insisted on its rights to set off the notes

against the account. The authorities sustain the right: 2 Shinn on Attachment, sec. 624; Lannan v. Walter, 149 Mass. 14, 20 N. E. 196; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. Rep. 648, 30 L. ed. 707; St. Paul & M. Trust Co. v. Leck, 57 Minn. 87, 47 Am. St. Rep. 576, 58 N. W. 826; Lynde v. Watson, 52 Vt. 648; Smith v. Stearns, 19 Pick. 20; Jefferson Co. Sav. Bank v. Nathan, 138 Ala. 342, 35 South. 355; 20 Cyc. 1077, and cases cited.

It is stated in Shinn on Attachment, *supra*, that the policy of the law is that the garnishee, being an indifferent and sometimes an unwilling party to litigation, shall not be disturbed in his rights, and he is permitted to interpose in defense all equities and defenses existing in his favor at the time he is served with process, and which he might have enforced by any of the modes allowed at common law or by statute, had the action been brought against him by the defendant. The same principle is thus expressed in 20 Cyc. 1060: "Plaintiff, seeking to subject a debt due to the principal defendant, acquires no greater right by the service of a writ of garnishment than that which defendant could have asserted and enforced in an action against the garnishee; and the fact that garnishment process has been served on the garnishee places him in no worse position and under no greater liability than he would have been in or under ⁴⁷² had an action at law been brought against him by defendant": See, also, *Waples-Plattner v. Texas & P. R. Co.*, 95 Tex. 486, 68 S. W. 265, 59 L. R. A. 353.

While it is true that the plaintiff in garnishment proceedings acquires by the service of summons upon the garnishee a lien upon all money or property in his hands belonging to the defendant, the lien, existing by force of the garnishment only, is, under the doctrine stated, subject and inferior to the equities existing in favor of the garnishee against the defendant. The plaintiff in such an action stands in no better position than the defendant, with no greater rights. In fact, he occupies a position similar to that held by a purchaser of overdue commercial paper, or an assignee of a chose in action, which our statutes declare are taken subject to all equities and defenses in favor of the debtor. So the question in the case at bar is whether the bank, in an action by the depositor to recover the amount of his deposit, could interpose as a set-off notes held against him, though not yet due. The authorities cited answer the question in the affirmative. The fact that the notes were not due does not change the situation, from an equitable standpoint. Defendants were insolvent at the time the garnishment was served, and that fact furnishes the necessary foundation for an application of the right to setoff: *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

But it is insisted that defendants were not insolvent within the meaning of the law of equitable setoff. The fact of their insolvency at the time the garnishment summons was served is not questioned, however; but it is insisted that this is not enough—that to give rise to the right of setoff, especially of unmatured obligations, an adjudication of insolvency in insolvency or bankruptcy proceedings, should appear. Or, as counsel expresses it: "Insolvency is a condition which must find expression in some act or declaration of the insolvent which can be given recognition in law."

We are unable to concur in this contention. Viewing the doctrine of equitable setoff in the light of its purpose, to protect the rights of all the parties, and to administer even and exact justice, it would seem that insolvency in fact, whether accompanied by judicial ⁴⁷³ recognition or not, is alone sufficient. To adopt counsel's contention and apply the limitation suggested would confine the right of setoff to insolvency or bankruptcy proceedings, and entirely exclude its application in garnishment proceedings; for such proceedings, as a rule, at least, precede insolvency or bankruptcy proceedings, wherein there is a judicial recognition of insolvency. So that, if adjudication of insolvency, or some act or declaration of the insolvent which the law would recognize as evidence of the fact, be essential, the right of setoff could rarely be granted in favor of a garnishee.

Nor does the fact, asserted by counsel for intervener, that the bank was unaware of the insolvency of defendants at the time the summons was served, militate against its position. Nor should it be deprived of the right it now insists upon because no demand had been made for the payment of the notes prior to the service of the summons. Whether it knew in fact of defendant's insolvency is in no proper view controlling. It asserted the right to setoff in its disclosure, and again when application for judgment was made by the intervener, and this was all it was required to do for the protection of its rights.

Order affirmed.

Setoff After Insolvency is the subject of a note to *St. Paul et. Trust Co. v. Leck*, 47 Am. St. Rep. 578. See, also, *Jump v. Leon*, 132 Mass. 511, 116 Am. St. Rep. 265, and cases cited in the cross-reference note thereto. If an employer is garnished for an indebtedness due his employé, and his answer of no indebtedness is contested, but it appears that he allowed his employé to overdraw his wages by way of payment in advance for his services, the garnishee is entitled to avail himself of such overdrafts to extinguish, pro tanto, his liability to the employé without pleading or claiming them as a setoff: *Heary v. McNamara*, 124 Ala. 412, 82 Am. St. Rep. 183.

SLATER v. TAYLOR.

[109 Minn. 492, 124 N. W. 3.]

MORTGAGE FORECLOSURE.—The Omission in a Notice of foreclosure of a real estate mortgage of the letters "A. M.," following the hour set for the sale of the property, held, in view of the fact that the statutes require all such sales to take place "between 9 o'clock A. M. and the setting of the sun," not fatal to the validity of the foreclosure. The notice sufficiently indicates the hour of the sale to be 10 o'clock in the forenoon. (p. 793.)

(Syllabus by the court.)

John J. McHale, for the appellant.

C. S. Deaver and William H. Hallam, for the respondent.

492 PER CURIAM. Action to set aside the foreclosure of a real estate mortgage. Plaintiff appealed from an order sustaining a general demurrer to the complaint.

The only defect in the proceedings complained of by plaintiff is found in that part of the notice of foreclosure naming the hour of the sale. The notice contains the information that the sale will take place at the sheriff's office in the city of Minneapolis, "on the sixth day of July, 1908, at 10 o'clock thereof." The point made is that ⁴⁹³ the hour is not indicated as A. M. or P. M. The statutes of the state require all foreclosure sales to take place "between 9 o'clock A. M. and the setting of the sun," and it must be assumed that the hour stated in the notice was intended to be within these limitations, for a sale could not lawfully be held at 10 o'clock at night. The omission of the letters "A. M.," or the word "forenoon," in the notice, was not fatal.

Order affirmed.

Notice of Judicial Sales: See notes to Hoffman v. Anthony, 75 Am. Dec. 704; Almy v. Grinnell, 44 Am. Dec. 238.

HENRY v. ST. PAUL CITY RAILWAY COMPANY.

[109 Minn. 503, 124 N. W. 245.]

STREET RAILWAY—Duty Toward Dogs on Track.—A street-car company is not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collision with dogs. A motorman, operating a car, is entitled to act on the presumption that ordinarily a dog on a street-car track will get out of the way. *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577, followed and applied. No circumstances presented by the record in this case take it out of the ordinary rule. (p. 795.)

(Syllabus by the court.)

W. D. Dwyer, for the appellant.

Todd & Mayo, for the respondent.

504 JAGGARD, J. Plaintiff's dog was run over and killed by defendant's car on a municipal thoroughfare. The car was running at a high rate of speed, estimated variously at from fifteen to twenty-five miles an hour. The dog was following his master, who drove across the track a moment or two before the car passed. The street at this place was straight, clear and wide, and there were no other vehicles or obstructions to obscure the view. The dog was on the track some distance ahead of the approaching car. Its attention was diverted by another dog. The car struck the dog and passed on. The record shows that the motorman set the air-brakes on the car when he saw the dog, but did not succeed in stopping the car. The trial court found for the plaintiff in the sum of fifty dollars. This appeal was taken from the order of the trial court denying defendant's motion for a new trial.

It is the settled law generally in this jurisdiction that a street-car company is not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collision with dogs; that ordinarily dogs may be presumed to take care of themselves; and that the motorman operating the car may act on such presumption: *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577. It is true that when dogs are apparently oblivious to an approaching car, as when engaged in fighting upon street railway tracks, the motorman, upon discovering them in a position of peril, is required to exercise reasonable care, by using proper signals or checking the speed of his car, to avoid their injury: *Harper v. St. Paul City Ry. Co.*, 99 Minn. 253, 116 Am. St. Rep. 415, 109 N. W. 227, 6 L. R. A., N. S., 911. But where, as here, there appears to be no reason why a motorman, who sees a dog running along a track toward an approaching car, is not justified in supposing that the dog would take care of itself and get out of the way, he has a right to presume, even with respect to human beings, that they will act as men usually do and avoid collision with

an approaching car; yet as to them, the duty of taking care is strict. Their ability to move quickly, moreover, does not approximate that of a dog. "A dog . . . can be waked out of deep sleep by a cart wheel touching his flank, and can spring away unharmed before that wheel comes on." It does not appear that defendant's car was going so ⁵⁰⁵ rapidly that this alone constituted negligence on its part. It owed no duty under the circumstances here presented to regulate its speed according to the presence or absence of a dog running toward it. Under the circumstances, plaintiff has failed to show actionable negligence on the part of defendant company.

Reversed.

That a Railway Company is Liable for the Negligent Killing of a dog, see El Dorado & Bastrop Ry. Co. v. Knox, 90 Ark. 1, ante, p. 17, and cases cited in the cross-reference note thereto. When dogs are fighting on a street railway track, apparently oblivious to an approaching car, the motorman, upon discovering their peril, should take reasonable precautions, by giving signals or checking the speed of the car, to avoid injury to them. If he fails to exercise such care, the railway company is answerable for injuries sustained by the animals: Harper v. St. Paul City Ry. Co., 99 Minn. 253, 116 Am. St. Rep. 415. And where an electric car follows a dog running down hill in the center of the track for one hundred and fifty yards, the men in charge ringing the bell but doing nothing to get the car under control until it is too late to save the animal, the railway company is liable for his killing: Jackson Elec. Ry. etc. Co. v. Waycaster, 92 Miss. 816, 131 Am. St. Rep. 554.

CASES AT LAW
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

MAY v. HURLEY.

[77 N. J. L. 611, 71 Atl. 913.]

VESSELS—Pledge of Owner's Credit.—The authority of a master of a vessel to bind the owners in personam falls within the law of principal and agent excepting when such authority arises *ex necessitate*, and there is no authority *ex necessitate* in the master of the vessel to pledge the owner's credit where the owner or his managing agent is either at the port of the ship's anchorage, or so near it as to be reasonably expected to intervene personally. (p. 797.)

(Syllabus by the court.)

William T. Read, for the plaintiffs in error.

Ralph W. E. Donges, for the defendants in error.

612 DILL, J. In this case a single writ of error was sued out for the purpose of reviewing three separate judgments that resulted from as many different actions that were tried together by consent. There should, of course, have been three separate writs of error, but this being suggested upon the argument, it was agreed to treat the record as amended to make three writs of error and separate returns.

The one question of importance presented by this review is whether the master of a vessel, in the absence of special authority, may pledge the owner's credit for supplies and repairs, when the owner is at the port of the ship's anchorage or so near to it as to be reasonably expected to intervene personally.

The plaintiffs sued, in personam, the owners of the bark "Primus" for supplies furnished and services rendered upon the order of the master while the vessel lay in anchor at the port of Philadelphia, opposite the city of Camden, where the owners resided, as the plaintiffs knew.

The theory of the plaintiffs was that the supplies and services were necessary for the vessel; that they were furnished upon the order of the master, and that, as a matter of law, the master was the agent of the owners of the vessel and

authorized *ex necessitate* to bind them for necessities in the way of supplies and repairs irrespective of the port where the vessel was located.

The defendants urged the rule that there is no authority *x* *necessitate* in the master of the vessel to pledge the owner's credit where the owner or his managing agent is either at the port of the ship's anchorage or so near it as to be reasonably expected to intervene personally.

The court left every disputed issue of fact to the jury, including the question whether the supplies thus furnished were necessities and whether the managing owner, who lived just across the river from the port where the vessel was anchored, was so near as to be reasonably expected to intervene personally.

The jury found for the defendants.

613 The issue is presented by an exception to the refusal of the trial judge to direct a verdict in favor of the plaintiff and by an exception to the charge; in both rulings and throughout the trial the court followed the rule in *Arthur v. Barton*, 6 Mees. & W. 142: "Under the general authority which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner, or his general agent, be at the port, or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him, or to his agent, to do what is necessary."

In this we concur, following *Johns v. Simons*, 2 Q. B. 425; *Stonehouse v. Gent*, 2 Q. B. 431; *Beldon v. Campbell*, 6 Ex. 186; *The Jeanie Landles*, 9 Saw. 102, 17 Fed. 91; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387, 10 L. ed. 213; *Jager v. Babcock*, 48 N. Y. 154, 8 Am. Rep. 532; *Dyer v. Snow*, 47 Me. 254; *Pentz v. Clarke*, 41 Md. 327; *Stearns v. Doe*, 12 Gray, 482, 74 Am. Dec. 608.

We decline to follow *Winsor v. Maddock*, 64 Pa. 231; *Carr v. Burke*, 32 Mo. 233.

The ordinary rules of law as to principal and agent apply, excepting in so far as the peculiar exigency involved alters it. The exigency arises from the voyage or necessity when the master is out of touch with the principal. It is necessity, not necessities, that is the basis of the rule which gives the master authority.

In this case, there being a known opportunity of communicating with the owners that accorded with the rule we

have laid down, the master could not be considered as having authority to pledge the owners' credit.

⁶¹⁴ Holding, as we do, that the trial court did not err either in its refusal to direct a verdict or in its charge, the other alleged errors fall likewise.

The judgment in each case is affirmed.

For Authorities Bearing upon the Principal Case, see Arey v. Hill, 81 Me. 17, 10 Am. St. Rep. 232. The master of a vessel in a foreign port, where there is no consignee, if he has no other means, may pledge the credit of the owners of the vessel for money needed to pay the officers and crew, and money so lent may be recovered of the owner, if the loan has been in good faith and after due diligence to ascertain the necessity; and the questions of the necessity, good faith and diligence are for the jury: Stearns v. Doe, 12 Gray. 42, 74 Am. Dec. 608. See, also, Gager v. Babcock, 48 N. Y. 151, 8 Am. Rep. 532. According to McLellan v. Cox, 36 Me. 95, 58 Am. Dec. 736, the master of a vessel may bind the owners for necessary supplies and repairs for their vessel, when he is their agent, but he cannot bind them where no agency, express or implied, exists.

MEEKER v. CITY OF EAST ORANGE.

[77 N. J. L. 623, 74 Atl. 379.]

PERCOLATING WATERS.—The "English Rule" as to Property Rights in percolating underground water rejected. The doctrine of "reasonable user" adhered to. (pp. 801, 810.)

PERCOLATING WATERS.—A Land Owner has not an Absolute and Unqualified Property in all water that may be found percolating in his soil, to do what he pleases with it, as with the sand and rock that form part of the soil; his right is to use such waters only in a reasonable manner and to a reasonable extent for his own benefit, as in agriculture, irrigation, manufacturing, domestic consumption, and the like, and without undue interference with the rights of other land owners to the like use and enjoyment of waters percolating beneath their land, or of watercourses fed therefrom. (pp. 803, 810.)

PERCOLATING WATERS.—The Defendant, a Municipal Corporation, for the purpose of supplying its inhabitants with water, acquired a tract of land and sank thereon a number of artesian wells, through which it drew out percolating underground water which, but for its interception, would have reached a spring, stream and well upon plaintiff's land, and also withdrew percolating underground water from beneath the surface of his land to such extent as to damage his crops. Held, actionable. (pp. 800, 810.)

PERCOLATING WATERS.—Withdrawal for Sale.—Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water, or if his wells, springs or streams are thereby materially diminished in flow, or his land rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses. (pp. 800, 806.)

(Syllabi by the court.)

Ralph E. Lum and Guild, Lum & Tamblyn, for the plaintiff in error.

Jerome D. Gedney, for the defendant in error.

⁶²⁴ PITNEY, C. Plaintiff brought two actions in one of the district courts of the city of Newark to recover damages for the diversion by the defendant of percolating underground water. In each case the district court rendered judgment in favor of the defendant, and upon appeal to the supreme court the judgments were affirmed. By writs of error the records are brought here for review.

The cases were submitted to the trial court upon agreed statements of fact. In one case it is stipulated that plaintiff owns and occupies a farm of about one hundred acres, situate in the valley of Canoe Brook, in the townships of Millburn and Livingston, in the county of Essex. He is a milkman, and has for a number of years used his farm for the pasture and support of his cows and horses. Canoe Brook and two small streams tributary thereto flow through his farm. Upon the farm there is also a spring, inclosed by a spring-house, the water of which has for years been used by the plaintiff for drinking purposes and for the storing and keeping of his milk. His cattle in pasture have for years resorted to the brook and its tributaries for drinking water. The defendant, the city of East Orange, under the authority of "An act to enable cities to supply the inhabitants thereof with pure and ⁶²⁵ wholesome water," approved April 21, 1876, and the acts supplemental thereto and amendatory thereof (Pamphlet Laws, p. 366; Gen. Stats., p. 646), acquired a tract of land containing about six hundred and eighty acres, situate in the valley of Canoe Brook and in the township of Millburn, and installed hereon a water plant consisting of about twenty artesian wells, situate farther down the stream than plaintiff's farm and distant upward of a mile therefrom. In the construction of these wells, and of the works, mains and reservoirs connected therewith, the city has expended more than one million dollars. A few years prior to the commencement of the action the city began to take water from the wells, and has thus taken percolating underground water which, but for its interception, would have reached the plaintiff's spring or stream. No water other than percolating water has been taken, and no water has been taken out of any surface stream or from the spring of the plaintiff after it (the water) has appeared upon the surface or in any surface spring or stream. In this action the plaintiff seeks damages for the diversion of the underground water that otherwise would have reached his spring and streams.

In the other action the agreed statement of facts differs only in that it shows the existence upon plaintiff's farm of a well which for years had provided water for the various purposes of the plaintiff, and that as a result of the defendant's operations it had taken percolating underground water which otherwise would have reached this well, and had also taken percolating underground water from beneath the surface or soil of the plaintiff's land to such an extent that his crops will not now grow as they did formerly, and the taking of such percolating water has damaged the plaintiff's hay and crops and also has reduced the level of the water in his well. For this diversion damages are sought.

The judgments under review are based upon the theory that the city has an absolute right to appropriate all percolating water found beneath the land owned by it, and to use the water for purposes entirely unconnected with the beneficial use and enjoyment of that land, to the extent, indeed, ⁶²⁶ of making merchandise of the water and conveying it to a distance for the supply of the inhabitants of East Orange, and that although by such diversion the plaintiff's spring well and stream are dried up, and his land rendered so arid as to be untillable, it is *damnum absque injuria*.

The judgments are attacked upon the ground that the law recognizes correlative rights in percolating subterranean waters; that each land owner is entitled to use such waters only in a reasonable manner and to a reasonable extent beneficial to his own land, and without undue interference with the rights of other land owners to the like use and enjoyment of waters percolating beneath their lands, or of watercourses fed therefrom.

The law respecting the rights of property owners in percolating subterranean waters is of comparatively recent development, the first English decision bearing directly upon the question having been rendered in 1843: *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Ex. 289. This was followed by *Chasemore v. Richards* (1859), 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur., N. S., 873, 1 Eng. Rul. Cas. 729. These cases may be taken as establishing for that jurisdiction the rule upon which the judgments under review are based.

They were followed by a considerable line of decisions in this country in which the English rule was adhered to, and which will be found discussed in Washburn on Easements, *363, *390; Angell on Watercourses, sections 109-114, and 30 American and English Encyclopedia of Law, second edition, 310, 313.

The soundness of the English doctrine was, however, challenged by the supreme court of New Hampshire in a well-considered case decided in 1862 (*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179, 3 Am. Law Reg., N. S., 223, O. S., vol. 12), where it was elaborately reasoned

that the doctrine of absolute ownership is not well founded on legal principles, and is not so commended by its practical application as to require its adoption; that the true rule is that the rights of each owner being similar, and their enjoyment dependent upon the action of other land owners, their rights must be correlative and subject to the operation of the maxim "sic utere," etc., so that each land owner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others. This decision was followed by *Swett v. Utts* (1870), 50 N. H. 439, 9 Am. Rep. 276, 11 Am. Law Reg., N. S., 11, where the court again laid it down that the land owner has not an absolute and unqualified property in all such water as may be found in his soil, to do what he pleases with it, as with the sand and rock that form part of the soil, but that his right is to make reasonable use of it for domestic, agricultural and manufacturing purposes, not trenching upon the similar rights of others.

The doctrine thus enunciated has come to be known in the discussion of the topic as the rule of "reasonable use."

The question as to which of these contrary rules obtains in this state has not been set at rest by any previous adjudication in this court.

In *Ocean Grove C. M. Assn. v. Asbury Park Commrs.* (1885), 40 N. J. Eq. 447, 3 Atl. 168, both parties were seeking a general supply of water for the respective summer resorts. Ocean Grove obtained by boring upon its own land a supply of water for its inhabitants. Asbury Park bought water by boring upon lands of third parties with the consent of the latter. Vice-Chancellor Bird refused an injunction upon the ground that subterranean percolating waters are the absolute property of the owner of the fee, citing the leading English cases and some American decisions that follow them. His decision could, perhaps, have been based upon the doctrine of reasonable use, because either party was proposing to confine its use of the waters to the beneficial enjoyment of the lands from which they were taken.

In 1898 the case of *Harper et al. v. Mountain Water Co.* came on to be tried at circuit before Chief Justice Magie, afterward chancellor. Plaintiffs were mill owners, and sued the company for damages for abstracting water from the sources of a natural stream to the use of which they were entitled. The evidence tended to show that defendant's waterworks were so constructed and managed as to withdraw water directly from the head sources of the stream after this water ⁶²⁸ had issued from the ground. It also tended to show that percolating underground water was abstracted, some of which would and other would not, in

the ordinary course of nature, have come to the surface and formed a part of the sources of the stream. The learned chief justice denied a motion for nonsuit because of the evidence of the abstraction by the defendant of water that had already come to the surface. With respect to subterranean waters, he expressed himself as being unable to say why the abstraction thereof was not an actionable wrong and expressed grave doubt, amounting to dissent, respecting the English cases that deny the liability. But deeming the English rule established by the weight of authority, he declined to apply his own view at *nisi prius*. Accordingly, in his instructions to the jury, he ruled that the interception of percolating underground water by the defendant's wells did not furnish a cause of action, and confined the plaintiff's damages to such as resulted from the diversion of waters that had come to the surface. There was a verdict for the plaintiff, which was sustained by the supreme court on rule to show cause, the court saying that the defendants could not complain of the law laid down by the trial judge respecting their liability. Plaintiff's successors in title afterward obtained an injunction to restrain further diversion: *Harper, Hollingsworth & Darby Co. v. Mountain Water Co.*, 65 N. J. Eq. 479, 56 Atl. 297. Vice-Chancellor Emery in his opinion gives a résumé of the chief justice's instructions to the jury. His personal dissent from the English rule we have taken from the report of the trial. It is likewise referred to in the opinion of the supreme court in the case at bar.

The decision of this court in *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 14 L. R. A., N. S., 197, 10 Ann. Cas. 116, had to do with the diversion of the waters of the Passaic river, and the validity of a statute that is designed to preserve and maintain the lakes, ponds, brooks, creeks, rivers and streams of this state, and prevent the waters thereof from being carried by conduits into other states. The dictum found on page 710 of the opinion, and quoted by the supreme court in the case at bar, viz., "We may concede, for present purposes, that subterranean ⁶²⁹ waters, such as may be reached only by driving wells, when thus acquired, become absolutely the property of the proprietor of the soil, and may be dealt with by him as merchandise," was, of course, not intended as a decision that such is the law, but, as the opinion shows, was conceded only for the purpose of narrowing the discussion by distinguishing the exact point that was then before the court.

In the absence of any anciently established rule of the English common law upon the subject, and of any contrary decision in this court, and in view of what will shortly appear, that the decisions in other jurisdictions are conflicting.

with the trend of modern decisions in this country strongly in favor of adopting the doctrine of reasonable use, this court is at the present time open to decide the cases at bar in accordance with sound reason and general principles of law and justice.

A brief review of the leading English decisions will not be out of place.

Acton v. Blundell (1843), 12 Mees. & W. 324, 13 L. J. Ex. 289, held that a land owner has no such right or interest in a subterranean watercourse as to enable him to maintain an action against a land owner who, in carrying on mining operations upon his own land in the usual manner, drains away the water from the land of the first-mentioned owner and lays his well dry. This decision might well have been based upon the doctrine of reasonable use, but it was rested upon the absolute ownership on the part of the mine owner of all that lay beneath the surface of his land.

In *Dickinson v. Grand Junction Canal Co.* (1852), 7 Ex. 82, 21 L. J. Ex. 241, the defendant was a corporation operating a navigable canal. It sunk a well upon its own land and placed over it a pump and steam engine whereby it pumped into its summit level a quantity of underground water, a part of which would otherwise have reached a certain natural stream by underground flow, a part would have reached the same stream by underground percolation, and another withdrew from the stream a portion of the water flowing therein, which by means of the operation of defendant's ⁶³⁰ well and pump was drawn off through underground percolation. The plaintiffs, who were mill owners further down the stream, were, in consequence of defendant's operations, prevented from working their mills as beneficially as otherwise they might have done. The court of exchequer held that at common law the company was liable to an action for abstracting the water which actually had formed a part of the stream, by sinking a well, and for abstracting water which never had formed a part of the stream, but was prevented from doing so in its natural course by the excavation of defendant's well, whether the water was part of an underground watercourse or percolated through the strata. The court distinguished *Acton v. Blundell* on the ground that to maintain an action in that case would be to limit the defendant land owner in the full enjoyment of his rights of property, while in the case presented the use of the ground water by the defendant was disconnected from the beneficial enjoyment of defendant's land.

In *Chasemore v. Richards* (1859), 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur., N. S., 873, 1 Eng. Rul. Cas. 729, the facts were that the plaintiff was the occupier of an ancient mill on the River Wandle, and that he and his predecessors

for more than sixty years had used and enjoyed as of right the flow of the river; that the river was supplied above the plaintiff's mill in part by the rainfall on a district many thousand acres in extent, comprising the town of Croydon and its vicinity, the water sinking into the ground to various depths and then flowing and percolating through the strata to the river, part rising to the surface and part finding its way underground in courses which continually varied. The defendant represented the members of the local board of health of Croydon, who, for the purpose of supplying that town with water, sank a well upon their own land in the town and about a quarter of a mile from the river, and pumped out large quantities of water for the supply of the town, thereby intercepting underground water that otherwise would have found its way into the river and so to the plaintiff's mill. The question was whether the plaintiff could maintain an action ⁶³¹ for this diversion, abstraction and interception of the underground water. The court of exchequer, upon the authority of *Broadbent v. Ramsbotham*, 11 Ex. 602, 25 L. J. Ex. 115, gave judgment for the defendant, which was affirmed by the court of exchequer chamber. Justice Coleridge dissenting: 2 Hurl. & N. 168. The house of lords affirmed the judgment under review upon grounds that practically overrule the decision in *Dickinson v. Grand Junction Canal Co.*

The decision in *Chasemore v. Richards* has been treated as finally settling the law for England, and has been followed or approved in numerous subsequent English cases.

A few of the earlier American decisions may also be noted.

In *Greenleaf v. Francis* (1836), 18 Pick. 117, the supreme court of Massachusetts held that, in the absence of rights acquired by grant or adverse user, a land owner may dig a well on any part of his land, notwithstanding he thereby diminishes the water in his neighbor's well, unless in so doing he is actuated by a mere malicious intent to deprive his neighbor of water. Although this case is sometimes cited as authority for the rule afterward established in England, the reasoning of the opinion is consistent with the doctrine of "reasonable user."

The same is true of *Roath v. Driscoll* (1850), 20 Conn. 533. 52 Am. Dec. 352.

Wilson v. City of New Bedford (1871), 108 Mass. 261. 11 Am. Rep. 352. Here the city had constructed a reservoir from which water percolated underground to the plaintiff's cellars about a thousand feet distant, and prevented the natural passage of water underground into the natural stream on which the dam of the reservoir was constructed. The court sustained the plaintiff's right of action, citing *Chasemore v. Richards* without disapproval, but holding

that the principle upon which it is decided did not prevent the plaintiff from having a recovery.

Chase v. Silverstone (1873), 62 Me. 175, 16 Am. Rep. 419, held that a defendant who dug a well on his own land in good faith for the obtaining of water for his own domestic uses was not liable to damages that incidentally resulted to the plaintiff by means of the diversion of water that had been accustomed to percolate or flow in an unknown subterranean current into the plaintiff's spring. The decision is fully justifiable under the doctrine of "reasonable user," and, indeed, is so justified in the opinion, but the court goes further and cites with approval *Acton v. Blundell*, *Chasemore v. Richards* and later English cases.

But it is not too much to say that the rule adopted in *Chasemore v. Richards*, and the reasoning upon which it was rested, have not withstood the test of time, experience and ample discussion, and it is entirely clear that the strong trend of more recent decisions in this country is in the direction of a repudiation of the English rule and the adoption of the doctrine that there are correlative rights in percolating underground waters; that no land owner has the absolute right to withdraw these from the soil to the detriment of other owners, and is limited to reasonable uses.

The modern tendency of the courts is well shown in 30 American and English Encyclopedia of Law, second edition, title "Water and Watercourses," where, after a full citation of the earlier cases, the writer proceeds to say (at page 314); "In the later cases the right of a land owner to intercept and divert percolating waters has been subject to some qualifications on the ground that such right relates to the beneficial use of the waters or of the land for some purpose connected with ordinary operations of agriculture, mining, domestic use or improvements either public or private. Under this doctrine it has been held that a land owner has no right, except for the benefit and improvement of his own premises or for his beneficial use, to drain, collect or divert percolating waters therein, where such act will destroy or materially injure the spring of another, the waters of which spring are used by the general public for domestic purposes; that he cannot drain, collect or divert such waters for the sole purpose of wasting them; that the owner of land cannot gather percolating water by pumps or by natural means that it may be carried to a distant place for use by or sale to strangers having no right to it, in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner, and that a municipality has no right by reason of its ownership of land to collect percolating waters or distribution to its inhabitants by means of wells and pumps therein having such suction power as to draw the percolating waters from the surrounding land to a great

distance, thereby rendering such lands unfit for cultivation. So it has been held that a land owner cannot collect percolating water by means of artesian wells and convey it away from his land for sale to a distant land owner to the injury of his neighboring land owners."

A brief review of some of the recent decisions will suffice.

The earlier cases in New York repeatedly approved the rule laid down in *Acton v. Blundell* and *Chasemore v. Richards*: *Ellis v. Duncan* (1855), 21 Barb. 230, affirmed, 29 N. Y. 466, 45 N. Y. 363; *Goodale v. Tuttle* (1864), 29 N. Y. 459; *Pixley v. Clark* (1866), 35 N. Y. 520, 527, 91 Am. Dec. 72; *Village of Delhi v. Youmans* (1871), 45 N. Y. 362, 6 Am. Rep. 100; *Phelps v. Nowlen* (1878), 72 N. Y. 39, 28 Am. Rep. 93; *Bloodgood v. Ayers* (1888), 108 N. Y. 400, 2 Am. St. Rep. 443, 15 N. E. 433; *Van Wycklen v. City of Brooklyn* (1890), 118 N. Y. 424, 24 N. E. 179. But most, if not all, of these decisions would be equally justified under the doctrine of "reasonable user." And in *Smith v. City of Brooklyn* (1899), 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664, the court of appeals sustained an action against the city for the diversion and diminution of a natural stream upon the plaintiff's land, although it appeared that this was caused by the arrest and collection of underground waters which fed the stream by percolation through the earth. And in *Forbell v. City of New York* (1900), 164 N. Y. 522, 79 Am. St. Rep. 666, 58 N. E. 644, 51 L. R. A. 695, the same court held that a municipal corporation which, by the operation of a water system consisting of wells and pumps on its own land, taps the subsurface water stored in the land of an adjoining owner and in the contiguous territory, leads it to its own land, and by merchandising it prevents its return, whereby the value of the land of such owner is impaired for agricultural purposes, is liable to him for the damages occasioned thereby. The court in this case clearly rested its judgment upon the doctrine of "reasonable user": See, also, *Reisert v. City of New York* (1903), 174 N. Y. 196, 66 N. E. 731.

City of Emporia v. Soden (1881), 25 Kan. 588, 37 Am. Rep. 265: The plaintiff had erected and for many years maintained and operated mills upon the bank of a river, the power being furnished by a dam built by him. The defendant city then erected waterworks for municipal purposes and supplied them from this pond, drawing part of the water directly through pipes which led into the pond, and part indirectly by percolation into a well adjacent to the pond. The plaintiff obtained an injunction in the district court restraining the city from taking water either from the pond or from the well without compensation to the plaintiff. Upon appeal the supreme court sustained the injunction in both branches. The opinion by Justice Brewer, while apparently bowing to the authority of *Chasemore v. Richards* so far as

respects the interception of water that otherwise would percolate toward and into a stream, held that this case had left *Dickinson v. Grand Junction Canal Co.* unquestioned with respect to the abstraction of water from a stream by percolation, basing this distinction upon what was said by Lord Hatherley in *Grand Junction Canal Co. v. Shugar*, 6 Ch. App. 483, 487.

Katz v. Walkinshaw (1902), 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, held that the owner of a portion of a tract of land which is saturated below the surface with an abundant supply of percolating water cannot remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment.

Cohen v. La Canada Land Co. (1907), 151 Cal. 680, 91 Pac. 584, 11 L. R. A., N. S., 752, held (distinguishing *Katz v. Walkinshaw* and other California cases) that percolating waters may be taken for use of land other than that where found, if this can be done without injury to adjoining owners.

Barclay v. Abraham (1903), 121 Iowa, 619, 100 Am. St. Rep. 365, 96 N. W. 1080, 64 L. R. A. 255, held that while a land owner has a right to make such beneficial use of water from underground reservoirs in the improvement of his estate as he may choose, ⁶³⁵ there is no right to draw water from such underground reservoir merely for the purpose of wasting it, to the injury of other land owners having equal rights to use and means of access to it, or of maliciously depriving them of its beneficial use.

Pence v. Carney (1905), 58 W. Va. 296, 112 Am. St. Rep. 963, 52 S. E. 702, 6 L. R. A., N. S., 266, held that the owner of land who explores for and produces subterranean percolating water within the boundary of his land is limited to a reasonable and beneficial use of such water, when to otherwise use it would deplete the water supply of a valuable natural spring of another on adjoining or neighboring land, and thereby materially injure or destroy such spring.

Erickson v. Crookston Waterworks Co. (1907), 100 Minn. 481, 111 N. W. 391, 8 L. R. A., N. S., 1250, 10 Ann. Cas. 843, held that the law of correlative rights applies to the use by adjoining land owners of waters drawn from an artesian basin, and that such proprietors must so use their wells as not to unreasonably injure their neighbors.

Erickson v. Crookston Waterworks Co. (1908), 105 Minn. 182, 117 N. W. 435, 17 L. R. A., N. S., 650, was a second appeal after a second trial of the case above reported under the same title. On the present occasion the court reiterated the doctrine of "reasonable user."

A review of the reasoning upon which the English doctrine respecting percolating underground waters rests will demon-

strate, as we think, that this reasoning is unsatisfactory in itself and inconsistent with legal principles otherwise well established.

Thus, in *Acton v. Blundell*, 12 Mees. & W. 349, Chief Justice Tindal, in undertaking to show the inapplicability to percolating waters of the law that governs running streams, declared that the ground and origin of the law respecting the latter would seem to be that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious; that the enjoyment has been long continued and uninterrupted, and therefore based upon ⁶³⁶ the implied assent and agreement of the proprietors of the different lands from all ages, while underground waters being concealed from view, there can be no implied mutual consent or agreement between the owners of the several lands respecting them. But, as has been since repeatedly pointed out, the right of the riparian owner to the flow of a natural stream arises *ex jure naturae*, and not at all from prescription or presumed grant or acquiescence arising from long-continued user: See remarks of Baron Parke, in *Broadbent v. Ramsbotham*, as reported in 25 L. J. Ex. (at page 121), and remarks of Lord Wensleydale in *Chasemore v. Richards*, 7 H. L. Cas. (at pages 382, 383), 29 L. J. Ex. 87, 1 Eng. Rul. Cas. 752, 753, and cases cited.

Again, in *Acton v. Blundell*, 12 Mees. & W. 351, the chief justice said: "If a man who sinks a well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the soil." Obviously, he failed to note that there is a middle ground between the existence of an absolute and indefeasible right and the absence of any right that the law will recognize and protect. There is room for the existence of qualified and correlative rights in both land owners.

The English rule seems to be rested at bottom upon the maxim, "*Cujus est solum, ejus est usque ad coelum et ad inferos.*" Thus, in *Acton v. Blundell*, 12 Mees. & W. 351, Chief Justice Tindal said that the case fell within "that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure." Here the impracticability of applying the rule of absolute ownership to the fluid, water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked. If the owner of Whiteacre is the absolute proprietor of all the

percolating water found beneath the soil, the owner of the neighboring Blackacre must, by the same rule, have the like proprietorship in his own percolating water. How, then, can it be consistent with the declared principle to allow the owner of Whiteacre to withdraw, by pumping or otherwise, not only all the percolating water that is normally subjacent to his own soil, but also, and at the same time, the whole or a part of that which is normally subjacent to Blackacre? Where percolating water exists in a state of nature generally throughout a tract of land, whose parcels are held in several ownership by different proprietors, it is, in the nature of things, impossible to accord to each of these proprietors the absolute right to withdraw ad libitum all percolating water which may be reached by a well or pump upon any one of the several lots, for such withdrawal by one owner necessarily interferes to some extent with the enjoyment of the like privilege and opportunity by the other owners.

Again, the denial of the applicability to underground waters of the general principles of law that obtain with respect to waters upon the surface of the earth is in part placed upon the mere difficulty of proving the facts respecting water that is concealed from view. But experience has demonstrated in a multitude of cases that this difficulty is often readily solved. When it is solved in a given case, by the production of satisfactory proof, this reason for the rule at once vanishes.

It is sometimes said that unless the English rule be adopted, and owners will be hampered in the development of their property because of the uncertainty that would thus be thrown about their rights. It seems to us that this reasoning is wholly faulty. If the English rule is to obtain, a man may discover upon his own land springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums of money upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring land owner, who may, with impunity, sink deeper wells and employ more powerful machinery, and thus wholly drain the subsurface water from the land of the first discoverer.

In the case before us the city of East Orange might have its underground water supply cut off or materially impaired by the establishment of deeper wells and more powerful pumps upon some neighboring tract—even upon the tract owned by the plaintiff.

In short, under that rule, *might* literally makes *right*, and we are remitted to—

“The simple plan,
That they should take who have the power,
And they should keep who can.”

For a further elaboration of the grounds upon which the "English rule" is open to criticism, and upon which the doctrine of "reasonable user" of subterranean percolating waters is supported, reference may be made to the dissenting opinion of Mr. Justice Coleridge, in *Chasemore v. Richards*, 2 Hurl. & N. 188, to the judgment of Lord Wensleydale in the house of lords in the same case, 7 H. L. Cas. 384, 29 L. J. Ex. 87, 1 Eng. Rul. Cas. 754, and to the opinions in the recent American cases above cited.

Upon the whole we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of "reasonable user" rests is better supported upon general principles of law and more in consonance with natural justice and equity.

We therefore adopt the latter doctrine. This does not prevent the proper user by any land owner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted. But it does prevent the withdrawal of underground waters for distribution or sale for ~~use~~ uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of sub-surface water upon his land, or if his wells, springs or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses.

It follows that the judgments of the district court and of the supreme court must be reversed.

And since we have before us, in the record of each judgment, an agreed statement of facts that includes all essentials upon which the right of recovery depends, such statement of facts ought to be treated as a special verdict, upon which this court will render the same judgment that the trial court ought to have rendered—that is, an affirmative judgment that the plaintiff do recover his damages: *Sullivan v. Visconti*, 68 N. J. L. 543, 53 Atl. 598, affirmed 69 N. J. L. 452, 55 Atl. 1133; *Reischman v. Masker*, 69 N. J. L. 353, 55 Atl. 301; *National Bank of New Jersey v. Berrall*, 70 N. J. L. 757, 106 Am. St. Rep. 821, 58 Atl. 189, 66 L. R. A. 599, 1 Ann. Cas. 630.

But since there is an absence of any finding or stipulation as to the amount of the damages, a writ of inquiry should be awarded, and the record remitted to the supreme court, to

which court application should be made as to the mode of executing the writ of inquiry.

The Rights in Subterranean Waters of the owner of the land are considered in the note to *Katz v. Walkinshaw*, 99 Am. St. Rep. 66. The use by the owner of land who searches therein, discovers and produces percolating water, is limited to a reasonable and beneficial use of such water, where to use it otherwise would deprive the adjacent and neighboring lands of the enjoyment of the percolating or natural spring water therein: *Pence v. Carney*, 58 W. Va. 296, 112 Am. St. Rep. 963; *Barclay v. Abraham*, 121 Iowa, 619, 100 Am. St. Rep. 365; *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 99 Am. St. Rep. 541; *Parcelon v. Commercial etc. Assn.*, 184 Mass. 8, 99 Am. St. Rep. 541; *Houston etc. R. R. Co. v. East*, 98 Tex. 146, 107 Am. St. Rep. 620.

As to the Right to Withdraw Percolating Waters for the purpose of merchandising it, see *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 126, 128 Am. St. Rep. 555; *Forbell v. New York*, 164 N. Y. 522, 79 Am. St. Rep. 666; *Katz v. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 65. The above Hathorn case is explained in the subsequent case of *People v. New York Carbonic Acid Gas Co.*, 196 N. Y. 421, 90 N. E. 141, where it is affirmed that while a land owner is entitled to make every use of subsurface waters which is for the legitimate improvement or enjoyment of his lands, however it may interfere with others, as to its natural consequences, still if his use is unreasonable, in the sense that he is attempting to increase the flow upon his premises for purposes not connected with such enjoyment or improvement, and to the destruction or impairment of the flow upon adjacent land belonging to others, he commits an unlawful act.

TIMES SQUARE AUTOMOBILE COMPANY v. RUTHERFORD NATIONAL BANK.

[77 N. J. L. 649, 73 Atl. 479.]

CERTIFIED CHECK.—The Effect of the Certification of a Check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. (p. 812.)

CERTIFIED CHECK.—The Obligation of the Bank to the Payee of a check which it has certified at his request is the same as if the funds had been actually paid out by the bank to him, redeposited by him to his own credit, and a certificate of deposit issued to him therefor. (p. 813.)

CERTIFIED CHECK.—Revocation by Drawer.—After the payee of a check has procured the bank to certify it, the bank may not refuse to honor the check because instructed by the drawer not to pay it. (p. 813.)

Guy L. Fake, for the plaintiff in error.

Luther Shafer, for the defendant in error.

⁶⁴⁹ GUMMERE, C. J. One Purdy, being desirous of purchasing a second-hand automobile, employed Millard Ashton, an automobile salesman, to assist him in making a proper

selection. Ashton took him to the salesroom of the Times Square Automobile Company, and after looking over its stock Purdy, with Ashton's approval, selected a car, the price of which was six hundred dollars and gave his check on the Rutherford National Bank for the purchase price. The check was drawn to the order of Ashton, who indorsed it and delivered it to the manager of the automobile company. Immediately after receiving it, the automobile company sent it by special messenger to the banking-house of the Rutherford National Bank with a request that it be certified. This request was complied with. Afterward, when the check was presented for payment, the bank refused to honor it, upon the ground that it had received instructions from Purdy not to pay it. The automobile company thereupon brought suit against the bank on its contract of certification. The defendant admitted that it had ^{and} certified the check, and that it did so at the request of the plaintiff, the holder thereof, but sought to justify its refusal to pay upon the ground that Purdy had been induced to purchase the car by false representations made by the manager of the plaintiff as to its condition and value. It is contended on behalf of the plaintiff that this defense was not open to the defendant. It was, however, admitted over its objection. At the close of the case, plaintiff asked for a direction of a verdict in his favor. This request was refused, the case was sent to the jury, and a verdict in favor of the defendant was rendered. The plaintiff now seeks a reversal of the judgment entered upon that verdict, on the ground that its request for a direction in its favor should have been complied with.

The effect of the certification of a check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. When a check is presented by the drawer for certification, the bank knows that it has not yet been negotiated, and that the drawer wishes the obligation of the bank to pay it to the holder, when it is negotiated, in addition to his own obligation. A certification under such circumstances does not operate to discharge the drawer (*Minot v. Russ*, 156 Mass. 458, 32 Am. St. Rep. 472, 31 N. E. 489, 16 L. R. A. 510; 5 Am. & Eng. Ency. of Law 1056), and so long as the drawer remains undischarged, such a defense as that set up in the present case is open both to him and to the bank. But when the certification by the bank is done at the request of the holder, the effect is radically different. The transaction, then, is virtually this: The bank says, "That check is good; we have the money of the drawer here ready to pay it; we will pay it now if you will receive it." The holder says, "No, I will not take the money now; you may retain it for me until the check is presented for payment." The bank replies, "Very well, we will do so": First

Nat. Bank of Jersey City v. Leach, 52 N. Y. 350, 11 Am. Rep. 708. The result is to discharge the drawer from any further liability on the check (Negotiable Instrument Act, sec. 188; Pamphlet Laws, 1902, p. 614), and to substitute a new contract between the holder and the bank by the terms of which the money called for by the check is transferred from the account of the drawer to the account ⁶⁵¹ of the holder. In contemplation of law the obligation of the bank to the holder, when the certification is at his request, is the same as if the funds had been actually paid out by the bank to him, by him redeposited to his own credit, and a certificate of deposit issued to him therefor: 5 Am. & Eng. Ency. of Law, 1055; Daniel on Negotiable Instruments, sec. 1603.

The defendant, in refusing payment of Purdy's check, apparently considered that its obligation to the holder was no greater than if its certification had been made at Purdy's request. It failed to realize that its act operated as a payment of the check, so far as Purdy was concerned, and transferred the moneys which it called for to the account of the plaintiff. The situation was the same, so far as the defendant was concerned, as if Purdy had paid cash to the plaintiff for the car which he had purchased, and the plaintiff had then deposited the cash in the defendant's bank. Having accepted the plaintiff's money, and issued to him a certificate of deposit therefor, it did not concern the defendant from whom, or how, or under what circumstances the money had been obtained. Its contract required it to pay the amount of the deposit to the plaintiff, or its order, and it could not avoid its obligation to do so by showing that the plaintiff had fraudulently obtained the money which it had deposited with the defendant.

The defense interposed should have been overruled, and a verdict directed for the plaintiff. The judgment under review will be reversed.

The Law of Certified Checks is the subject of a note to Blake v. Hamilton Dime Sav. Bk. Co., 128 Am. St. Rep. 691.

STATE v. MARTIN.

[77 N. J. L. 652, 73 Atl. 548.]

DISORDERLY HOUSE.—Any Place in Which Illegal Practices are habitually carried on is a disorderly house. (p. 815.)

USURY.—A Violation of the Law Against Usury is an unlawful act, although the statute imposes no penalty except to deprive the lender of his right to enforce payment of any interest, and although the statute does not prohibit the borrower from paying usury. (p. 816.)

DISORDERLY HOUSE.—A Place Where Practices Interdicted by statute are habitually carried on is a disorderly house. (p. 816.)

DISORDERLY HOUSE.—Conducting Usurious Business.—One who maintains a place of business in which the law against usury is habitually violated is guilty of keeping a disorderly house. (pp. 816, 817.)

Gilbert Collins, for the plaintiff in error.

William J. Crossley, prosecutor of the pleas, and William R. Piper, assistant prosecutor, for the state.

⁶⁵² GUMMERE, C. J. This writ of error brings up for review a judgment of the supreme court affirming the conviction of the defendant of the crime of keeping a disorderly house. The gravamen of the offense charged against the defendant is the habitual taking of usurious interest for loans made by him at the office of the Capitol Loan Company in the city of Trenton. Both in the trial court and in the supreme court it was contended on his behalf that the habitual taking of usury does not make the place where such practice is carried on a disorderly house. The ruling upon this point was adverse to the defendant in both courts, the precise question having been previously so determined by the supreme court in the case of *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 289, and the first assignment of error argued before us challenges the soundness of that ruling.

What constitutes a disorderly house has been frequently declared by the courts of this state. In the case of *State v. Williams*, ⁶⁵³ 30 N. J. L. 102, it was defined by Chief Justice Whelpley, speaking for the supreme court, as "Any place of public resort, whether an inn, a dwelling-house, a storehouse, or any other building or garden in which illegal practices are habitually carried on." In *State v. Hall*, 32 N. J. L. 158, Chief Justice Beasley, delivering the opinion of the same court, says: "In a legal point of view a house may be disorderly in two ways, viz., first, from the end or purpose to which it is appropriated, and, second, from the mode in which it is kept. The end or purpose for which the house is designed will render the keeping of such house illegal, if it be such as, of necessity, contravenes the provisions of any public statute." In the case of *McClean v. State*, 49 N. J. L. 471, 9 Atl. 681, the court adopted the definition of a disorderly

ouse given in *State v. Williams*, 30 N. J. L. 102, and declared that "Any place of public resort in which illegal practices are habitually carried on" is a disorderly house. This definition was again approved by this court in *Haring v. State*, 53 N. J. L. 664, 23 Atl. 581. In the earlier case of *Meyer v. State*, 42 N. J. L. 145, we declared that "A person who habitually keeps his house open . . . for a purpose which the statute interdicts" is guilty of the offense of keeping a disorderly house.

In view of this line of decisions it must be accepted as settled that any place in which illegal practices are habitually carried on is a disorderly house. The cases of *State v. Hall*, 2 N. J. L. 158, and *Meyer v. State*, 42 N. J. L. 145, would seem to have determined that practices which are prohibited by statute are illegal practices within the meaning of this definition. Counsel for the defendant now contends that the declaration of the two cases last referred to is broader than the decision of those cases required, and that it is only in cases where the habitual violation of a statute involves criminality or moral turpitude that a person is guilty of illegal practices within the meaning of that phrase as used in the case of *State v. Williams*, 30 N. J. L. 102, and the other cases following it. He further contends that the taking of usury is not made unlawful by the statute of this state.

This latter contention may properly be considered first, for, if it is sound, it is dispositive of the case now before us. ⁵⁴ The title of our statute is, "An act against usury": Gen. Stats., p. 3703. The provision of its first section is "That no person or corporation shall, upon contract, take directly or indirectly, for loan of any money, wares, merchandise, goods and chattels, above the value of six dollars for the forbearance of one hundred dollars for a year, and after that rate for a greater or less sum or for longer or shorter time." The object disclosed in the title of the act is the prevention of usury; the method by which the legislature provides for the carrying of that object into effect is by enacting an express prohibition against taking it. Counsel argues that a violation of this mandate of the statute by a person loaning money does not constitute an unlawful act; first, for the reason that the statute imposes no penalty upon him for so doing, and, second, because there is nothing in the act which prohibits the borrower from paying usury.

The statement that the statute does not impose any penalty upon a person who takes usury is not accurate, for the second section of the act deprives him of the power to enforce the payment of any interest on his loan, and entitles the borrower to have the amount of the usury deducted from the principal of the loan in case usury has been paid. In this respect our usury act is quite similar to our act to prevent gaming (Gen. Stats., p. 1606), the penalty imposed by which upon the suc-

cessful better is the return of the stake if it has been paid to him. Each statute prevents the person who is benefited by the violation of its provision from enjoying that benefit, and nothing more. A violation of the act to prevent gaming has been declared by this court, in *Haring v. State*, 53 N. J. L. 664, 23 Atl. 581, to be illegal, and a place where such violations are habitually indulged in to be a disorderly house. We conclude, therefore, that the fact that the statute imposes no penalty, except the deprivation of the money which the statute prohibits the lender from taking, affords no ground for holding that the taking of usury is not unlawful.

Nor do we think the suggestion sound that the taking of usury is not unlawful because the statute does not prohibit ~~655~~ the borrower from paying it. If it is, then the sale of liquor without a license is not unlawful, although prohibited by statute, for there is nothing in the statute which imposes any penalty on a person who purchases liquor from an unlicensed vendor, or which forbids anyone from so purchasing. The gaming act, also, although it prohibits gambling, imposes no penalty on the loser.

We are clear that a violation of the law against usury is an unlawful act.

Is it necessary that the unlawful practices which are habitually indulged in must contain an element of criminality or of moral turpitude in order to render the place in which they are carried on a disorderly house? The sale of intoxicating liquor is not criminal per se. It is only made so by statute when the sale is unlicensed or occurs on Sunday, and not always then: See *Meyer v. State*, 42 N. J. L. 145. Nor does it, in the eye of the state, involve moral turpitude, whatever opinion we, as individuals, may entertain upon the subject, for the state grants permission to selected persons to make such sales and collects revenue for the permission, and the idea that the state, for motives of gain, is willing to become a party to an act which, in its judgment, involves moral turpitude, cannot be tolerated for a moment. And yet it is settled in this state that a house in which unlawful sales of liquor are habitually made is a nuisance, and he who maintains it is guilty of keeping a disorderly house: *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651, 62 N. J. L. 801, 45 Atl. 1092. The logical conclusion to be drawn from the case just cited, and those like it, as it seems to us, is that the declaration of Chief Justice Beasley in *State v. Hall*, 32 N. J. L. 153, and our own statement in *Meyer v. State*, 42 N. J. L. 145, that a place where practices which are interdicted by statute are habitually carried on is a disorderly house, is sound in its fullest extent.

We conclude, therefore, that a person who maintains a place of business in which the law against usury is habitually

violated is guilty of the offense charged in the indictment now before us.

⁶⁵⁶ Counsel for the defendant further contends that the evidence submitted at the trial did not support the finding of the jury that the defendant habitually carried on the practice of taking usury at the office of the Capitol Loan Company, and that, therefore, the judgment against him should be reversed. This contention may be disposed of by saying that it is not justified by the fact; there is ample proof in the case to support the jury's conclusion upon this point.

The final assignment of error argued before us is directed at the charge of the court, and, in order that it may be appreciated, a brief reference to the facts is necessary. The defendant carried on business in the city of Trenton as the manager of the Capitol Loan Company. His method of transacting business was as follows: A person who desired to borrow, say two hundred dollars for a year, was required to obligate himself to pay two hundred and seventy dollars in twelve monthly installments of twenty-two dollars and fifty cents each. Where the amount was less than two hundred dollars the excess required to be repaid was proportionately larger, increasing as the size of the loan diminished; the amount of the excess on a loan of ten dollars, for instance, being five dollars and sixty cents. The method adopted by the defendant in making his loans was this: The borrower was told that the money advanced to him belonged to Clara H. Woodward, said to be a resident of a small town in the state of Illinois, and he was required to execute a chattel mortgage in her favor for the amount of the loan, with legal interest, and to pay for the drawing and recording of that instrument; he was further informed that the loan company was under obligation to guarantee to Mrs. Woodward the repayment of all of her moneys which it loaned, and he was required to give a second mortgage to the company for the remaining portion of the money which he agreed to pay at the end of the year, the excess over the principal and legal interest, as he was informed, being the company's charge for drawing the necessary papers and guaranteeing the loan and its commission for obtaining it. Both the defendant and one Weatherby, one of the company's managers, testified that this method was not a mere scheme adopted to evade the usury law, but that the ⁶⁵⁷ transactions were exactly what they were represented to be; that the money loaned was the money of Mrs. Woodward, and that she got for its use by the borrower only the legal rate of interest. The court, in charging the jury on this phase of the case, instructed them that if they found there was such a person as Mrs. Woodward, and that she was the lender of the money, and did not participate in the taking of the money

charged for expenses incurred, and services rendered in making the loan, they must acquit the defendant; but that if they found that Mrs. Woodward was a myth, or a name put in the papers for the purpose of having some other person than the Capitol Loan Company appear as the lender, then it would be for them to say whether the making of a part of the papers in the name of Mrs. Woodward, and a part in the name of the loan company, was a mere device or scheme for exacting illegal rates of interest. The latter portion of this instruction was excepted to, and was assigned for error, both in the supreme court and here, the pith of the assignment being that there was nothing in the proofs which would justify the jury in finding that Clara H. Woodward was a myth, and that to permit them to do so was harmful to the defendant. The supreme court disposed of the assignment by saying: "There was no evidence that Woodward was a myth, and if the judge had rested the case on that alone the charge could not be sustained. He did not rest it on that alone, but upon the question whether part of the papers were taken in her name, and part in the name of the Capitol Loan Company, as a mere device and scheme for exacting illegal rates of interest. We think the circumstances of the case justified this instruction.

We are inclined to think the statement of the supreme court that there was no evidence that Woodward was a myth is hardly justified. The only testimony that tended to show that she had any existence as a person connected with the transaction under investigation was that of the defendant and of Weatherby. The jury, by its finding, must be considered to have found these witnesses untruthful in their story with relation to the manner in which the loans were, in reality, made. ⁶⁵⁸ That there was abundant evidence to justify it in so doing we have already stated. Having found that they had testified falsely upon this material part of the case, it was justified in disbelieving their statement that Clara H. Woodward was the person whose money was loaned. It was not pretended that she had any other connection with the transactions, and the jury, if it did not believe that the money loaned was hers, was justified in finding—were compelled to find—that she was a mythical personage, so far as these transactions were concerned. This, it seems to me, was all that the trial judge meant the jury was at liberty to find when he used the expression just criticised. If we are wrong in so considering, and he meant that the jury might find that there was no such person in the whole world as Clara H. Woodward, then the instruction, to the extent that it went beyond a declaration that the jury might find she was a mythical person so far as any connection with the transactions under review was involved, was harmless; for, if they found she was a myth so far as the making of those loans was

concerned, it was entirely immaterial whether such a person actually existed or not, and that fact could in no way have affected the decision of the case.

The judgment under review will be affirmed.

WHAT IS A DISORDERLY HOUSE.

I. Criticism of the Principal Case, 819.

II. The Reasoning Therefor in Support of Grounds Numbered 1, 2, and 3, and Giving Definitions of a Disorderly House, 820.

III. Errors Caused by Alleged Quotations and Dealing With Grounds Numbered 4 and 5, 822.

IV. Misapplication of Other Authorities and Dealing With Grounds Numbered 6 and 7, 824.

I. Criticism of the Principal Case.

The object of this note is, on this occasion, away from the routine of furnishing directly to the reader our views on the subject of the title, supported, as a rule, by perhaps a greater range of authority than either the learned judge who wrote the opinion or the learned counsel who argued it had the privilege or opportunity of seeing or expressing, and written from the vantage standpoint of criticism, that point which gives the looker-on the sight of the whole of the game. It will be necessary that we deal with the subject of the note incidentally, but its prime purpose is to put on record a protest against the case of *State v. Martin*, 77 N. J. L. 652, ante, p. 814, 73 Atl. 548, 24 L. R. A., N. S., 507, notwithstanding the array of legal talent which promulgated it, with only Mr. Justice Vroom dissenting from the phalanx of opinion formed by the eleven concurring judges, with the Chief Justice Gummere at their head. The fact that the decision is against all precedent save a few almost equally inaccurate decisions of the same state would in all conscience call for remonstrance, but when, as in this case, it is fraught with the gravest danger to society, a calm and collected analysis of the reasons which have actuated the eleven good men and true in placing their fiat upon it must serve a useful end. We do not for a moment suggest that the doctrine of *stare decisis* run mad could have attacked and inoculated them with a quasi hydrophobic horror of a disorderly house, and yet in the difficulty of finding anything but reasoning equally poor with that put forth to sustain the case—in the strenuous endeavor to swallow whole “the logical conclusion” to be drawn from a case cited, *Parker v. State*, 62 N. J. L. 801, 45 Atl. 1092—in the effort to reconcile the case with the elementary principles of common law, for there is no pretense of support from statutory enactment—in the earnest desire to discover one paystreak of common sense in the legal lode vein to which the New Jersey state has an undisputed patent—we fail to discover a single trace of authority for the proposition for which the decision in question is responsible.

The facts are, briefly, that a man habitually charged a higher rate of interest for money lent than the statute permitted. His office is in the state. He is convicted on these facts for being the keeper of a disorderly house. Categorically the grounds of our protest are:

1. That in *State v. Martin*, 48 N. J. L. 652, ante, p. 814, 73 Atl. 548, 24 L. R. A., N. S., 507, the conviction in the trial court was bad in law.

2. That the affirmance of the conviction in the supreme court of New Jersey was bad law.

3. That the affirmance thereof on review by the court of errors and appeals of New Jersey was bad law.

4. That the case of *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286, cited in support thereof is bad law.

5. That the statement and authority cited for it in the last-named case, "It cannot be disputed that a place where persons gather together to do acts which by law are made crimes or misdemeanors is a disorderly house (*State v. Lovell*, 39 N. J. L. 436)," are not borne out by that last-named case.

6. That the cases of *State v. Hall*, 32 N. J. L. 158, *Meyer v. State*, 42 N. J. L. 145, *McClean v. State*, 49 N. J. L. 471, 9 Atl. 681, and *Haring v. State*, 53 N. J. L. 664, 23 Atl. 581 (which adopted *State v. Williams*, 30 N. J. L. 102), all cited in the principal case, are not authorities in point.

7. That there are no authorities in any other state to support the decision in the principal case.

II. The Reasoning Therefor in Support of Grounds Numbered 1, 2 and 3, and Giving Definitions of a Disorderly House.

We now propose to support all of these grounds. As to 1, 2 and 3, that in the principal case there should have been no conviction in the trial court nor affirmance by the supreme court and court of errors and appeals: Inasmuch as the case turns on what is a disorderly house, the definitions furnished by the leading authorities are a necessary basis for the discussion.

A disorderly house is one so kept as to disturb, annoy or scandalize the public generally, the inhabitants of any particular neighborhood or the passers-by on the street. Of this class is one used for gaming, prostitution or other immoral or illegal purposes, to which people habitually resort to the disturbance of those lawfully there or near. In other words, it includes any house or place the inmates of which behave so badly as to make it a nuisance—such as the houses above described: *Hickey v. State*, 53 Ala. 514; *Price v. State*, 96 Ala. 1, 11 South. 128; *State v. Maxwell*, 33 Conn. 239; *Overman v. State*, 88 Ind. 6; *Commonwealth v. Besaler*, 97 Ky. 493, 30 S. W. 1012; *State v. Groszofski*, 89 Minn. 343, 94 N. W. 1077; *State v. Wilson*, 93 N. C. 608; *People v. Clark*, 1 Wheel. C. C. (N. Y.) 288; *Hawkins v. Lutton*, 95 Wis. 492, 60 Am. St. Rep. 131, 70 N. W. 483.

The term "disorderly house" in the Connecticut Revision of 1896, title 12, section 133, is synonymous with a house where lewd, dissolute or drunken persons resort, and this is very nearly the common-law definition of a disorderly house, which is a house the inmates of which behave so badly as to become a nuisance to the neighborhood: *State v. Maxwell*, 33 Conn. 259. These are the words of Chief Justice Hinman in the case referred to. A disorderly house, in its restricted sense, is a house in which people abide or to which they resort, disturbing the repose of the neighborhood; but in its more enlarged sense, it includes bawdy-houses, common gaming-houses, and places of like character, to which people promiscuously resort for

purposes injurious to the public morals, or health, or convenience, or safety. Nor is it essential that there be any disorder or disturbance in the sense that it disturbs the public peace or the quiet of the neighborhood. It is enough that the acts done there are contrary to law and subversive of public morals, and the result is the same whether the unlawful acts are denounced by the common law or by statute: *Cheek v. Commonwealth*, 79 Ky. 359.

Such are the definitions of authority outside of New Jersey, and we draw special attention to the last sentence in the Kentucky authority, both as to what it says and does not say: "It is enough that the acts done there are contrary to law." On that part of a sentence is built the whole superstructure of the New Jersey decisions. Even if the words last quoted were a full period, their juxtaposition would stamp the acts referred to as ejusdem generis with bawdy-houses, common gaming-houses and places of like character, and the word "there" means in the houses referred to. But one more definition from the New York Penal Code, section 322, keeping disorderly houses, etc.: "A person who keeps a house of ill-fame or assignation of any description, or a house or place for persons to visit for unlawful sexual intercourse, or for any lewd, obscene or indecent purpose, or disorderly house, or a house commonly known as a state beer dive or any place of public resort by which the peace, comfort, or decency of a neighborhood is habitually disturbed, . . . or who permits a building or a portion of a building to be so used, is guilty of a misdemeanor."

As to the construction put on part of the common-law definition it will be dealt with later on. At this stage we are dealing only with the correctness of the original decision. The defendant stood charged with keeping a disorderly house, and the very words of the indictment should have suggested the incongruity of placing the recitals in it. In the absence of the document itself we must assume that it alleged, *inter alia*, that the defendant on certain days in the place named "unlawfully did keep and maintain a common, ill-governed and disorderly house," and "in the said house for the lucre and gain of him, the said Martin, certain persons [we will leave out the character] there unlawfully and willingly did cause and procure to frequent and come together . . . to the great damage and common nuisance of all good citizens and against the peace and dignity of the state of New Jersey." The last clause in the indictment was absolutely necessary of averment. In the language of *State v. Baldwin*, 18 N. C. 195, we might well ask, "What is the offense set forth in the indictment" which is to the common nuisance of the good citizens of New Jersey? "This indictment, therefore, before it can be sustained as one for a common nuisance, ought to contain a specification of such facts and circumstances as will warrant the averment of an annoyance to the community. If the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words *ad commune nocumentum*, though always proper and safest to be inserted, may be omitted, for they neither describe the crime nor the facts which constitute it. Such facts necessarily show the crime. If the facts charged show an offense inconvenient and troublesome, that may have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of *ad commune nocumentum* becomes indispensable.

. . . But an allegation in an indictment that certain facts charged were 'to the common nuisance of all the good citizens of the state,'

will not make it a good indictment for a common nuisance, unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact." Can it be pretended for one moment that the court could, as a matter of law—of horse sense—find that a loan transaction conducted in the ordinary manner was to the common nuisance of the good citizens of Trenton who lived around the defendant's place of business? Or that a solemn court of justice could seriously submit it to a jury? In what lay the nuisance? To us it suggests itself that the only person affected was the defendant himself, who might have regarded the transaction of borrowing money at a high rate of interest a nuisance, and as to him the maxim of "To the willing injury does not accrue" might be applied. So much for the indictment. But worse remains behind. For if the decision can be even whispered as sound, how does it read and result? Let us see. The court in the principal case says: "In view of this line of decisions it must be accepted as settled that any place in which illegal practices are habitually carried on is a disorderly house," and as usury is illegal, therefore the place where it is committed is a disorderly house. With what form of logical litmus paper shall this exhibit be tested? Selecting the *reductio ad absurdum* brand, we find it yields these results: Assuming that marriages are solemnized in churches in New Jersey, if the minister habitually solemnizes marriages in his church between persons under the legal age of consent—clearly an offense—his church, on the authority of the principal case, is a disorderly house! If the grocer habitually sells adulterated goods, his store is also a disorderly house! If the milkman has been taking liberties with the pump—but no; we will not pursue it further. It will be noted we accept the case as it must have been presented, with all the facts, so far as the usury is concerned, admitted, and the inquiry resolves itself into the very natural and pertinent question of why the prosecution was undertaken at all. The court lays down that usury is unlawful, and that practically General Statutes, page 3703, "An act against usury," provides for the penalizing of the defendant. The wrong and the remedy are both within the four corners of the act itself, whereas the ordinary indictment for nuisance with regard to disorderly houses covers ground which has not been appropriated by the designation and punishment of the offense otherwise. The only reason we can see for the conviction in the trial court was the use, or rather the abuse, of adopting precedent decisions without that full inquiry which the importance of the case and the dignity of justice imperatively demanded.

III. Errors Caused by Alleged Quotations and Dealing With Grounds Numbered 4 and 5.

The reasons given above apply with the same, if not greater, force to *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286, for in that case will be found the statement, "It cannot be disputed that a place where persons gather together to do acts which by law are made crimes or misdemeanors is a disorderly house." The authority given at the end of that sentence is *State v. Lovell*, 39 N. J. L. 463. A perusal of that case will disclose that it does not contain a single sentence, phrase or word to warrant the conclusion adopted by the court in *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286. The case of *State v. Lovell*, 39 N. J. L. 463, follows in that volume *State v. Lovell*, p. 458, which decided that "auction pools," "French pools" and "con-

ination pools" upon horseraces were lotteries within the crimes act, and Lovell was convicted of making such a lottery. In the case following, which is the one unwarrantably cited in *State v. Diamant*, 3 N. J. L. 131, 62 Atl. 286, Lovell was charged with keeping a disorderly house, and the short opinion of the court is reproduced in globo, both for further reference in this argument and so that here shall be no suggestion of its misreading:

"The opinion of the court was delivered by

"DIXON, J. The decision of the former case against the same defendant fixes the decision of this. Lotteries for money are, by statute (Crimes Act, Rev., sec. 51), common and public nuisances, and the sale of lottery tickets is a misdemeanor: Crimes Act, Rev., sec. 52. Any place of public resort, kept for the habitual setting up of lotteries or sale of lottery tickets, must, therefore, be a disorderly house: *State v. Williams*, 1 Vroom, 102. And of this character was the place of business of the defendant. It was a disorderly house in another aspect: It was a public resort for persons to bet upon horseraces, and where the defendant held himself out as the stakeholder of the money wagered. The making of such bets and the holding of such stakes are misdemeanors: Crimes Act, Rev., secs. 56, 57. It was urged that these statutes apply only to races in this state; but there is no reason for such contention. Horseracing was not the evil which the legislature designed by these enactments to forbid. For that, punishment had been provided in section 55. But it was the mischievous practice of gambling upon horseraces which the lawmaker here intended to reach; and the injurious effects of that practice are in no way affected by the locality of the race. If there had been a purpose so to restrict the nature of the act made criminal, it would have been expressed as it is in the fifty-eighth section, prohibiting the making up of purses to be run for by horses at any place in this state. The absence of such a restriction indicates a design, which the courts will effectuate, to make the remedy as broad as the mischief. The judgment should be affirmed, with costs."

This opinion effects a double purpose: In the first place, it shows that neither by expression nor intendment can it be said to support the proposition in *State v. Diamant*, 73 N. J. L. 131, 62 Atl. 286, referred to, and next it shows correctly the syllogism on which the court correctly founded their opinion that Lovell was properly convicted. Lotteries are a common nuisance. A place kept where lotteries are conducted is a disorderly house. Lovell kept such a place and was therefore rightly convicted. Apply that reasoning to the case under discussion, and we find usury is not a common nuisance, and therefore a place kept where usurious transactions take place does not fall within the category. Thus the foundation of the case on which the opinion in the principal case is based not only does not support it, but furnishes what proves to be substantial, though apparently hitherto undiscovered, reasons for its unqualified condemnation. How apt are Byron's lines in "English Bards and Scottish Reviewers":

"So the struck eagle, stretch'd upon the plain,
No more through rolling clouds to soar again,
View'd his own feather on the fatal dart,
And wing'd the shaft, that quiver'd in his heart."

V. Misapplication of Other Authorities and Dealing With Grounds Numbered 6 and 7.

The four cases referred to in the sixth of the grounds of protest are not authorities in point. Taking them chronologically, *State v. Hall*, 32 N. J. L. 158, has been most grievously misapplied in the principal case, where a quotation from it appears. "In a legal point of view a house may be disorderly in two ways, viz., first, from the end or purpose to which it is appropriated, and, second, from the mode in which it is kept. The end or purpose for which the house is designed will render the keeping of such house illegal, if it be such as, of necessity, contravenes the provisions of any public statute." The quotation stops there, and be it specially noted in the middle of a sentence. Let us now look at the case itself. First, it decides that a ten-pin alley, kept for public use, in a village, is not per se a nuisance. Nor is such ten-pin alley a nuisance, though kept in connection with a lager beer saloon; and next, where it is one of the terms of the establishment that the loser is to pay for the use of the alley, such playing is not gambling.

The excerpt above referred to ends in the principal case with a period; not so, however, in the official report, which has a semicolon after which occurs the following: "Or be such as must be injurious to the public morals, peace, or health; or to the comfort of society. Instances of this sort are brothels, or places kept as a rendezvous for thieves." Now, of what kind of a house was the learned chief justice speaking? Here are his own words on page 164 of 32 N. J. L. "My conclusion is, that a house or place kept by the owner, with a view to profit, for the practice of public amusements, not in themselves prohibited by law, cannot be held to be a nuisance, unless such consequence attach from the mode in which it is kept." Comment is needless. The whole case dealt with a house for public amusement, sanctioned or prohibited as the case may be, and though the range of legal ingenuity is popularly supposed to be limitless, we cannot conceive a place devoted to "spider-and-the-fly" loan transactions at the modest rate of about fifty per cent being an amusement in any even elaborately twisted definition of the term. Is the words of *Æsop*, the stone-throwing into the frog-pond was amusement to the thrower, but it was death to the frog!

Next on the dissecting-table is *Meyer v. State*, 42 N. J. L. 145 which decided that "a house in which unlawful sales of liquor are habitually made is an indictable nuisance, although there is a city ordinance prescribing penalties for such sales, as such traffic is not only a breach of the city law, but is also forbidden by the state law." We have quoted the syllabus at the head of the case in order to show how necessary it is not to be satisfied with syllabi, as a rule. For example, the first six lines of the opinion read: "The opinion of the court was delivered by Van Syckel, J. The defendant was convicted in the Essex county quarter sessions, on an indictment charging him with keeping a disorderly house in the city of Newark. The habitual sale of liquor on Sunday was the only disorder proved on the trial." Thus the very opening of the opinion discloses how inapt an authority it is to support the principal case. The chief reference in *Blackstone* on the subject of inns and tippling-houses will be found in *Cooley's Blackstone*, page 1340: "Disorderly Places—All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage plays, unlicensed booths and stages for rope dancers, mount-

banks, and the like, are public nuisances, and may upon indictment be suppressed and fined." *Meyer v. State*, 42 N. J. L. 145, is founded not only on this old-time and time-honored principle, but also on the aggravation of the offense by committing it on the day set apart for Sabbath observance. Before we leave Blackstone, let us turn back a few leaves to page 1338: "I shall here only remind the student that common nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and not merely some particular person, and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects. Of this nature are . . . disorderly places." Reverting to *Meyer v. State*, 42 N. J. L. 145, we find solid argument in it against the conviction in the principal case. We are not concerned in the internal ramifications as to state or municipal prohibition. We regard it in the broader view of the suppression of acts which have a tendency to subvert public morals. It seems ungenerous to use, for purposes of demolition, the words of an opinion cited in support of the principal case, but the following will serve to mark the distinction if it does increase the wonder why and how the case was used at all for the court to lean upon. "The popular voice, as expressed in legislative enactments in many of the states, has pronounced the sale of intoxicating liquors on Sunday to be vicious in its effect. That the open, habitual, and persistent disregard of such laws will encourage vice and immorality is too plainly proven, by observation and experience, to be successfully controverted. Whether any given act will tend to demoralize the public must be judged by the standard of morals which prevails to-day, not by that which measured the conduct of men two centuries ago. . . . The rule that a house is indictable where immoral practices are allowed remains unchanged, but the sense of mankind, at the time when the legal principle is to be applied, must determine what state of facts shall make the citizen amenable to it." Coming now to *McClean v. State*, 49 N. J. L. 471, 9 Atl. 681, which is in the list of the precedents adopted in the principal case, we find that it did adopt the dictum from *State v. Williams*, 30 N. J. L. 102, which has been so grievously distorted. A reference to the opinions of Whelpley, C. J., and Elmer, J., will show that the court was dealing with the case of a defendant keeping a house with a counter in the room occupied by him, and beer barrels, and that he sold beer from the barrels every Sunday during the time charged or whenever anyone called for it. The utterances of the court, therefore, show clearly what was in their minds. We extract from that case the first three paragraphs of the learned chief justice's opinion: "Any place of public resort, whether an inn, a dwelling-house, a storehouse, or any other building, or garden, is a public nuisance in which illegal practices are habitually carried on, or when it becomes the habitual resort of thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredations upon society, and disturbing either its peace or its rights of property."

"Such collections of persons can have no other effect than to debauch and deprave the public morals, although they may be quiet

and orderly places, so far as mere noise and confusion is concerned They are notable nuisances at common law, because they are nocummenti, nuisances—that is, injurious to the public health, public quiet, or public morals.

"No private individual has a right, for his own amusement or gain, to carry on a public business clearly injurious to and destructive of the public quiet, health, or morals, and is indictable for so doing, because the injury is of a public character to the public, and not merely private, or to a single individual."

And from the opinion of Elmer, J., we get his appreciation of the case before him: "A house to which people promiscuously resort for purposes injurious to the public morals or health, or convenience or safety, is a nuisance, and the keeper is liable to indictment for keeping a disorderly house. That bawdy and gaming houses, and houses of entertainment resorted to by prostitutes, thieves and vagabonds are of this character cannot be doubted." If opinions are to be founded on words, phrases or sentences extracted from their setting, there will be no responsibility in future decisions. For instance, under Judge Elmer's definition, if we were to subject his able opinion to the same treatment as was accorded to extracts in the long list of cases referred to, we should have to admit that in the event of a fire, if people promiscuously resorted to a place of safety, such place would ipso facto become a disorderly house! *Reductio ad absurdum* cannot be carried much further than the hitherto unquestioned application of inappropriate dicta to cases of the class under examination.

One more case completes the list. *Haring v. State*, 51 N. J. L. 386, 17 Atl. 1079, according to its syllabus, tells us: "The defendant kept a room in the city of Paterson, to which persons commonly resorted for the purpose of betting on horseraces. Held, that he was properly convicted of keeping a disorderly house." And so he was. But where is his case analogous to that of the defendant in the principal case? The main discussion in *Haring's* case was as to the constitutionality of a certain act, while as to the offense there was no need to buttress the prosecution with authorities and precedents. *Haring v. State*, 51 N. J. L. 386, 17 Atl. 1079, 23 Atl. 581, is good law and undoubted justice, and is but little impaired by its unnecessary references to the unfortunate misapplication of the earlier cases—each individually sound—each by false relation misleading. It is not assuming too much to say that the words in *State v. Williams*, 30 N. J. L. 102, referred to, not only do not apply in the narrow—not the broad—sense to any house wherein any offense against the law is committed, but that it was furthest from the thought of the learned judge who uttered them, that they would meet with the abuse so unmercifully meted out to them by his successors and colleagues of the bench. The old lines, "Many a shaft at random sent finds mark the archer little meant," may be well affixed to them, and equally well be taken to heart by the New Jersey justices of appeal for furnishing data which uncover the faults of their unique decision. We say unique, for we have been unable to find anything approaching it in the decisions of other courts—of other states or in England—a decision which stands a sorry disfigurement of Justice with her eyes too tightly bound.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

**DARCY v. BROOKLYN AND NEW YORK FERRY
COMPANY.**

[196 N. Y. 99, 89 N. E. 461.]

CORPORATION — Sale of Assets — Liability of Directors to Creditors.—It is a "violation of their duties," under subdivision 2 of section 1781 of the Code of Civil Procedure, for the directors of a corporation to set over all its assets to a purchasing corporation without giving an opportunity to creditors to present and enforce their claims, and renders the directors liable for the amount of debts that have accrued against their company before the transfer, although they acted in good faith and although the purchasing company agreed to assume all debts of the selling corporation. (pp. 828, 829.)

John Delahunty, for the appellants.

James C. Cropsey and Rufus O. Catlin, for the respondent.

¹⁰¹ WILLARD BARTLETT, J. On November 15, 1900, the plaintiff duly recovered a judgment against the Brooklyn and New York Ferry Company upon a cause of action which had accrued on the second day of July, 1897. The execution upon this judgment was returned unsatisfied. The plaintiff found himself unable to enforce it because the defendant corporation, on the 22d of August, 1898, had through its board of directors assumed to sell, assign and transfer the entire corporate property to another corporation known as the Brooklyn Ferry Company in New York for six millions of dollars. The present suit was instituted on the theory that the directors had violated their duties in making the transfer in the manner in which they made it, and hence could be compelled to satisfy the plaintiff's claim.

The consideration for the transfer did not pass from the purchasing corporation to the Brooklyn and New York Ferry Company or its directors, but was turned over directly to the stockholders of the selling corporation and distributed among them. The Brooklyn and New York Ferry Company thereupon immediately ceased doing business, having thus parted

with all its franchises, although no proceedings were ever taken to effect a dissolution of the corporation according to law. No notice of the transfer was given to creditors, nor was any property retained by the directors with which to meet the plaintiff's claim, or any other indebtedness which might legally be established against the corporation. At the time of the transfer, however, the purchasing corporation did agree to assume all the then existing debts and liabilities of the selling corporation. This agreement was the sole provision ¹⁰² made by the directors for the payment of the creditors of the corporation which they represented.

The narrative of the transaction leaves no doubt that what the directors of the Brooklyn and New York Ferry Company sought to bring about was a voluntary dissolution of the corporation and the distribution of its assets without taking the steps to that end which are prescribed by law. Notwithstanding their failure to proceed under the statute, they contend that a creditor of a corporation has no standing to compel them to pay a claim of which they were ignorant at the time of the transfer of the corporate property, in the absence of proof of actual fraud on their part. It is true that there is no allegation or finding of fraud; but there is evidence that the officers of the company had knowledge of the injury to the plaintiff which was the basis of his claim. The liability of the directors is predicated not on the ground that their action in making the transfer was fraudulent, but upon the proposition that it is a violation of duty on the part of the directors of a corporation to divest it of all its property without affording a reasonable opportunity to its creditors to present and enforce their claims before the transfer shall become effective.

This is the proposition involved in the judgment in this case which we are asked to reverse. We think it is sound in law and should be upheld.

There is express statutory authority for the maintenance of an action by a creditor of a corporation against its directors to compel them to pay the value of any property which they have transferred to others by a violation of their duties: Code Civ. Proc., secs. 1781, 1782, substantially re-enacted in 1909 as sections 90 and 91 of the general corporation law. The assets of a corporation constitute a trust fund for the payment of its debts: *Bartlett v. Drew*, 57 N. Y. 587. A creditor cannot be deprived of his equitable lien thereon by an agreement between the corporation and a transferee of the property that the latter shall assume and pay all the corporate debts. The consent of the creditor to accept the substituted ¹⁰³ debtor is essential to make such an agreement valid as against him. Hence the fact that the Brooklyn Ferry Company of New York agreed with the Brooklyn and New York

Ferry Company to assume all the debts of the latter did not justify the directors of the selling corporation in disposing of its assets without making some other provision for the payment of its creditors. The plaintiff was left in the position of the creditor so aptly described by Werner, J., in *Hurd v. New York & C. Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327: "When he demands payment of his claim, he is referred to the empty shell which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his at the time of its creation."

It is not necessary to determine precisely what the directors of a corporation must do in order to protect themselves against liability when they undertake to divest it of all its property and practically dissolve it without taking the proceedings for a voluntary dissolution which are prescribed by law. For the purposes of the present case it is enough to say that they were bound to give some notice to creditors of the proposed transfer, and they gave none whatever. We think that their failure to do so was "a violation of their duties" under subdivision 2 of section 1781 of the Code of Civil Procedure and rendered them liable to the plaintiff for the amount of the claim which he established against the corporation as having accrued before the transfer. The motives which induced the omission are immaterial. The entire assets could not lawfully be set over by the selling corporation to the purchasing corporation until some sort of opportunity had been given to the creditors of the latter to present and enforce their claims. The neglect to afford this opportunity is what constituted a violation of the directors' duties, and it matters not that they may have supposed they were not required to do any more than they did for the protection of creditors. The case is quite different from *Stokes v. Stokes*, 23 App. Div. 552, 48 N. Y. Supp. 722, relied upon by the appellants. That was an action under the first subdivision of section 1781 of the Code of Civil Procedure ¹⁰⁴ and was based upon a charge of official misconduct against the directors of a corporation. There it was held that in view of the character of the action it was necessary to show something more than the mere impropriety or unlawfulness of the acts charged. Here, however, we have an action under the second subdivision of section 1781 founded simply upon a violation of duty on the part of the directors of the defendant corporation. Their omission to make adequate provision for the protection of the creditors was proof of their dereliction and good faith constitutes no defense. Indeed, business men have little cause for complaint when, as in this case, they find themselves in trouble because they have attempted to accomplish privately what the law contemplates shall only be accomplished publicly, namely, the voluntary dissolution of a corporation. The

judgment enforces a sound lesson in business morals and should be affirmed, with costs.

Cullen, C. J., Edward T. Bartlett, Werner, Hiscock and Chase, JJ., concur; Gray, J., absent.

Judgment affirmed.

The Effect of the Sale by a Corporation of All Its Assets is the subject of a note to *Tanner v. Lindell Ry. Co.*, 103 Am. St. Rep. 541. The effect of the consolidation of corporations is the subject of a note to *Morrison v. American Snuff Co.*, 89 Am. St. Rep. 604. As to the liability of the purchasing corporation for the debts of the selling corporation in the case of a transfer of assets, see the recent cases of *Whiting v. Malden etc. R. R. Co.*, 202 Mass. 298, 132 Am. St. Rep. 493; *J. L. Kelley Co. v. Pollock & Bernheimer*, 57 Fla. 459, 131 Am. St. Rep. 1101; *Denver etc. Ry. Co. v. Hannegan*, 43 Colo. 122, 127 Am. St. Rep. 100.

IN RE CRANDALL'S ESTATE.

[196 N. Y. 127, 89 N. E. 578.]

DIVORCE—Effect of Interlocutory Judgment.—An interlocutory judgment in an action for divorce does not dissolve the marriage relation, but contemplates that the final judgment shall accomplish that result. (p. 831.)

DIVORCE—Effect of Death of Plaintiff.—An action for divorce is primarily an action of a personal nature, which, in the absence of statutory provisions, abates with the death of the party bringing it. (p. 832.)

JUDGMENT—Interlocutory Decree—Death of Party.—Section 753 of the Code of Civil Procedure, providing that "if either party to an action dies after . . . an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties," applies only to actions which do not abate on death. (p. 832.)

DIVORCE—Theory of Interlocutory Decree.—By leaving the granting of the final judgment in divorce within the power of the court for three months after the entry of the interlocutory judgment, it is intended to prevent fraudulent and collusive judgments and speedy prearranged remarriages. (p. 833.)

DIVORCE—The Final Judgment in Divorce Does not Follow the interlocutory judgment as of course and automatically, and is not a mere matter of form. (p. 832.)

DIVORCE—Death of Plaintiff Before Final Decree.—Where no application was made for the entry of final judgment in an action of divorce within the time prescribed by statute after entry of the interlocutory judgment, and no satisfactory excuse for the failure is made, a final decree cannot be entered after the death of the plaintiff effect as of a date prior thereto. (p. 834.)

Personius, for the appellant.

Burrell, for the respondents.

¹²⁹ HISCOCK, J. The superficial question in this case is whether the appellant, who was the wife of one Ira L. Crandall, is entitled as widow to letters of administration on his estate, the same thus far having been refused to her. The underlying and interesting question is whether the marriage relation between him and her was so dissolved by a purported judgment in an action for absolute divorce brought by him that she is not his widow and is not entitled to such letters.

The brief facts which give rise to these questions are as follows:

The deceased having brought said action for divorce, so succeeded therein that on or about May 23, 1906, he obtained the ordinary interlocutory judgment in his favor in accordance with the provisions of section 1774 of the Code of Civil Procedure as now framed. He did not obtain or apply for a further and final judgment within the prescribed period or prior to his death, which occurred January 23, 1907, and there is no explanation of his own failure to act. Some considerable time after his death his attorney in the divorce action, attempting to make his thinly veiled laches an excuse for the delay, and without any substitution of parties in the place of the deceased plaintiff or other steps for the revival of the divorce action, if such proceedings were possible, obtained at ¹³⁰ a special term of the supreme court an order that a final judgment in favor of said plaintiff against the appellant be allowed, and that "the same may be entered and shall stand and be of the same force and effect as though said Ira L. Crandall was alive, and the same had been granted and entered within the time prescribed by section 1774 of the Code of Civil Procedure," and subsequently a purported final judgment was entered in accordance therewith.

The learned appellate division has unanimously decided that this post-mortem judgment was valid; that it could be made to take effect as of a date prior to the plaintiff's decease and thus appear to work a dissolution of a marriage contract which at the time it was really entered had already been very effectually dissolved by death. While no opinion instructs us as to the course by which this conclusion was reached, we presume that it was based on the provisions of section 763 of the code, to which further reference will be hereafter made. Whatever the basis for the conclusion, however, we are unable to adopt it.

We suppose that there will be no dispute concerning the proposition that the interlocutory judgment could not and did not even purport to dissolve the marriage relation between the parties to the action, but contemplated and provided for a final judgment which should accomplish that result: Code, sec. 1774; *Pettit v. Pettit*, 105 App. Div. 312, 93 N. Y. Supp. 1001; *Cook v. Cook*, 144 Mass. 163, 10 N. E. 749.

We also suppose that it will be conceded that an action for divorce is pre-eminently an action of a personal nature which in the absence of statutory provisions abates with the death of the party bringing it. While it has been held in some jurisdictions that a party defeated in a divorce action by a judgment and thereby deprived of property rights may prosecute an appeal after the death of the other party (*Thomas v. Thomas*, 57 Md. 504; *Nickerson v. Nickerson*, 34 Or. 1. 48 Pac. 423, 54 Pac. 277), it has never been held that an action like the present one may be prosecuted to judgment after the death of the plaintiff because incidentally it might take away property rights from ¹³¹ the other party, but the contrary has been held: *Downer v. Howard*, 44 Wis. 82; *Danforth v. Danforth*, 111 Ill. 236.

But, as we have assumed, section 763 of the Code of Civil Procedure under the circumstances is relied on to change this rule against the appellant. It provides: "If either party to an action dies after . . . an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless . . . the interlocutory judgment is set aside."

Examination of the subject, however, shows that if this section was held to apply to this case this was error. It is unnecessary to show, by reference to the caption of the title in which the section is found and by reference to other related sections in the title in which it occurs, that such section applies only to actions which do not abate on death, because this construction has already been made authoritative by the decision of this court: *Robinson v. Govers*, 65 Hun, 562, 20 N. Y. Supp. 571; affirmed on this point, although reversed on other grounds, 138 N. Y. 425, 34 N. E. 209.

It has, however, been further suggested on this appeal that even though the action of the deceased husband was not preserved by special statutory provisions, that result could and ought to be accomplished on other principles. As we understand the argument, it is somewhat on the line that the interlocutory judgment really settled the rights of the parties in the divorce action, and that the final judgment followed as of course and by an automatic progression which should not be interrupted even by the death of the party who alone was entitled to it. We are not able to adopt this view, either. It does not seem to us that the entry of the final judgment, especially under the circumstances presented to us, was automatic and of course. We all know that there was a very definite purpose in postponing the entry of final judgment in divorce actions for three months after the entry of the so-called interlocutory judgment. It was not a mere matter of form. It was intended to leave the granting of this final judgment for ¹³² that period under the consideration and within the power of the court, and thus to prevent those scandals of fraudulent

and conclusive judgments and of speedy and prearranged remarriages which had become too familiar to require further specification. So we find section 1774 providing with much particularity that "No final judgment annulling a marriage, or divorcing the parties . . . shall be entered, . . . until after the expiration of three months after the filing of the decision of the court or report of the referee"; also, that "such decision or report must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and cannot be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay"; also, that "The final judgment must be entered within thirty days after the expiration of said period of three months and cannot be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay," and, finally, under any circumstances that its entry shall be subject to its being "by the court in the meantime . . . otherwise ordered."

Thus, if the plaintiff had applied within the proper and prescribed time for final judgment, his application was subject to further consideration and denial by the court. But without any personal excuse for his delay and with only a very shadowy one made by his attorney after death, no application was made for final judgment within the time prescribed by law and, therefore, even if the application had occurred while plaintiff was alive, it was liable to be defeated by the refusal of the court to accept for his nonaction some excuse which, if not better than the one now presented by his attorney, could very properly have been rejected as insufficient. And so it seems to us that the deceased, by his own failure to observe the law, had placed himself before death in a position in which it certainly cannot be said that he was so entitled as of course to a final judgment that such final judgment ¹³³ had become a mere formality and should be entered after his death and made to relate back.

A question largely similar to this was decided in *Chase v. Webster*, 168 Mass. 228, 46 N. E. 705. In that state at the time of said decision the statute provided: "All decrees of divorce shall in the first instance be decrees nisi, to become absolute after the expiration of six months from the entry thereof, unless the court has for sufficient cause, on application of any party interested, otherwise ordered." The plaintiff had obtained a judgment nisi. Pending the expiration of the six months when absolute judgment might have been rendered he died, and it was held that the judgment nisi did not operate to dissolve the marriage and that "the death of either party before the decree has been made absolute, and

before the time when it can be made absolute, puts an end to the suit; and thereafter the divorce cannot be made absolute, either by order of the court or by operation of" a specific statute of which the provisions were very much similar to those of section 763 of the code already referred to.

Of course we do not overlook the fact that in the Massachusetts case the party died before the expiration of the period required to elapse before a judgment absolute could be rendered, but we do not think that such fact prevents said decision from being an authority in favor of the proposition that a judgment after death in a divorce action cannot be entered in favor of a party who had failed to take advantage of the provisions made for a final judgment in his behalf and had placed himself in a position of default from which he could be relieved only for reasons satisfactory to the court. In one case the party at the time of death was not entitled to final judgment because the date thereof had not yet arrived; in the other case the party at the time of death was not entitled to final judgment because he had allowed the time to elapse within which he should have made application therefor. In neither case was the party at the time of death entitled to a judgment automatically and as a matter of course, and which supposed right is made the basis of the argument now ¹³⁴ under consideration for sustaining the decision of the court below.

The order of the appellate division and the surrogate's decree should be reversed, with costs in all courts, and the proceedings remitted to the surrogate's court for further action in accordance herewith.

Cullen, C. J., Gray, Edward T. Bartlett, Werner and Wilard Bartlett, JJ., concur.

Chase, J., absent.

Ordered accordingly.

As to Interlocutory Decrees of Divorce Under the California Statute. see Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23; Deyoe v. Superior Court, 140 Cal. 476, 98 Am. St. Rep. 73; Pereira v. Pereira, 156 Cal. 1, 134 Am. St. Rep. 107.

Judgments for or Against Deceased Persons are discussed as to their validity and effect in the note to Wardrobe v. Leonard, 126 Am. St. Rep. 622.

HENRY v. BABCOCK & WILCOX COMPANY.

[196 N. Y. 302, 89 N. E. 942.]

CORPORATION—Inspection of Books, Right of Stockholder to Make.—The New York statute gives a stockholder the absolute right to inspect the books of the corporation during business hours, and imposes on the corporation and the custodian of the books the absolute duty to permit such inspection, without any disclosure by the stockholder of his purpose, (p. 836.)

CORPORATION—Inspection of Books—Making Memoranda.—The right of a stockholder to inspect the stock-books of the corporation includes the right to copy the names of the shareholders, together with their addresses and the number of shares held by each. (p. 837.)

William M. Bennett for the appellant.

Charles J. Fay, for the respondent.

³⁰³ WILLARD BARTLETT, J. The defendant is a corporation organized under the laws of New Jersey, having its main office for the transaction of business in this state at No. 85 Liberty street in the borough of Manhattan in the city of New York, where it keeps its stock-book. On January 17, 1908, during the usual hours of business, the plaintiff, being a resident of New York and the owner of one share of stock in said corporation, demanded of its treasurer, who was the officer having charge of the stock-book, "to be allowed to inspect the said stock-book and to copy therefrom the names of the persons therein set down as stockholders of the defendant, together with their places of residences and the number of shares of stock held by them respectively." The treasurer asked the plaintiff his purpose in making the request. This the plaintiff declined to state, saying that he understood his ³⁰⁴ right was absolute under the law. The treasurer thereupon said: "If you tell me your purpose, and if such purpose appears to me to be proper, I will then allow you to inspect the stock-book, but not otherwise." The plaintiff still declined to disclose his purpose, whereupon the treasurer finally refused the desired inspection.

This controversy was then stated between the parties and duly submitted to the appellate division, the plaintiff contending that the refusal to permit an inspection of the defendant's stock-book entitled him to recover a penalty of two hundred and fifty dollars under section 53 of the Stock Corporation Law. The appellate division has rendered judgment in favor of the defendant, and from that judgment the plaintiff now appeals.

Section 53 of the Stock Corporation Law, as in force at the time of this transaction (now section 33 of chapter 59 of the Consolidated Laws), provided that every foreign corporation having an office for the transaction of business in this

state should keep a stock-book containing a list of its stockholders, showing their places of residence, the number of shares of stock held by them respectively, etc. It further provided as follows: "Such stock-book shall be open daily, during business hours, for the inspection of its stockholders. . . . For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of two hundred and fifty dollars (\$250), to be recovered by the person to whom such refusal was made": Laws 1892, c. 688, sec. 53, as amended by Laws 1897, c. 384.

Referring to those cases in which it has been held that the courts in the exercise of their discretion may properly refuse to compel by mandamus the production of the books of a corporation for inspection by a stockholder where it does not appear that the inspection is sought for a legitimate purpose, the learned judge who wrote the prevailing opinion below saw no reason why the same rule should not be adopted in the present case. He thought that the plaintiff's refusal to disclose his motive authorized the inference that the motive was improper; and that the desired permission to inspect and ³⁰⁵ copy was rightfully denied, not only for that reason, but because the statute did not expressly entitle a stockholder to copy the names and addresses of the other holders of stock from the stock-book.

In *Matter of Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461, the question certified to this court for decision was "Has the supreme court the power, upon the petition of a stockholder, to compel by mandamus the corporation to exhibit its books for his inspection?" In the opinion of the court, Judge Vann carefully inquired into the origin and extent of the authority of the supreme court and its power of visitation or of examining into the affairs of corporations according to the common law; and the conclusion was reached that the common-law right of a stockholder with reference to the inspection of the books of his corporation still exists unimpaired by legislation, and that the supreme court has power, in its sound discretion, upon good cause shown, to enforce such right. The decision, so far as it goes, tends to sustain the position of the appellant; but it did not pass upon the force and effect of the statute whose operation is invoked in the present case.

No doubt the legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose under which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder and imposes an absolute duty upon the corporation and the custodian of the stock-book. The law requires no statement or proof of any particular intent upon the part of the person demanding the inspection.

He must be a stockholder and must prefer his request during business hours; that is all. If it appeared in good faith that the book was then in actual use for other corporate purposes, he could, of course, be required to wait a reasonable time until such use terminated; but no such matter of defense is suggested here. The plaintiff was refused any inspection at all in the absence of a disclosure of his purpose; and this action of the defendant has been sanctioned by the judgment of the appellate division. We think that judgment ³⁰⁶ is based upon a mistaken construction of the statute in this respect. Nor was the refusal justified on the ground that the law confers upon the stockholder no express right to copy from the book. The right to inspect the book includes the right on the part of the stockholder to aid his memory by copying therefrom to the extent indicated in the agreed statement of facts in the present case. In *Cotheal v. Brouwer*, 5 N. Y. 562, it was held that the custodian of a register of stockholders which the stockholder had a statutory right to examine could not close the book because a stockholder desired to make a memorandum in the course of his examination in order to assist his recollection. "Unless the stockholder is permitted to take memoranda from the books," said Paige, J., "or copies of the names of the stockholders, the plain object of the statutory provision would be defeated" (p. 567).

The judgment of the appellate division should be reversed and judgment directed for the plaintiff in accordance with the terms of the submission, with costs in both courts.

Cullen, C. J., Vann, Werner, Hiscock and Chase, JJ., concur; Gray, J., not voting.

Judgment reversed, etc.

The Right of a Stockholder to Inspect the Books of His Corporation and the remedies for its enforcement are considered in the note to *Harkness v. Guthrie*, 107 Am. St. Rep. 674.

WRIGHT v. KNIGHTS OF THE MACCABEES OF THE WORLD.

[196 N. Y. 391, 89 N. E. 1078.]

BENEFIT SOCIETY—Power to Change By-laws.—The reservation of a general power to amend its by-laws does not authorize a mutual benefit association to adopt an amendment forfeiting or substantially reducing the benefits to which a pre-existing member is entitled under his contract. (p. 844.)

BENEFIT SOCIETY—Power to Change By-laws.—The reservation of a general power to amend its by-laws does not authorize a mutual benefit association to adopt an amendment increasing the rate of assessments, as against pre-existing members, at least when such increase is not necessary to the continued existence of the association. (p. 846.)

John Conboy, for the appellant.

De Vere Hall, B. A. Field and D. D. Aitken, for the respondent.

338 VANN, J. This appeal was heard on the judgment-roll, no case having been made and none of the evidence or exhibits being printed, except as portions of the latter appear in the findings of the trial court. The following facts found by the court, present the questions that we are called upon to decide: In his application to become a member of the defendant, dated June 9, 1897, the plaintiff stated: "I hereby agree that . . . the laws of the Supreme Tent of the Knights of the Maccabees of the World, now in force or that may hereafter be adopted, shall form the basis of this contract for beneficial membership . . . ; that any . . . neglect to pay any assessment which shall be made by the Supreme Tent within the time provided by the laws thereof or neglect to pay the dues fixed by said laws, in the manner and at the time provided by said laws, or the by-laws of the tent to which I may belong, shall vitiate my benefit certificate and forfeit all payments made thereon This application and the laws of the Supreme Tent now in force, or that may hereafter be adopted, are made a part of the contract between myself and the Supreme Tent; and I for myself, and my beneficiary or beneficiaries, agree to conform to and be governed thereby."

On the 19th of June, 1897, the defendant issued to the plaintiff a certificate or policy of insurance stating in part as follows: "This certifies that Sir Knight Dennis L. Wright has been regularly admitted as a member of Watertown Tent No. 418, located at Watertown, state of New York and that in accordance with and under the provisions of the laws of the order he is entitled to all the rights, benefits and privileges of membership therein, and that at his death or

assessment on the membership, not exceeding in amount the sum of one thousand dollars, will be paid as a benefit to Mary Wright . . . provided he shall have in every particular complied with the laws of the order in force or that may hereafter be adopted."

The plaintiff, who at the date of the certificate was of the age of fifty years, complied with the rules of the defendant and paid all dues, assessments and charges against him until and ³⁹⁶ including the month of December, 1904. According to the laws of the association in force at the time of plaintiff's admission to membership the annual dues were three dollars per year, and in January, 1898, with his acquiescence, they were changed to four dollars per year, and he thereafter paid at that rate. According to said laws when the plaintiff was admitted each monthly assessment was one dollar and forty cents, and, as the court found, "it was further agreed that 'he shall pay the same rate of assessment thereafter so long as he remains continually in good standing in the order.' " Provision was made, however, that in case one assessment per month should not be sufficient to pay death and disability claims as they should occur, additional assessments might be made from time to time to pay such claims.

At the time the plaintiff joined the defendant the by-laws provided that "Any member holding a benefit certificate who shall become totally and permanently disabled from any cause, not the result of his own illegal act, to perform or direct any kind of labor or business, or who shall arrive at the age of seventy years, and who has paid all legal dues and assessments since the date of his initiation to the date of such disability or period in life, shall be relieved from the payment of any further dues or assessments levied under these laws, or the by-laws of the tent of which he is a member, and shall be entitled to receive from the disability fund annually one-tenth part of the sum for which his benefit certificate is issued, provided, however, that the aggregate of such installments received by him shall in no case exceed the sum specified in such certificate."

In July, 1904, the defendant, without the consent of the plaintiff, so amended its by-laws as to provide that "On and after January 1, 1905, all present life benefit members of the association who are then fifty-five years of age, or over . . . shall pay three dollars per month for each one thousand dollars of life benefits carried." The amendment also provided for a per capita tax of ten cents per month and a "fraternal tax of fifty cents a year," upon every member of the association. ³⁹⁷ Additional assessments at the new rate were authorized to pay death and disability claims whenever the amount of the life benefit fund was not

sufficient for the purpose. On January 1, 1905, the plaintiff had passed the age of fifty-five years.

The amended laws further provided that "A life benefit member of the association who shall become totally and permanently disabled by other than his own illegal, reckless or foolhardy act from performing or directing any and all kinds of labor or business, whether such directing is his customary occupation or not, and he is in good standing in the association at the time of such disability, may receive total and permanent disability benefits, provided that such member shall continue to pay all monthly rates, additional assessments, dues and fines which he would have been required to pay if such disability had not occurred. . . . A member so disabled may receive from the life benefit fund annually one-tenth part of the amount named in his life benefit certificate, which amount shall be paid in quarterly payments, provided that such installments shall be paid only during the good standing of such member in the association and the aggregate of such installments shall in no case exceed the amount in his life benefit certificate."

As the plaintiff declined to pay at the rate as increased by the amendments of 1904, he was suspended and owing to the suspension, according to the by-laws, he forfeited absolutely all his rights derived from membership. In January, 1905, he duly tendered to the defendant in due time the sum of two dollars and forty cents, which included all that he was owing at the old rate of one dollar and forty cents per month, and one dollar dues for the quarter beginning on the first of the month, but the defendant refused to accept less than four dollars and ten cents, the amount due according to the new rate.

The court further found that according to the defendant's experience the rate assessed at the time the plaintiff became a member "at twelve assessments per year is not sufficient for its perpetual maintenance and without an additional number of assessments to pay death and disability claims as they occur, it will be compelled to go out of business within eighteen ³⁹⁸ to twenty-five years from September, 1905", and "that the increase in the rate, or the number of assessments, was necessary for the continued existence of the defendant."

The contract between the parties consisted of the application, certificate and the by-laws in force when the certificate was issued. Seven years after the contract was made the by-laws were changed by the defendant, without the consent of the plaintiff, so as (1) to increase the monthly assessments from one dollar and forty cents to three dollars and to require a per capita tax of ten cents per month, together with a fraternal tax of fifty cents per annum, the provision for additional assessments being still continued in force; (2) to

abolish the right of a member, upon reaching the age of seventy years, to relief from the payment of any further dues or assessments; (3) to abolish the right of a member on reaching that age to receive annually one-tenth of the sum named in his certificate; and (4) to so modify the disability clause as to entitle a member to the benefit of the annual payment of one-tenth, only in case he should continue to pay precisely the same as if he had not become disabled, and even to continue to pay after he had received the full amount called for by his certificate.

The question presented for decision is whether the reservation by the defendant of a general power to amend its by-laws, without specifying in what respects, authorized it to amend them in all the particulars above mentioned. In other words, can such an association amend a specific clause under a general power?

The amendments involve not only a substantial increase in the rate of assessment, but also a substantial decrease in the amount of benefits. While the member is now required to pay more than twice as much as before, he is to receive in return materially less than before. He is deprived altogether of the benefit to which he was entitled upon reaching the age of seventy and is deprived of a material part of the benefit to which he was entitled in case of disability. While it was specifically provided that he should "pay at the same rate of assessment thereafter," the rate of assessment is now more than ³⁰⁰ doubled. The benefits were specified and the rate was specified and can such a contract of insurance be so amended by the insurer, under a general power, as to take away from the insured without his consent an essential part of what he specifically contracted for? If the defendant had stated in the body of the certificate that it reserved the right to amend by increasing assessments and reducing benefits, the plaintiff would have had notice of what he might expect, but, in that event, it is doubtful whether he would have taken out the insurance, yet the defendant is forced to claim that the contract now has precisely the same meaning and effect as if it had been drawn in that form. The general reservation doubtless authorized the defendant to amend its by-laws so as to cover subjects not therein specifically provided for and even in other respects, which would not essentially impair the contract as made. But the subjects of assessments and benefits were specifically provided for, each being defined in express terms so that the member knew what he was bound to pay and what he was entitled to receive. After he had acted upon those specifications in the contract by paying at the rate provided thereby for seven years, the plan of insurance was changed from term to life, while the assessments were so advanced

and the benefits so reduced as to make a new contract of much less value to him than the old.

Much has been written in various jurisdictions upon the subject of amendments to by-laws, but we shall confine our review to our own decisions, which we regard as conclusive in principle. They show determined and consistent progression.

More than thirty years ago it was held by this court, in a carefully considered case, that, even when the power to amend is reserved by the charter of a business corporation, a by-law could not be repealed so as to impair rights which had been given and had become vested by virtue of such by-law: *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159.

In a later case, brought against the defendant now before us, the act of self-destruction insured against according to the by-laws was held beyond the power of amendment, so as to ⁴⁰⁰ provide that such an act should not be insured against: *Weber v. Supreme Tent of the Knights of Macca-bees of the World*, 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258.

In *Shipman v. Protected Home Circle*, 174 N. Y. 398, 61 N. E. 83, 63 L. R. A. 347, there was no provision in the certificate or by-laws against death by suicide, but acting under a power reserved by express consent an amendment was adopted making the certificate void, in case the insured "died by suicide, felonious or otherwise, sane or insane." The court, speaking through Judge Werner, said: "As the contract was silent upon the subject of self-destruction by the insured while insane, death from that cause was clearly within its terms. Upon the execution of the contract the insured, therefore, acquired a fixed and vested right to insurance covering that risk. No subsequent amendment of the by-laws could affect that right without the express assent of the insured": Citing the *Weber* case (172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258).

In another case, against the present defendant, Judge Cullen, speaking for all the judges but one, said: "A reference to the laws of the order informed the plaintiff at the time he joined the order of the character of the disability which entitled him to receive half the amount of the certificate, and there was no provision therein to the effect that the payment was not to be immediate but in annual installments. As said by Judge Gray in *Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266, 66 N. E. 932: 'It was beyond the power of the defendant to affect the obligation expressed in the certificate, without the consent of its holder.' The constitution and laws of the defendant constitute a book of over ninety pages and the provision authorizing an amendment of the endowment laws is

found not in the endowment laws, but in a brief section of the constitution." After reviewing certain cases he continued: "Under the doctrine of these cases we think that the obligations assumed by the defendant in its certificate of membership should not be impaired by provisions of the constitution and laws of the order to which the attention of the member might never be ⁴⁰¹ called, or, at least, they should not be cut down under the reservation of the power to amend. It is quite easy for fraternal organizations, such as the defendant, if they deem the provisions for benefits to their members tentative only and desire to have them subject to such modification as the business of the orders may require, to express that in the certificate. So, in the present case, if the certificate had provided that the payments therein specified should be subject to such modification as to amount, terms and conditions of payment and contingencies in which the same were payable as the endowment laws of the order from time to time might provide, the amendments would be applicable to existing members. But I think that nothing less explicit than this appearing in the certificate itself should be effectual for such a purpose": *Beach v. Supreme Tent of the Knights of the Maccabees of the World*, 177 N. Y. 100, 69 N. E. 281.

We soon had the subject before us again in a case where the application contained a promise similar to that made by the plaintiff in this case "to conform in all respects to the by-laws, rules and regulations of the association now in force or which may hereafter be adopted"; and the charter provided for the payment to the beneficiary "of such sum as the by-laws of such association may from time to time prescribe." By an amendment of the by-laws an attempt was made to cut down the benefit specified in the certificate. Judge Haight, who had dissented in the *Beach* case, wrote for all the judges and held that the case then in hand could not be distinguished from that case. He said: "The opinion in that case received the approval of all of the members of this court except myself. I entertained the view that under the contract entered into in that case the right to amend the by-laws was reserved, and the certificate holder, or those for whose interest he procured the same, did not acquire an absolute vested right under existing by-laws, but that they were subject to the reasonable amendments that should thereafter be found necessary and proper. But a contrary view was adopted by my associates, and it therefore becomes my duty to submit to the ⁴⁰² views of the majority." After holding that the two cases were the same in principle, he continued: "It is true that there is a variation in the certificates. In the *Maccabees* case the certificate provided for payments to be made in case of total disability. In this case the certificate contains no provision of that char-

acter, but I am unable to see that this distinguishes the two cases in principle. In the Maccabees case the beneficiary would ultimately receive the full amount of his certificate. In this case the beneficiary gets only about one-third of the amount of the certificate. We think that the former case is controlling upon us": *Evans v. Southern Tier Masonic Relief Assn.*, 182 N. Y. 453, 75 N. E. 317.

All these cases, among others, were cited and relied upon in *Ayers v. Ancient Order of United Workmen*, 188 N. Y. 280, 80 N. E. 1020. In that case power to amend was expressly reserved and an amendment provided that the certificate should become void if the insured should thereafter "enter into the business or occupation of selling, by retail, intoxicating liquor as a beverage." All the judges who sat united in holding the amendment void, in the absence of a reservation of the specific right to so amend the by-laws as to restrict the occupation or business of the insured, upon the ground that it violated a vested right. Among other things it was said: "An amendment of by-laws which form part of a contract is an amendment of the contract itself, and when such a power is reserved in general terms the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the ⁴⁰³ former, and we have said that human language is not strong enough to place a person in that situation: *Industrial & General Trust, Limited, v. Tod*, 180 N. Y. 215, 73 N. E. 7. While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the federal constitution": See, also, *Parish v. New York Produce Exchange*, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; *Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266, 66 N. E. 932; *Simons v. American Legion of Honor*, 178 N. Y. 263, 70 N. E. 776; *Dowdall v. Catholic Mutual Benefit Assn.*, 196 N. Y. 405, 89 N. E. 1075.

These cases establish the rule that benefits cannot be reduced, or new conditions forfeiting the benefits added by an amendment of the by-laws, even when the general right to amend is expressly reserved. They are controlling, therefore, so far as all the amendments now in question are concerned, except that providing for an increase in the rate of assessments. Following the authorities cited we hold that the amendments which assume to cut down the benefits to which the plaintiff became entitled by his contract with the defendant are void and of no effect.

I am, personally, of the opinion that the amendment increasing the rate of assessment is also void, for I can see no difference in principle between reducing benefits and increasing the amount to be paid for benefits. The plaintiff entered into the contract on the faith of the promise by the association that he should "pay at the same rate thereafter so long as he remains continually in good standing in the order," which he had the right to assume, and the defendant knew that he would assume, was a covenant not to increase the rate. The certificate states that "he is entitled to all the rights, benefits and privileges" provided by the laws of the order, which are thus made a part ⁴⁰⁴ of the certificate. Hence the right to pay at the old rate was one of the rights provided for and that he contracted for. It was a vested right, immune from change by amendment, in the absence of a specific reservation of power to amend in that particular. On the average, such contracts would be impaired by doubling assessments to the same extent as by cutting off one-half of the benefit. The price to be paid by the plaintiff for insurance is as essential a part of his contract as the amount of insurance to be paid to him by the defendant on the maturity of the policy. Whether the one is increased or the other proportionately decreased makes no difference in principle, or in the final result. By either method the pecuniary value of the contract, which is property, would be reduced one-half.

The defendant seeks to sustain its action in increasing the rate of assessment, by invoking the general power to amend and pleading that the exercise thereof was essential to its existence. The court did not find, as matter of fact or law, that a reduction of benefits was necessary, nor did it find as a fact that an increase in the rate of assessments was necessary, but found that "the increase in the rate, or the number of assessments, was necessary for the continued existence of the defendant." Necessity bears only on the question whether the amendments are reasonable. While they were desirable as a matter of policy, they were not necessary, for the old by-laws gave the defendants power to raise all the money needed for every purpose by simply increasing the number of assessments. It is true that a

great increase in this respect might reduce the membership still that did not make an increase in the rate of assessments necessary, for it cannot be necessary for a corporation to violate its contract in order to preserve its existence: *Vought v. Eastern B. & L. Assn.*, 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496. Moreover, the existence of the defendant, according to the findings, is not now threatened, nor will it be until after the lapse of from eighteen to twenty-five years, and no one can foresee the changes that will take place in the meantime. If the wonderful growth of the defendant, as stated by ⁴⁰⁵ its counsel, continues, the danger now apprehended as to what may take place a quarter of a century hence, may wholly disappear before that period expires.

I think that an increase in the rate of assessment falls under the same condemnation of the law as a reduction in the amount of benefits. A judgment requiring the defendant to perform according to the contract as made and not as amended, yet requiring the plaintiff to pay according to the contract as amended and not as made, would contain inconsistent provisions, one of which would necessarily violate the principle upon which the other was founded.

The judgment should be reversed and a new trial granted, with costs to abide event.

Cullen, C. J., Gray, Werner, Willard Bartlett, Hiscock and Chase, JJ., concur.

Judgment reversed, etc.

The Effect of Changes in the By-laws of Beneficial Associations as against pre-existing members is discussed in the note to *Strass v. Mutual Reserve etc. Assn.*, 83 Am. St. Rep. 706. The general rule is that members of an association who have stipulated in their contract of membership to comply with the laws of the society then in force, or thereafter adopted, are bound by subsequent reasonable amendments to a by-law in force when they became members. However, the power reserved by an association to make changes in its by-laws warrants only reasonable variances in its contracts with members, and not such as are destructive of vested rights: *Lange v. Royal Highlanders*, 75 Neb. 188, 121 Am. St. Rep. 786; *Olson v. Court of Honor*, 100 Minn. 117, 117 Am. St. Rep. 676; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 107 Am. St. Rep. 17, and cases cited in the cross-reference note thereto.

In *Dowdall v. Supreme Council C. M. B. Assn.*, 196 N. Y. 405, 89 N. E. 1078, a certificate insuring the life of a member of a beneficial association for two thousand dollars contained this covenant: "The certificate is issued upon the express condition that the said Dowdall shall, in every particular while a member of said association, comply with all the laws, rules and requirements thereof." The association, after entering into this contract of insurance, attempted to increase a single assessment against Dowdall from one dollar and ten cents to five dollars and fifty-six cents. The court held that the association could not do this by an amendment to its constitution or rules or regulations; that the covenant referred only to such laws, rules and

requirements as existed at the time the contract was entered into; and that any after changes or alterations made therein or additions thereto, seeking to modify or alter the contract, did not bind the insured, citing and reviewing the following cases: *Weber v. Supreme Tent of the Knights of Maccabees of the World*, 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; *Beach v. Supreme Tent of the Knights of the Maccabees of the World*, 177 N. Y. 100, 69 N. E. 281; *Evans v. Southern Tier Masonic Relief Assn.*, 182 N. Y. 453, 75 N. E. 317; *Ayers v. Order of United Workmen*, 188 N. Y. 280, 80 N. E. 220; *Industrial & General Trust, Ltd., v. Tod*, 180 N. Y. 215, 73 N. E. 7; *Wright v. Knights of the Maccabees of the World*, 196 N. Y. 391, ante, p. 838, 89 N. E. 1078.

It was contended by the beneficial association that unless invested with the power to increase the amount of a single assessment, as the exigencies of the situation might require, it would be unable to continue its financial life and pay its death losses. In answer to which the court quoted as follows from *Vought v. Eastern B. & L. Assn.*, 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496:

"It is contended that if the construction we have given this contract is to prevail, it will affect the responsibility of the defendant, if it does not result in its bankruptcy. If that be true, yet it affords no proper reason why we should disregard the plain and unqualified terms and provisions of the contract. Nor does it furnish any excuse for us to disregard well-established principles of law to hold it unenforceable."

Continuing the court said: "A further and persuasive answer is that plaintiff's counsel, without objection, read from the report of the supreme medical examiner of the defendant, made to the convention of the supreme council of the defendant held at Buffalo, October 9-11, 1900, as follows: 'We have too many deaths among new members. Of the 1,394 deaths during this term 76 died before they were members one year, and 140 more before the end of their second year, making 207 or 14.84 per cent of all our deaths among those who were members less than two years. This cannot be entirely due to accident, and certainly should not be. Many of those men must have been afflicted with some form of organic disease at the time they were examined for admission, but which they managed to conceal in some way from the local examiner, who sometimes through lack of time or his desire to increase our membership or to see the family of a friend provided for, becomes careless in making his examination, but very careful in filling out his reports to see that all the questions are answered favorably to the applicant and would necessarily be approved by the supervising medical examiner.'

"Plaintiff's counsel also read from the report of the supreme recorder to the same convention, as follows: 'Another word in regard to the deaths of this term: Reference to the report will show that of the deaths of the past three years, 37 occurred within six months of initiation, costing \$68,000; 97 occurred within one year of initiation, costing \$167,000; 209 occurred within two years of initiation, costing \$365,000; 283 occurred within three years of initiation, costing \$485,000. Here it will be seen we have paid nearly half a million dollars for members whose average duration of membership will not exceed twenty-two months.'

"This very severe arraignment of the business methods of the defendant, coming as it does from its officials in high position, goes far to establish the fact that the peril of coming insolvency is due to a failure to observe the fundamental principles of life insurance."

GUFFANTI v. NATIONAL SURETY COMPANY.

[196 N. Y. 452, 90 N. E. 174.]

SURETYSHIP—Action by One for Benefit of Others.—Where a person engaged in selling steamship tickets and in receiving deposits of money for transmission to foreign countries converts or embezzles the deposits of numerous persons aggregating an amount exceeding the penalty in his bond required by statute, equity will entertain a suit by one depositor in behalf of himself and others similarly interested to prove their rights to participate in the proceeds of the bond and any recovery thereon, and to compel the surety to pay the amount thereof pro rata to himself and such others as may become parties to the action and prove their claims therein. (p. 851.)

C. Walter Artz and William J. Griffin, for the appellant.

Joseph J. Corn and J. Lester Lewine, for the respondent.

455 CHASE, J. One Zanolini was engaged in the city of New York in selling steamship tickets for transportation to and from foreign countries, and in conjunction with said business he carried on the business of receiving deposits of money for the purpose of transmitting the same or the equivalent thereof to foreign countries. He gave a bond to the people of the state of New York in the penal sum of fifteen thousand dollars conditioned for the faithful holding and transmission of any and all moneys or the equivalent thereof which should be delivered to him for transmission to a foreign country or countries, pursuant to chapter 185 of the Laws of 1907 and for the due accounting for and prompt payment by him of all such moneys or the equivalent thereof received by him as aforesaid. Said bond was signed by the defendant as surety, and it was thereafter approved by the controller of the state of New York and filed in his office. Thereafter and on August 4, 1908, Zanolini received from the plaintiff six hundred dollars for the sole and express purpose of transmitting the same to a person named in Italy. Instead of transmitting the same he converted such money to his own use. Between July 1, 1908, and October 1, 1908, more than one hundred and fifty persons deposited money with said Zanolini for transmission to Italy. The moneys so paid to Zanolini by said one hundred and fifty and more persons amounted to upward of fifteen thousand dollars, and each of the amounts so paid to him were by said Zanolini converted to his own use, and he has not paid or accounted therefor or for any part thereof. On December 10, 1908, and prior to the commencement of this action he was adjudicated a bankrupt. Prior thereto he had absconded, and his whereabouts then became and ever since have been unknown and cannot now be ascertained.

Said act of 1907 is constitutional, but if we assume that it is unconstitutional the defendants cannot assert its unconstitutionality ⁴⁵⁶ as a defense to this action: *Musco v. United Surety Co.*, 196 N. Y. 459, post, p. 851, 90 N. E. 171.

This action is brought by the plaintiff in behalf of himself and all others similarly interested to prove their rights to participate in the proceeds of said bond and of any recovery thereon, and to compel the defendant to pay said sum of fifteen thousand dollars with interest thereon ratably and pro rata to the plaintiff and to such other persons as may become parties to the action and exhibit and prove their claims and demands herein. The defendant surety company disputes the right of the plaintiff to bring this action in equity.

The said act of 1907 was intended to prevent fraud upon ignorant, dependent and unsuspecting foreigners. The business of bankers is supervised by state or federal authority. Transatlantic steamship companies have well-known places of business and a business reputation and standing to maintain that is of itself some guaranty of honest dealing. The act in requiring a bond as therein provided aids to some extent in obtaining supervision over the corporations, firms and persons receiving deposits of money for the purpose of transmitting the same, by reason of the self-interest arising from the responsibility of the sureties on such bonds.

The act was not only intended to prevent frauds upon ignorant foreigners who are naturally attracted to persons selling steamship tickets, as a depository of their money for transmission to foreign countries, but to provide a guaranty fund to make good any losses arising from the failure of such persons to faithfully hold and transmit such money. The penalty of the bond represents a fund which stands as a guaranty against dishonesty, limited only by its amount. The condition of the bond, read in connection with section 4 of the act, would seem to give a person who has deposited money, which is subsequently embezzled, a right of action upon the bond in his individual capacity, but the bond is for the benefit of every person who deposits money with a corporation, firm or person named in the act, and where the facts require it the court will exercise its equitable powers to ⁴⁵⁷ prevent the amount of the penalty thereof being paid to some of the persons defrauded to the exclusion of others equally entitled to payment therefrom.

In this case it appears that the money of one hundred and fifty more persons deposited with the defendant Zanolini has neither been faithfully held nor transmitted as provided by the terms of said bond. The total amount of the claims exceeds the penalty of the bond and the claims of

each of said persons against the defendant surety company arise out of the same instrument and are dependent upon the same contract. The penalty of the bond is the measure of the total liability of the defendant surety company and the depositors with Zanolini must lose the amount of such deposits unless they are collected from the bond. A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements. Unless in a case like this the amount of the bond is so distributed among the persons having claims which are secured thereby, it must necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements.

Many of the persons who so deposited money with said Zanolini are now residing outside of the state of New York. One or more of such persons now reside in each of four foreign countries and each of eighteen states of the Union. They may not even now have knowledge of Zanolini's frauds. Surely this is a case where a suit in equity will aid to distribute, so far as possible, the limited fund represented by the penalty of the bond in accordance with the intention of the statute. The rules of equity are not so technical and cumbersome that they cannot lay hold of the situation described in the complaint for the relief of the courts and to do justice among the claimants. Pomeroy, in his *Equity Jurisprudence* (third edition, section 269), says: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious ⁴⁵⁸ acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right,' or of 'interest in the subject matter' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. . . . Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

We have in the case under consideration not only a multiplicity of suits which may be brought against the same defendant, but they all grow out of the same contract, and there is a limited fund out of which the aggregate recoveries must be sought. The contract with the defendant stated in the bond underlies the claims of each of the depositors as against the defendant surety company, and only the amount of the deposit with Zanolini and his default is separate and independent.

Actions among persons having similar legal relations to one another have been frequently upheld in the courts: *Kittel v. Domeyer*, 175 N. Y. 205, 67 N. E. 433; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; *Matter of Thompson*, 184 N. Y. 36, 76 N. E. 870; *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419, 34 L. R. A. 757; *Pfohl v. Simpson*, 74 N. Y. 137; *Knickerbocker Trust Co. v. Iselin*, 185 N. Y. 54, 113 Am. St. Rep. 863, 77 N. E. 877; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *American Surety Co. v. Lawrenceville Cement Co.*, 96 Fed. 25.

⁴⁵⁹ The order should be affirmed, with costs, and the first question certified should be answered in the affirmative, and the other two in the negative.

Cullen, C. J., Edward T. Bartlett, Haight, Vann, Willard Bartlett and Hiscock, JJ., concur.

Order affirmed.

The Constitutionality of the Statute requiring persons engaged in selling steamship tickets, and in conjunction therewith receiving deposits for transmission to foreign countries, to give a bond is upheld in *Musco v. United Surety Co.*, 196 N. Y. 459, post, p. 851.

MUSCO v. UNITED SURETY COMPANY.

[196 N. Y. 459, 90 N. E. 171.]

CONSTITUTIONAL PROVISIONS.—An Individual may Waive constitutional provisions for his benefit, when no question of public policy or public morals is involved. (p. 853.)

CONSTITUTIONAL PROVISIONS—Waiver by Principal and Surety.—Where one gives the statutory bond required of persons engaged in receiving deposits for transmission to foreign countries, and enters upon the transaction of such business, neither he nor his sureties will be permitted, in an action on their undertaking, to question the constitutionality of the statute requiring the bond. (p. 853.)

CONSTITUTIONAL LAW.—A Statute Requiring Persons Engaged in selling steamship tickets, and in connection therewith receiving deposits of money to transmit to foreign countries, to give a bond for the faithful discharge of their duties, is constitutional. (pp. 853, 854.)

INTERSTATE COMMERCE.—A State Police Regulation, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the federal jurisdiction, or strictly a regulation of interstate commerce. (p. 856.)

INTERSTATE COMMERCE.—A Statute Requiring Persons Engaged in selling steamship tickets, and in conjunction therewith receiving deposits of money to transmit to foreign countries, to give a bond for the faithful discharge of their duties, is not unconstitutional as conflicting with the commerce clause of the federal constitution. (p. 856.)

Edwin Blumenstiel, for the appellant.

Nelson L. Keach and Achille J. Oishei, for the respondent.

⁴⁶² **HISCOCK, J.** Chapter 185 of the Laws of 1907 is entitled, "An act to regulate the taking of deposits by certain persons, firms and corporations." Amongst other things it provides (section 1): "All corporations, firms and persons now or hereafter engaged in the selling of steamship or railroad tickets for transportation to or from foreign countries, who in conjunction with said business carry on the business of ⁴⁶³ receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, shall, before entering into said business, or before continuing said business, except as hereinbefore provided, make, execute and deliver a bond to the people of the state of New York in the sum of fifteen thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof, which shall be delivered to it or them for transmission to a foreign country"; also (section 6), "This act shall not apply to drafts, money orders and travelers' checks issued by trans-Atlantic steamship companies or their duly authorized agents or international banks, state banks or trust companies"; also, that a suit to recover on such a bond may be brought by or upon the relation of any party aggrieved; also, that any corporation, firm or person continuing in the business aforesaid "contrary to the provisions of this act," shall be guilty of a misdemeanor.

The appellant, as surety, having executed an undertaking in accordance with the provisions of said act with and for a person engaged in receiving deposits as aforesaid, in this action brought in behalf of persons who made deposits with the principal after such undertaking was executed, which have not been accounted for, defends on the ground that said act is unconstitutional. It insists that the statute is unconstitutional, first, because it is an unjustifiable interference with the rights of citizens to carry on a legitimate business; second, because it unjustly discriminates between members of the same class, since it exempts steamship companies or their authorized agents in certain respects from the operation of

the said statute; and, third, because it is in violation of the provision of the federal constitution that Congress shall regulate foreign commerce.

We are of the opinion that these contentions cannot prevail; that, in the first place, the appellant is debarred from making them; and, secondly, that the objections, even if available to it, could not be sustained.

The appellant and its principal have waived any question ⁴⁶⁴ concerning the constitutionality of the act in question. That act in effect prohibited appellant's principal from carrying on the business of receiving deposits unless he should execute an undertaking as therein provided. Conversely, in effect, it authorized him to conduct such business if he could execute such a bond. He very well may have concluded that it would be to his advantage in the conduct of the business to give such an undertaking, whether he could be compelled so to do or not, and he executed one. Having done this, and respondent's assignors having made deposits with him, as we must assume, on the faith of such an undertaking, neither he nor his surety can now raise the question of constitutionality, for it is well settled that an individual may waive even constitutional provisions for his benefit when no question of public policy or public morals is involved: *Mayor etc. of New York v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494; *Cooley's Constitutional Limitations*, 7th ed., p. 250.

If the principal could and did waive any question of constitutionality of the act, the appellant cannot raise such question, for certainly its position as a surety for a consideration is not any stronger than that of its principal.

Appellant seeks to break the force of an apparent waiver by its principal by insisting that the undertaking was executed under duress, the act providing that a person who carried on the business in question without executing such undertaking should be guilty of a misdemeanor. Assuming that the defense of duress in favor of the principal would be available to the appellant, we feel entirely clear that no such defense would exist in favor of such principal under the circumstances of this case. Counsel has called to our attention various familiar cases holding that a person executing an undertaking to release his person from custody or his goods from attachment is not to be regarded as having thereby waived any claim of invalidity of the act or process under which his body or property had been seized; that such custody, whether of person or property, constitutes a duress which relieves the party executing the undertaking from the ⁴⁶⁵ imputation of having voluntarily waived the invalidity. We are, however, not aware of any authority which would extend that doctrine to the present case. If the act requiring the principal to execute an un-

dertaking was unconstitutional and void, he must be assumed to have known it at the time, and he was entitled to believe that no one would attempt to enforce against him an unconstitutional act. The mere possibility that some one in the future might attempt so to do was altogether too remote a consideration to operate as a coercive influence on his mind when he executed the undertaking which amounted to legal duress.

But, as stated, if the constitutionality of the statute in question were open to attack by appellant on the grounds stated by it, such attack could not succeed.

The regulation of the business of receiving deposits is plainly within the power possessed by the state to regulate the conduct of various pursuits when necessary for the protection of the public. We have no difficulty in approving as constitutional the action of the legislature in subjecting to regulation the particular class of people designated by the statute. We doubtless may take judicial notice of the public report made by the commission of immigration recently appointed by the governor to inquire into the condition and welfare of aliens in this state, and by which report it appears that there has been a special disposition on the part of ignorant aliens to deposit for transmission abroad moneys with irresponsible persons who carried on the business of selling steamship tickets; that the latter branch of business naturally attracted the former branch, which resulted in widespread frauds upon and losses by the ignorant depositors. Even if we should ignore this report we might readily assume that the legislature had knowledge of the very conditions presented by it, and, therefore, were justified in selecting for regulation the class of persons whom it did select.

This statute in question is so entirely different in the nature of its provisions from the one absolutely prohibiting the sale of railroad tickets, except by a limited class of persons, which ⁴⁶⁶ was under consideration in the case of *People v. Warden of City Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763, 51 N. E. 1006, 43 L. R. A. 264, and which is especially relied upon by appellant, that we do not deem it necessary to occupy space in pointing out the difference.

The act does not improperly discriminate against the class to which appellant's principal belonged and in favor of others, because by the provision in section 6 thereof that it "shall not apply to drafts, money orders and travelers' checks issued by trans-Atlantic steamship companies or their duly authorized agents." It is quite probable that if necessary we could find sufficient reason to justify the legislature in distinguishing between trans-Atlantic steamship companies, almost necessarily possessing large capital and credit, and individuals of the class to which appellant's

principal belongs who frequently might be expected to be without either. But it is not necessary to do this. When section 6 provided that the act should not apply to the things therein mentioned, it but declared what would have been the meaning and construction of the statute without any specific provision. On the face of the statute we should not interpret its provisions regulating the business of receiving deposits as applying to the sale and issue of drafts, money orders and travelers' checks. The former in the ordinary conduct of the business would involve quite different operations than those implied in the latter branch of business.

Really the only claim of unconstitutionality made by the appellant which seems to us to furnish any reasonable basis even for discussion is the one that this statute infringes on the exclusive right of Congress to regulate foreign and interstate commerce, and of the conclusion to be reached in the discussion of that question we have no doubt.

If we assumed that persons designated in the act receiving deposits for transmission would ship the actual money and therefore might be said to be engaged in commerce, it still is apparent to us that the act was not passed for the purpose of regulating that branch of the business. It was passed for the purpose of regulating and safeguarding the business of receiving ⁴⁶⁷ deposits, which is a business and transaction by itself preceding and not to be confounded for the purposes of this discussion with the later transmission of the money, although leading up to such transmission. The act is entitled "An act to regulate the taking of deposits," and it relates to those who in conjunction with the business of selling tickets "carry on the business of receiving deposits of money for the purpose of transmitting the same." It does not purport to affect those merely engaged in forwarding money or to regulate or prescribe the method in which the money shall be forwarded or transmitted. It applies to the act of receiving on deposit moneys to be transmitted some time in the future, and it is perfectly clear that great opportunity for fraud and loss would arise in connection with these deposits which were withdrawn from the observation and custody of the depositor on a promise at some time in the future to transmit them, and that it was the intent of the legislature to guard against the embezzlement or loss even by ignorance on the part of the banker of these moneys pending the proposed subsequent transmission. The acts of receiving the deposits and of subsequently transmitting them, although they may be related, are still entirely distinct.

The authority amongst the cases called to our attention which seems most nearly to fit the facts in this case is that of *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. Rep. 128,

45 L. ed. 186. That case presented for consideration the act of the state of Georgia whereby a specific tax was levied upon the occupation of "immigrant agent," meaning a person engaged in hiring laborers within the state, but to be transported and employed beyond its limits, and it was held that the levy of this tax did not amount to such an interference with the freedom of transit or of contract as to violate the federal constitution.

It is doubtless true that this statute regulating the receipt of deposits may incidentally and indirectly affect the business of transmitting moneys abroad. But it is well settled that the law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the federal ⁴⁶⁸ jurisdiction or strictly a regulation of interstate commerce, but is to be considered as an ordinary police regulation and therefore not invalid. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. Rep. 104. 41 L. ed. 166.

The order reversing the judgment overruling plaintiff's demurrer should be affirmed, with costs, and the question certified to us answered in the affirmative.

Cullen, C. J., Edward T. Bartlett, Haight, Vann, William Bartlett and Chase, JJ., concur.

Order affirmed.

The Statute Involved in the Principal Case was enforced in the recent case of *Guffanti v. National Surety Co.*, 196 N. Y. 452, ante, p. 84. The fact that a state statute in the nature of a police regulation to some extent affects interstate commerce does not render it unconstitutional: *Ex parte Fritz*, 86 Miss. 210, 109 Am. St. Rep. 700; *Crosman v. Lurman*, 171 N. Y. 329, 98 Am. St. Rep. 599.

JEFFERSON v. BANGS.

[197 N. Y. 35, 90 N. E. 109.]

MORTGAGE FORECLOSURE—Service on Administrator.—A foreclosure by advertisement is not void for failure to serve personal representatives of the deceased mortgagor, if there are none. (pp. 859, 860.)

MORTGAGE FORECLOSURE—Purchase by a Guardian in Socage.—Where the assignee of a mortgage is the life tenant, and also the guardian in socage of his daughter who is the devisee of the fee, his purchase at foreclosure is not void, but voidable at her election. (p. 860.)

ADVERSE POSSESSION—Remainderman and Life Tenant.—During the life of the tenant for life neither his possession nor that of his grantee can be adverse to that of the remainderman. (p. 861.)

ADVERSE POSSESSION — Remainderman and Mortgagee.—

The rule that a mortgagee's possession runs against those entitled to an estate in remainder has an exception where he enters, not merely as mortgagee, but by virtue of having a limited interest such as a life estate, and the exception applies to his transferee of the mortgage and life estate. (p. 861.)

MORTGAGE FORECLOSURE—Limitation of Actions.—

Where a foreclosure sale is voidable at the election of the remainderman, the purchaser being her guardian in socage and the life tenant, she is not bound to assert her rights during his lifetime, and her action against his grantees within less than twenty years after their entry is timely brought. (pp. 860, 862.)

Randolph Horton, for the appellant.

Rowland L. Davis, for the respondents.

³⁷ CULLEN, C. J. The action was brought to recover a farm of seventy-six acres in the town of Groton, Tompkins county. The facts out of which the controversy arises are as follows: In August, 1856, one William King was seised in fee of the farm in question, subject to a purchase money mortgage for fifteen hundred and ten dollars. By his will, which was afterward proved, the testator gave the use of one-third of his real estate to his wife, Hannah King, during life, and the use of two-thirds (and of the whole after the widow's death) to his adopted son, Hastings A. King (the father of the plaintiff), for and during his life. By the third clause he devised the fee simple of all his real estate to Lucy Ann King, daughter of Hastings King, and the present plaintiff, ³⁸ subject to the use thereof by her father and mother during their natural lives. It is further provided: "If the said Lucy Ann King should not arrive at full age and should not leave any lawful issue then in such case I give, devise and bequeath the fee simple of all my real estate to my sister, Hannah Freeman, and cousin by marriage, William Blodgett, to be equally divided between them." He appointed his wife, Hannah King, executrix of the will. In January, 1857, the purchase money mortgage on the farm was assigned to Hastings King. About the same time Hastings King demised his interest in the farm to his adopted mother, the executrix, Hannah King, during her life, and by the same instrument covenanted to maintain said Hannah in a comfortable manner, and for the faithful performance of that covenant assigned to her the said purchase money mortgage. Hannah King died in January, 1860. In January, 1861, Hastings King, the plaintiff's father, then in possession of the farm, foreclosed by advertisement the purchase money mortgage he had acquired. At this time the plaintiff was thirteen years old. Hastings King served no notice on the plaintiff, nor on any one, the executrix of his father's will being then dead, and no personal representatives of the testator having been appointed

in her stead. On the sale in that foreclosure Hastings King became the purchaser and continued in possession of the farm. On February 3, 1872, Hastings King and wife conveyed the farm to Rufus Hammond by warranty deed, but the grantors continued in possession of the farm until 1886 or 1887. In July, 1885, Hammond conveyed the premises to Frederick E. Bangs, a brother of the defendant. Said Bangs was a purchaser for value, but he knew at the time that the present plaintiff had a claim on the farm. On March 3, 1901, Frederick E. Bangs conveyed the farm to Loren B. Bangs, also for value, but the trial court found as a fact that each of the defendants understood the relation of the parties and the provision of the will of William King, and held as matter of law that the defendants could not be treated as purchasers in good faith without notice. Angeline King, the mother of the plaintiff, ³⁹ died February 24, 1901, and Hastings A. King, her father, February 21, 1904. The action was commenced in January, 1905. The judgment prayed for in the complaint is: 1. That the deeds of conveyance from Hastings King to Rufus Hammond and from Hammond to Bangs be declared null and void except as to the life estate of Hastings King; 2. That a decree be granted adjudging and decreeing that the plaintiff is the owner of said lands and entitled to the possession thereof; 3. That the plaintiff have such other and further relief as is just and equitable.

The trial court decided that the foreclosure by advertisement was not void by reason of the failure to serve personal representatives of William King, because at the time of the foreclosure there were no personal representatives. It further held that as Hastings A. King was at the time of the foreclosure both the guardian in socage of the plaintiff and also tenant of the farm for life, his purchase, though not void, was voidable at the election of the plaintiff. But it found as a matter of fact: "17. That prior to 1872 and after the plaintiff was beyond the age when the guardianship terminated, she was informed in regard to the will and her rights thereunder and that there had been an illegal transaction in that her father had no right to do what he had done." On this finding of fact the court decided as a matter of law: "11. That while the sale to Hastings A. King was voidable at the election of the plaintiff, it was incumbent upon her to act with reasonable diligence. 12. That the right to avoid the sale has been lost by not acting within reasonable time after discovery of the facts, and she must be held to have waived all right to attack the title acquired by the foreclosure sale. 13. That the statute of limitations was set running in 1872 when she was informed of her rights under the will and what her father had done. 14. That under the circumstances disclosed in this case, the delay of thirty-two years in attacking the sale is a bar to relief against the defendants; and

that this action is barred by the statute of limitations." As the judgment of the special term has been unanimously ⁴⁰ affirmed, all that we can review is the question whether the facts as found justified the judgment rendered.

The first point raised by the appellant is that the statutory foreclosure was void because of the failure to serve the personal representatives of the deceased. In other words, it is contended that if there are no personal representatives of the deceased, no foreclosure by advertisement can be had.

This question has never been decided by this court, but has been several times passed upon by the supreme court, and is the subject of conflicting decisions. At the time of the foreclosure such proceedings were regulated by the Revised Statutes (2 Rev. Stats., p. 546, sec. 3, subd. 3, as modified by Laws 1844, c. 346), which, in relation to serving notices is as follows: "3. By serving a copy of such notice, at least fourteen days prior to the time therein specified for the sale, upon the mortgagor or his personal representatives, and upon the subsequent grantees and mortgagees of the premises, whose conveyance and mortgage shall be upon record at the time of the first publication of the notice, and upon all persons having a lien by or under a judgment or decree upon the mortgaged premises, subject to said mortgage, personally or by leaving the same at their dwelling-house," etc. Of course, under this statute if the mortgagor were living, or if there were personal representatives in case of his decease, notice must be served on such parties or the foreclosure would be void. There is no requirement for serving notice on heirs or devisees of a deceased mortgagor. But the question arises, What course is to be pursued when there are no such personal representatives? One view has been entertained that in such case it was impossible to foreclose a mortgage by advertisement till the mortgagee had succeeded in getting a personal representative appointed. The other view is that in such case it is not necessary to serve notice on any persons, but that a foreclosure may be effected by the advertisement and posting of the public notice required by the statute. In *Anderson v. Austin*, 34 Barb. 319, the general term of the supreme court, second department, held, "where there is no personal ⁴¹ representative to be served with notice, that provision of the statute is inoperative, and the foreclosure will be good if conducted in the mode otherwise prescribed in the statute." In *Stanley v. Freckelton*, 65 Hun, 138, 19 N. Y. Supp. 913, the general term of the same department again held the same doctrine. In *King v. Duntz*, 11 Barb. 191, a special term case, the point was not directly involved, though Judge Ira Harris held that the heirs were not entitled to notice under the statute. In *Cole v. Moffitt*, 20 Barb. 18, though again the point was not decided because not actually in issue, the general term of the third department said concerning lack of service

of notice: "If the death of the mortgagor had been proved, the objection to the validity of the proceedings would have been removed, unless it had further appeared that he had personal representatives." In *Bond v. Bond*, 51 Hun, 507, 4 N. Y. Supp. 569, the same general term, by Landon, J., held "that where there are no personal representatives of the deceased mortgagor, the foreclosure is, nevertheless, valid against those upon whom service is made." On the other hand, in *Mackenzie v. Alster*, 64 How. Pr. 388, Gilbert, J., at special term, held that where there were no personal representatives there could be no foreclosure by advertisement. In *Van Schaack v. Saunders*, 32 Hun, 515, the same doctrine was held by the general term of the third district. Boardman, J., dissenting. This decision, of course, is prior to the one of the same department already cited. I shall not enter into any discussion of the merits of the argument on the respective sides of the question. The weight of authority is in favor of the proposition that the foreclosure is not void for failure to serve personal representatives when there are none. On these authorities many titles have been passed, and it would not do to now overrule them, especially as since 1877 the question has been disposed of by the enactment at that time of the Code of Civil Procedure, which provides (section 2388, subdivision 4): "A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed ⁴² and also upon his heirs, providing he died the owner of the mortgaged premises."

We now come to the second question in the case—the effect which the relation the owner of the mortgage bore to the plaintiff had on the validity of the sale. The mortgagee was her guardian in socage, but this did not render the purchase by him absolutely void: *Boyer v. East*, 161 N. Y. 580, 76 Am. St. Rep. 290, 56 N. E. 114. But the mortgagee was also the life tenant bound to discharge the interest on the mortgage. While the purchase was not void, it was, undoubtedly, by reason of the trust relation the mortgagee bore to the plaintiff, voidable at her election, and so the trial court held. Nevertheless, it defeated her election to avoid the sale on the theory that her rights had been cut off by the statute of limitations. This result was reached by the seventeenth finding of fact already referred to, that prior to 1872, and after she became of age, and the guardianship had terminated, the plaintiff was informed in regard to the will and her rights thereunder, and that there had been an illegal transaction in that her father had no right to do what he had done. The court decided that the plaintiff's cause of action arose at that time. If the plaintiff could have sustained in this suit her legal cause of action to recover possession of the property of

the theory that the sale under foreclosure was absolutely void, being a remainderman, there can be no question that the statute would not commence to run against her until the termination of the life estate, which was less than a year prior to her bringing suit: *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905. But it is urged that as the purchase by her father was not void, but voidable, the plaintiff at any time after she had become of age and acquired knowledge of the transaction could have brought her action to avoid the sale, and reliance is placed on the decision of this court in *Murphy v. Whitney*, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123. It is quite probable that under the authority cited the plaintiff might have maintained an action before the termination of the life estate, though the facts in that case and on which the right to maintain the action was placed by the court were peculiar.

⁴³ The agreement under which the defendant there held the land was not of record, and the court said that there was danger that she might convey away the land to a bona fide purchaser in fraud of the plaintiff's rights. The same principle was held in *Earle v. Earle*, 173 N. Y. 480, 66 N. E. 398. Assuming that the plaintiff might have maintained her action after she discovered the illegal act of her father, was she required to thus commence so as to avoid the bar of the statute of limitations? I can find no decision to that effect. It was said (not decided) in *Anderson v. Northrop*, 30 Fla. 612, 12 South. 318, that "no laches can be imputed to reversioners in a contest between them and the tenant for life over the reversionary property until after the termination of the life estate, unless it be shown clearly and unequivocally that before that time they had actual knowledge of an abandonment by the life tenant of her status as such, and of a holding of the property by her under a different and adverse right. And that the onus of showing such notice or knowledge as, when coupled with long acquiescence, would amount to laches, is on the party urging laches as a defense." In *Sedgwick's Curator v. Taylor*, 84 Va. 820, 6 S. E. 226, it was held that although the remaindermen could maintain an action, the objection that their claim was stale was not well founded so long as the life tenant was living. And it is the rule that during the life of the tenant for life neither his possession nor that of his grantee can be adverse to that of the remainderman: *Christie v. Gage*, 71 N. Y. 189. Nor do I see what relief the plaintiff could have sought in any action brought while her father was in possession, except to have the sale avoided. She could not recover possession because, though she avoided the sale, her father was still entitled to retain possession by virtue of his life estate. Nor was she required to pay the mortgage and redeem the land from its burden, for the law is well settled that while the mortgagee's possession runs against those entitled to an estate in re-

mainder, and his continuance in possession for twenty years will bar the title of the remainderman, this rule does not apply: "When the mortgagee has entered, not ⁴⁴ as mortgagee only, but by virtue of having a limited interest in the equity of redemption, as, for instance, a life estate, . . . time will not run in his favor during the continuance of that interest, for it would be his duty to keep down the interest on his mortgage in favor of the remaindermen": 2 Jones on Mortgages, sec. 1156; 2 Story's Equity Jurisprudence, sec. 1028. The exception to the rule equally applies to the defendants in this case, for the conveyance from Hastings King operated not only to transfer the mortgage, but to grant his life estate.

If, however, it were to be assumed that the entry of the defendants into actual possession of the farm was in hostility to the plaintiff, as that of a mortgagee in possession, that did not occur until April, 1887, less than twenty years before the bringing of the action. The action was timely brought within the provision of section 379 of the Code of Civil Procedure. The plaintiff was, therefore, entitled to a decree for the redemption of the farm in controversy from the mortgage hitherto recited on such terms as the court might, under the circumstances, determine to be just, and for this reason the judgment must be reversed and a new trial awarded, with costs to abide the final award of costs.

Edward T. Bartlett, Haight, Vann, Willard Bartlett and Chase, JJ., concur.

Hiscock, J., dissents on ground that action was barred by laches.

Judgment reversed, etc.

The Possession of a Life Tenant is not Deemed Adverse to the remainderman, for the latter has no right of entry or action for possession during the life term: Hanson v. Ingwaldson, 77 Minn. 533, 11 Am. St. Rep. 692; Bowen v. Brogan, 119 Mich. 218, 75 Am. St. Rep. 387; Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239; note to Allen v. De Grood, 14 Am. St. Rep. 635. During the continuation of an estate for life no possession can be adverse as against remaindermen, as the statute of limitations cannot operate against them until the determination of the life estate gives them a right of possession: Pryor v. Winter, 147 Cal. 554, 109 Am. St. Rep. 162.

As to How Far the Confidential Relations Between a Guardian and his wards affect his right to deal with them in matters in which he has a personal interest, see Scoville v. Brock, 79 Vt. 449, 118 Am. St. Rep. 975; Baum v. Hartmann, 226 Ill. 160, 117 Am. St. Rep. 246. The provision of a statute that a "guardian of an infant party to the action shall not purchase or be interested in the purchase of any of the property sold" relates only to guardians ad litem and does not refer to guardians in socage: Boyer v. East, 161 N. Y. 580, 76 Am. St. Rep. 290.

The Common-law Powers of Guardians are discussed in the note to Schmidt v. Shaver, 89 Am. St. Rep. 257.

SEWELL v. UNDERHILL.

[197 N. Y. 168, 90 N. E. 430.]

VENDOR AND VENDEE.—A Loss by Fire or other accident, not due to the fault of the vendor of the property, must fall upon the vendee, when the title is satisfactory and the contract of sale is thereafter capable of being specifically performed by the vendor. While at law the legal title may be unaffected by the contract, equity regards that which is agreed to be done as actually performed. (p. 865.)

Everett B. Abbott, for the appellant.

George B. Stoddart and Charles R. Weeks, for the respondent.

¹⁶⁹ GRAY, J. The plaintiff and defendant had entered into an agreement for the sale by the latter and the purchase by the former of a parcel of land at the price of twenty-five thousand dollars. The sum of five thousand dollars was paid by the plaintiff, upon the execution of the contract. The balance was to be paid by the execution of the purchaser's bond for twenty thousand dollars, secured by a mortgage upon the property. At the time when the title was finally arranged to be closed, the plaintiff had executed the bond and mortgage and the defendant had executed the deed, which the contract ¹⁷⁰ called for; but it was deemed desirable by the parties that a map should be filed with the deed, to which that instrument and the mortgage made reference, and the formal delivery of these instruments was deferred. It was arranged that the defendant's attorney should hold the deed and the mortgage until the plaintiff furnished him with a copy of the map; whereupon he was to effect the delivery of the instruments, by formally recording them. After this arrangement was made, and before the map was furnished, a house, which was standing upon the land, was destroyed by fire without fault on either side. Thereafter, the map having been delivered to the defendant's attorney, he recorded the instruments. The plaintiff had entered into possession of the premises under the contract as vendee.

This action was brought by the plaintiff to recover the damage suffered by him through the destruction of the dwelling-house, upon the theory that there had been a breach of the agreement, in the failure of the defendant to convey the house. Both parties moved for the direction of a verdict; the trial court determined in favor of the defendant, and the appellate division, in the second department, has affirmed her judgment. The one question which is presented by the plaintiff's appeal is, Should the loss occasioned by the accidental destruction of the building upon the premises be borne by the vendor or the vendee? The appellant argues that, upon prin-

ciple, the loss should fall upon the vendor, and insists that the contrary view rests upon a rule of the English courts which is not only unjust, but which is not to be regarded as conclusive upon us.

I think that it is too late to dispute the English rule, and that we must consider it as established by decisions of the courts of this state. It was authoritatively stated by Lord Eldon in *Paine v. Meller*, 6 Ves. 349, departing from the rule as asserted in the earlier case of *Stent v. Bailis*, 2 P. Wms. 220. In *Paine v. Meller* the buildings were destroyed by fire before the conveyance was ready. Somewhat like the present case, there, after the acceptance of the ¹⁷¹ title, a delay occurred in the preparation and execution of the deeds. With respect to that objection of the vendee, which was grounded upon the fire, Lord Eldon said: "As to the mere effect of the accident itself, no valid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his; chargeable as his; capable of being encumbered as his; they may be devised as his; they may be assets and they would descend to his heir." This case has been repeatedly recognized as an authority for the rule by the courts of this state: See *Gates v. Smith*, 4 Edw. Ch. 732; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Peltor v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Goldman v. Rosenberg*, 116 N. Y. 78, 22 N. E. 259; *McKechnie v. Sterling*, 48 Barb. 330; *Wicks v. Bowman*, 5 Daly, 225; and see 6 *Pomeroy's Equity Jurisprudence*, sec. 859. A contrary view has been taken by courts in other states; but the great weight of authority is in favor of the English doctrine: See 29 *Am. & Eng. Ency. of Law*, 2d ed., 713, where the cases are collated.

The case of *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, does not afford support for the contrary view, as the appellant argues. The decision of the case turned upon its peculiar facts. The plaintiff was in possession of certain premises, under a contract for their sale, which included a mill and the machinery within it. Pending the contract, which, because of the interests of infants, required approval by the court and provided that the vendee was to hold the premises as tenant, paying rent, the mill was destroyed by fire. It was said in the opinion that "the title to the personal property did not pass by the contract. By the agreement of the parties, the vendee at the time of the fire held it as tenant. When it was destroyed by the fire it was the property of the vendors." But Judge Andrews, who spoke for the whole court, was careful to advert to the English rule, whose protection was invoked by the vendors. "The general rule is," he says, "that the vendee in a contract for the sale of land is entitled ¹⁷² to any benefits or improvements happening to the land after the date of the contract, and must bear any losses by fire or otherwise

which occur without the fault of the vendor": Citing *Paine v. Meller*, 6 Ves. 349. In *Goldman v. Rosenberg*, 116 N. Y. 78, 22 N. E. 259, to which the appellant also refers, the opinion distinctly affirms the English rule as declared in *Paine v. Meller*, but holds it inapplicable to the peculiar facts of that case.

I am unable to find that the authority of the English rule has been shaken in this state, that a loss by fire or other accident, not due to the fault of the vendor, must fall upon the vendee when the title is satisfactory and the contract is, therefore, capable of being specifically performed by the vendor: See 6 Pomeroy's Equity Jurisprudence, sec. 859. While at law the legal title may be said to be unaffected by the contract, a court of equity regards that which is agreed to be done as actually performed. When we apply the rule to the facts of the present case, its justice is manifest. It will be perceived that its application is justified, not only by the theory upon which a court of equity proceeds, but by the facts, which establish that the contract itself had been performed, and that the termination of the transaction, through a formal delivery of the instruments, was delayed as a matter of convenience, and not for any matter essential to the passing of the title. The title was accepted and the contract was consummated prior to the fire, and what was deferred was the matter of placing the deed and the mortgage upon the records; a formality which it was agreed should operate as a delivery on either side. There is the further feature of this case that the plaintiff, as vendee, went into the possession of the premises upon the execution of the contract, not as a tenant paying rent, but as their equitable owner, and entitled to their beneficial enjoyment.

For these reasons, I advise the affirmance of the judgment.

Cullen, C. J., Edward T. Bartlett, Haight, Willard Bartlett, Hiscock and Chase, JJ., concur.

Judgment affirmed, with costs.

Under an Executory Contract for the Purchase of Land the vendor continues, in the strict legal sense, the owner until the purchase price is paid, retaining the legal title as security; but the vendee has the equitable title: *Lamm v. Armstrong*, 93 Minn. 434, 111 Am. St. Rep. 479. One who has purchased real property and given his notes for the purchase price, although he has received no conveyance, is deemed in equity the owner thereof, and the vendor merely as a mortgagee or trustee for the purchaser, who must take care of the property and not commit any waste thereon: *Newman v. Mountain Park Land Co.*, 85 Ark. 208, 122 Am. St. Rep. 27. If the owner of insured property agrees to transfer it, but the transfer is not consummated until the buildings are destroyed by fire, he is entitled to recover on the policy of insurance: *Evans v. Crawford County etc. Ins. Co.*, 130 Wis. 189, 118 Am. St. Rep. 1009.

MATTER OF LEASK.

[197 N. Y. 193, 90 N. E. 652.]

ADOPTION.—The Children of a Foreign Adoption whose rights are to be adjudicated upon here are regarded, it seems, in the same light as though they had been duly adopted under the laws of this state. (p. 867.)

ADOPTION—Limitation in Deed or Will.—Under the New York statute of adoption a limitation in a deed or will to a child or children, or conditioned upon the survivorship of a child or children, is not deemed to include an adopted child if the grantor or testator is a stranger to the adoption. (p. 867.)

WILL—Adopted Child.—Where a Testator Gives a certain sum to his executor to pay the income therefrom to his nephew "during his life, and upon his death leaving a child or children surviving him, to pay over the principal of said sum to such child or children," and in case of the nephew "leaving no children surviving him," the fund to "revert to and become a part of" the residuary estate, the expression "leaving a child or children" refers to the natural offspring of the life beneficiary and not to his adopted children. (pp. 867, 869.)

John Jay McKelvey and Alpheus H. Favour, for the appellant.

J. Hampden Dougherty, for the respondents.

¹⁹⁴ **WILLARD BARTLETT, J.** This case involves the right of an adopted child to take under a bequest to the child or children of a beneficiary named in a will upon the termination of a trust estate in favor of such beneficiary.

¹⁹⁵ By the will of Hudson Hoagland the sum of twenty-five thousand dollars was given to his executors, to pay the income thereof to Thomas C. Hoagland "during his life, and upon his death leaving a child or children surviving him, to pay over the principal of said sum to such child or children."

In the event of the death of Thomas C. Hoagland "leaving no children surviving him," the twenty-five thousand dollars was to "revert to and become a part of" the testator's residuary estate.

The residuary estate was devised and bequeathed to the testator's nephews and nieces in the proportions in which the gifts made to them in the will bore to one another.

Hudson Hoagland, the testator, died on January 30, 1904. On November 28, 1906, Thomas C. Hoagland and his wife, then being residents of the county of Los Angeles in the state of California, by a legal proceeding in the superior court there, formally adopted Dorothy Racilia Greene as their child. This girl was born on October 15, 1904, so that her birth and adoption were both subsequent to the testator's death. Thomas C. Hoagland died on April 28, 1907, leaving no issue and only this adopted child surviving.

She had taken his name, and is the appellant, Dorothy Racilia Hoagland.

This is a proceeding for the settlement of the account of the trustees under the will of Hudson Hoagland. The adopted child objected on the ground that the trustees did not account to her for the Thomas C. Hoagland fund of twenty-five thousand dollars, or recognize her right as the person legally entitled to such fund. The objections were referred to a referee, who disallowed the claim of the adopted child. His report was confirmed by the surrogate, who made a decree ignoring her claim, and directing the distribution of the Thomas C. Hoagland trust fund among the persons entitled to the testator's residuary estate; that decree was affirmed by the appellate division, and from the order of affirmance the adopted child appeals.

It may perhaps be assumed, as it was in *New York Life Ins. & Trust Co. v. Viele*, 161 N. Y. 11, 76 Am. St. Rep. 238, 55 N. E. 311, that "the legal status of an adopted child, acquired by the law of adoption, is by the law of comity recognized in every other jurisdiction where ¹⁹⁰ such status becomes material in determining the right to take property by will or inheritance."

The effect of this doctrine is to regard the children of foreign adoption whose rights are to be adjudicated upon here in the same light as though they had been duly adopted under the laws of New York.

While counsel for respondents insists that the doctrine does not apply in favor of a child of foreign adoption who has not become a resident of this state, we will discuss the case on the assumption that the appellant has the rights of a child adopted under the New York statute and proceed to inquire whether by force of that statute she is to be deemed a designated beneficiary under the provision of the will in question here, as being a child of Thomas C. Hoagland.

In a case of adoption under our statute the foster parent and the minor have all the rights of parent and child, including the right of inheritance from each other; "but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the right of remaindermen": Domestic Relations Law, sec. 64, Laws 1896, c. 272; now sec. 114, c. 14, Consolidated Laws.

In New York and other states having similar statutes of adoption a limitation in a deed or will to a child or children or conditioned upon the survivorship of a child or children is not deemed to include an adopted child, where the grantor or testator is a stranger to the adoption.

The words "leaving a child or children," as used by the testator, had reference to the natural offspring of the life

beneficiary—to a child or children born to him in wedlock and who should survive him. The testator contemplated actual parentage—a relation dependent upon the operation of natural laws in marital intercourse, and which could not arise without the intervention of natural laws favorable to the procreation and birth of offspring. In this respect it ¹⁹⁷ differs essentially from the relation of adoptive parentage which may be established by the voluntary act of the parties thereto. What Hudson Hoagland meant in substance was the same as though he had said: "If God, in his good providence, shall give my nephew, Thomas C. Hoagland, a child or children who shall survive him," etc. then they should receive the principal sum of twenty-five thousand dollars, of which the father was given the income for life. He did not mean that if this nephew should adopt a child who survived him that such child should take. Other language would have been used if he had intended thus to confer upon Thomas C. Hoagland a virtual power of appointment. The phrase "leaving a child or children" is not one which would naturally be used in reference to an adopted child or children. "Having adopted a child or children who survived him," or some similar phraseology, would have been employed if it had been the intention of the testator to include children by adoption in the qualifying clause under consideration.

The question involved in the present appeal does not appear ever to have been passed upon by this court. The nearest approach to its consideration by the supreme court was in *Matter of Hopkins*, 102 App. Div. 458, 92 N. Y. Supp. 463, in which the appellate division in the second department held that an adopted child of a son of the testator was not entitled to take under a will providing that if either of his sons should die before his wife, the share of that one should go to his children.

In the case of *Dodin v. Dodin*, 16 App. Div. 42, 44 N. Y. Supp. 800, Cullen, J., doubted whether a testator really intended that his adopted child should take even under a residuary clause which directed that the residuum of the estate should descend and be distributed according to the laws of the state of New York. He declared that the test was not what the status of the adopted child is at law, but how such child is treated in the nomenclature or vocabulary of the testator. Applying that test in the present case, we find it impossible to believe that when Hudson Hoagland spoke of his nephew leaving a ¹⁹⁸ child or children surviving him, he could have had an adopted child or children in contemplation.

In those states whose statutes of adoption resemble ours a limitation to a child in the will of a stranger to the adoptee is not treated as a limitation to an adopted child. Thus:

Pennsylvania a devise to trustees for the use of a married woman for life and upon her death to be conveyed to her children and the heirs of her children forever has been held to convey nothing to children who had been adopted by the life beneficiary under the Pennsylvania statute: *Schafer v. Eneu*, 54 Pa. 304.

In New Hampshire a statute for the adoption of children provided that the adopted child should be, for the purpose of inheritance by such child and all other legal consequences and incidents of the natural relations of parents and children, the child of the parents by adoption the same as if he had been born to them in lawful wedlock, except that he should not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption. It was held by the supreme court of that state that the adoption of an illegitimate child by the father and his wife did not render such child his issue under the statute of adoption so as to defeat a remainder created by will and made contingent upon his leaving no issue: *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557.

In Missouri it has been held that the devise of a remainder in fee to the "nearest and lawful heirs" of a testator and his wife carried nothing to an adopted son of the wife: *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288. In the case last cited the court said that the very terms "nearest and lawful heirs" excluded the idea of an adopted heir, and that in common parlance the terms "heirs at law" and "lawful heirs" invariably referred to the heirs upon whom descent is cast by law and not to an heir by adoption. So, here, we think that the expression "leaving a child or children," in common parlance, imports a child or children born in lawful wedlock, and not a child or children whose filial relation arises solely out of an adoption.

In those cases cited to sustain the proposition that a limitation ¹⁹⁹ to a child in a deed or will of a stranger to the adoption is to be taken as a limitation to an adopted child, it will be found that the statutes of adoption under consideration were much broader and more comprehensive in their terms than the New York statute. Thus, the statute of adoption considered in *Sewall v. Roberts*, 115 Mass. 262, provided that a child adopted thereunder "shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relations of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock." The Maine statute considered in *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435, made the adopted child, "to all intents and purposes, the child of his adopters, the same as if born to them in lawful wedlock," with an exception which is immaterial in this case;

and in *Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500, the Rhode Island statute whose operation was invoked was similar in effect to the statutes of Massachusetts and Maine.

Under the provision of our statute of adoption which declares that in regard to the limitation over of common property dependent on the foster parent dying without heirs the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen, the residuary legatees in the present case are to be considered such remaindermen and the adoption of the appellant by the life tenant is ineffectual to defeat their right to take.

In construing this very will this court has held that the nephews and nieces who are entitled to share in the residuary estate become in effect the remaindermen of those for whose benefit the trust was created but who had no children to take the principal: *Leask v. Richards*, 188 N. Y. 291, 80 N. E. 919.

In view of this explicit expression of opinion in the case cited it is hardly necessary to follow counsel in their extended discussion of the question whether the estate of the nephews and nieces is an estate in reversion or an estate in remainder. The term "remaindermen" in the statute of adoption was evidently employed by the legislature in the broad sense of ²⁰⁰ those who might ultimately be entitled to take the estate, whether they were technically remaindermen under the definition of the common law or otherwise. To allow the claim of the appellant to defeat their rights would be to disregard the plain declaration of our statute in regard to the effect of adoption.

The order appealed from should be affirmed, without costs.

Cullen, C. J., Haight, Vann, Werner, Hiscock and Chase, JJ., concur.

Order affirmed.

The Extraterritorial Effect of Adoption Proceedings is discussed in the note to *Van Matre v. Sankey*, 39 Am. St. Rep. 229. The general rule is that the adoption of a child authorized by the laws of the state gives it the status of a child of the adopting parent, and this status, with the consequent capacity to inherit from such parent, will be recognized and upheld in every other state, so far as not inconsistent with its own laws and policy: See the note to *Hockaday v. Lynn*, 118 Am. St. Rep. 685. But according to *Brown v. Finley*, 15 Ala. 424, 131 Am. St. Rep. 68, statutes of adoption have no extraterritorial effect, and hence do not confer any right to inherit lands of the adopting parent situate in another state.

If a Will Makes Provision for a "Child or Children" of some other person than the testator, the adopted child of such person is not included, unless other language of the will makes it clear that it was so intended: *Woodcock's Appeal*, 103 Me. 214, 125 Am. St. Rep. 21, and see cases cited in the cross-reference note thereto.

PEOPLE v. REARDON.

[197 N. Y. 236, 90 N. E. 829.]

TAXATION—Stock Transfers.—The Provisions of the New York statute for a tax on transfers of stock purport to authorize a compulsory general examination of all the private books and papers of a person having made or suspected of having made transfers of stocks as enumerated in the statute, for the purpose of ascertaining whether, if made, he has kept a record thereof and paid taxes thereon as required by the statute. (p. 872.)

TAXATION—Stock Transfers.—A Demand by a Representative of the state controller upon a member of a firm that "he be allowed to inspect the books of said firm which contained any entries, record or memoranda of any sale, agreement to sell or transfer of stock made within three months," is applicable not merely to the "book of account" required by statute to be kept for inspection, but to every book containing information of any sale or transfer of stock within the period named. (pp. 873, 874.)

CONSTITUTIONAL LAW—Criminal Evidence—"Witness Against Himself."—A statute taxing stock transfers which authorizes the controller to secure evidence from a person's private books and papers of violations, if any, of the statute, which might be made the basis of criminal proceedings against him thereunder or of an action for penalties, violates the constitutional prohibition against compelling an individual "in any criminal case to be a witness against himself." (pp. 872, 873.)

TAXATION—Stock Transfers—Statute Void in Part.—The provision of the New York statute taxing transfers of stock, which is unconstitutional because authorizing the controller to secure evidence from the private books of a person under investigation that might be used as the basis of criminal proceedings against him, does not affect the general provisions of the statute. (p. 879.)

Edward R. O'Malley, attorney general, William Travers Jerome, district attorney, and Robert C. Taylor, for the appellant.

John G. Milburn and Grenville Clark, for the respondent.

238 **HISCOCK, J.** This appeal involves the disposition of certain questions arising under chapter 241 of the Laws of 1905, as amended, entitled "An act to amend the tax law, by providing for a tax on transfers of stock," and which provisions have not been re-enacted as part of the Tax Law in the Consolidated Laws.

As the title of the original act indicated, this statute provided for the imposition of a tax on transfers of stock as evidenced or accomplished by various methods and contracts enumerated therein, and contained various provisions looking to the enforcement of said law, and prescribing both criminal punishment and civil penalties, so called, for violations thereof.

We have already had occasion to affirm the constitutionality of the act in its general scope and as a revenue pro-

ducing measure: *People v. Reardon*, 184 N. Y. 431, 112 Am. St. Rep. 628, 77 N. E. 970, 8 L. R. A., N. S., 314, 6 Ann. Cas. 515. ²³⁹ The questions now presented arise under certain special and subordinate provisions which became incorporated in section 321 of the Tax Law, and as thus presented they are:

1. Did said provisions of said section purport to authorize a compulsory general examination of all the private books and papers of a person having made or suspected of having made transfers of stocks as enumerated in the statute, for the purpose of ascertaining whether, if made, he had kept a record thereof and paid taxes thereon as required by the statute?

2. Did the controller, through his representative on the occasion which became the basis for this proceeding, demand such general examination of the private books and papers of relator's firm?

3. If these questions be answered in the affirmative, did the statute, in attempting to authorize the controller to secure evidence from relator's private books and papers of violations, if any, of the statute, which might be made the basis of criminal proceedings against him thereunder or of an action for penalties, violate the provision of the constitution which secures every individual against any attempt to compel him "in any criminal case to be a witness against himself"?

The answer to the first question seems to me to be so clear as not to require extended discussion beyond mere quotations from the statute itself.

Section 321 of chapter 241, Laws of 1905, as amended by Laws of 1907, chapter 324 (chapter 60, Consolidated Laws, section 276), first provides: "Every person, firm, company, association or corporation making a sale, agreement to sell, delivery, or transfer, of shares or certificates of stock or conducting or transacting a brokerage business shall keep or cause to be kept a just and true book of account wherein shall be plainly and legibly recorded," amongst other things, the date of, the number of shares covered by and the name of the party to such sale, agreement to sell, etc., "and such book shall at all times be subject to the inspection of the controller, or any of his representatives," within certain hours and excepting certain days.

²⁴⁰ No attack upon the foregoing provision is involved in this proceeding, and in our opinion it is entirely valid and constitutional. If this provision was complied with, the state required no further assurances than would be contained in this book to enable it to determine that proper taxes had or had not been paid. But the legislature apprehended that some persons might surrender too readily to a doubt whether a given transaction came within the prov-

sions of the statute, and that others might willfully attempt to evade its provisions, and that, therefore, this prescribed "book of account" might not be reliable. To guard against these contingencies it then added the provisions which are here attacked. It provided: "The state controller may, at any time after transfers of stock . . . inquire into and ascertain whether the tax imposed by the provisions of this article has been paid. For the purpose of ascertaining such fact the controller shall have the right and it shall be his duty to examine the books and papers of any person, firm, company, association or corporation, and memoranda of transfers shall remain accessible for such inspection for three months from their respective dates. . . . Every person, firm, company, association or corporation who shall refuse to permit the controller or any of his representatives to inspect such books or any memorandum or record relating to such sale, agreement to sell, delivery, or transfer, or transaction at any time as above provided, or who shall fail to keep such book of account, or who shall in any other respect violate any of the provisions of this section shall be deemed guilty of a misdemeanor."

Independent of banks and other persons it is manifest that in the ordinary course of affairs a person like relator's firm carrying on a brokerage business would keep many books and records showing bought and sold transactions in stocks. He would be compelled to keep accounts with his customers and with other brokers with whom he dealt; there would be either the originals or copies of statements, reports and correspondence relating to and evidencing such transactions, and very likely other memoranda or copies thereof under chapter 458 ²⁴¹ of the Laws of 1908, "relative to bucket-shops, and fixing penalties," all showing the sale or purchase of stocks. It is impossible to adopt any normal conception of private books and papers which would not include those of the general description enumerated, showing a broker's private, and oftentimes most confidential, transactions with his customers and others. Yet there can be no doubt that the statute attempted to authorize the controller and his agents to enter the place of business of any individual and at will demand, open up and examine any and all such books and records. The book which the statute required to be kept for public inspection is clearly and repeatedly described throughout the statute as a certain and specific "book of account," and when the statute describes as subject to inspection "the books and papers" and "any memoranda or record relating to" the sales, agreements to sell, etc., described in the statute, it clearly passes beyond this prescribed and required book of account and deals with all books and all papers in the possession of the person proceeded against. No entry of any confidential

transaction would be protected from the inquisitive examination of the public official. The purpose of this broad provision is of course apparent. The legislature intended to provide a means by general examination of ascertaining whether the book required by the statute had been truly kept and whether all of the taxes provided by the statute had been paid.

To my mind it is scarcely less clear that the controller, through his representative, on the occasion in question demanded a general examination of the private books and papers of relator's firm and not an examination of the book specified by the statute, and that therefore, the second question outlined above must be answered in the affirmative.

It appears that the controller had equipped his representative with a certificate stating that he was "a duly authorized representative of the controller of the state of New York to inspect and examine the books, memoranda, records and papers of any person, firm . . . who has made sale, agreement to sell, delivery or transfer of shares or certificates of ²⁴² stock, or who is conducting or transacting a brokerage business, to ascertain whether the tax imposed by law has been paid." When the controller's representative appeared at the office of the relator's firm he presented the above authorization and thus indicated the purpose for which he had come, and thereby very clearly defined the meaning and scope of his subsequent demand. According to his own affidavit presented in response to relator's petition, he "requested and demanded that he be allowed to inspect the books of said firm of Benjamin, Ferguson and McMurty which contained any entries, record or memoranda of any sale, agreement to sell or transfer of stock made within three months," and this demand was the one which was refused. By no reasonable interpretation, as it seems to me, can this demand be construed as applicable simply to the "book of account," required by the statute to be kept for inspection. The language employed in the demand is for all intents and purposes as broad as that employed in the statute itself. If the question was to the effect of a subpoena duces tecum containing the language of the demand, no one would doubt that it was broad enough to require the production of every book which contained any information relating to any sale or transfer of stock within the period named. If the agent desired to inspect the particular book described by the statute, he should and would have used entirely different language in his demand, and never would have employed that which has been quoted.

We thus reach the third and important question whether the statute under the process and penalties prescribed could compel a person to submit to an investigation of books and papers kept in his private business for the purpose of fur-

nishing evidence which might be used against him as a basis for criminal prosecution or suits to recover penalties.

It will be observed that I am not considering the question which has been discussed in the briefs of counsel, whether this statute offends against the Bill of Rights as incorporated in our statutes securing people "in their persons, houses, papers and effects against unreasonable searches and seizures." It ²⁴³ seems quite sufficient for the purposes of this appeal to test the provisions in question by section 6 of article 1 of our constitution against compelling an individual in a criminal case to be a witness against himself, and which is the same provision found in the constitution of the United States.

How can there be any doubt that this statute, if enforced, would violate the latter provision? The state controller is authorized to "inquire into and ascertain whether the tax . . . has been paid," and for this purpose it made it his right and duty to examine the books and papers. If, from such examination, he ascertains that the tax has not been paid, he "shall" bring an action for the recovery of the tax and "for any penalty incurred," etc. Any violation of the statute is made a misdemeanor, and in addition the violator will "forfeit . . . a civil penalty" of five hundred dollars in an action which the controller "shall" bring. Thus we have an investigation to be conducted by a state official, the purpose of which is the detection of violations of a statute, the procedure of which is to compel a party to produce his private books as evidence against himself, and the sequel of which is penalties and criminal prosecution. If the statute had in terms enacted that the controller might summon and examine, under oath, the relator for the purpose of securing evidence of violations by him and his firm of the statute, in order that such evidence might be used as a basis for criminal proceedings or an action to recover the prescribed penalties either then pending or thereafter to be instituted, I suppose that no one would seriously contend that it did not violate the constitution.

Practically this question under the milder aspect of a civil action to recover penalties has been passed on under a constitutional provision worded as ours: *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435.

Is the statute any the less effective or obnoxious when it attempts to force the relator to produce before the controller private books and papers duly identified as his, whose entries as well-established evidentiary admissions will be just as ²⁴⁴ probative of any violation as any sworn testimony for the purpose of sustaining against him a criminal prosecution or the action for a penalty which the controller is required to institute? The investigation is authorized; the violations are all defined; the punishment and penalties

are prescribed; the duty of prosecution is laid. There is only lacking the evidence, and for any practical or substantial purpose what difference does it make whether this is secured by statements of a witness under oath or by entries from his books and papers, which are competent evidence against him without an oath?

It seems to me that this kind of an inquisition and the attempt to secure from an individual evidence which may be used to convict him of a crime or to forfeit his property comes well within the principles which have been applied to the interpretation of the constitution: *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435; *In re Emery*, 107 Mass. 172, 9 Am. Rep. 22; *People v. Coombs*, 36 App. Div. 284, 55 N. Y. Supp. 276; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. Rep. 195, 35 L. ed. 1110; *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *People v. O'Brien*, 176 N. Y. 253, 68 N. E. 353.

In *Emery's case* (107 Mass. 172, 9 Am. Rep. 22) it was held that a constitutional provision that a citizen should not "be compelled to accuse or furnish evidence against himself," privileged him to refuse to testify before a legislative committee merely authorized "to inquire if the state police is guilty of bribery and corruption," on the ground that his evidence might tend to incriminate him. The court said (page 181): "By the narrowest construction this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime . . . by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution." The doctrine of this case was approved in the *Counselman case* (142 U. S. 547, 12 Sup. Ct. Rep. 195, 35 L. ed. 1110).

In the *Counselman case*, where the grand jury was engaged in an investigation of alleged violations by other parties, it was held that a witness could not be compelled to testify where his evidence might tend to convict him of a crime, it thus ²⁴⁵ being held that such an investigation by a grand jury was a "criminal case" within the meaning of the constitution. It was said: "The matter under investigation by the grand jury . . . was a criminal matter, to inquire whether there had been a criminal violation of the interstate commerce act. If *Counselman* had been guilty of the matters inquired of . . . he himself was liable to criminal prosecution under the act. The case before the grand jury was, therefore, a criminal case. . . . The object (of the constitutional provision) was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is

limited to criminal matters, but it is as broad as the mischief against which it seeks to guard" (page 562).

In the Taylor case (143 N. Y. 219, 38 N. E. 303) it was written: "The right of a witness to claim the benefit of these provisions has frequently been the subject of adjudication in both the federal and state courts. The principle established by these decisions is that no one shall be compelled in any judicial or other proceedings against himself, or upon the trial of issues between others, to disclose facts or circumstances that can be used against him as admissions tending to prove his guilt or connection with any criminal offense of which he may then or afterward be charged" (page 227).

In the Lewishon case (176 N. Y. 253, 68 N. E. 353) it was held that the constitution applies to a criminal proceeding against another than the witness, and protects him from testifying therein, where the effect of his answers might be to furnish the evidence upon which criminal proceedings might thereafter be instituted against him. In the course of the opinion the interpretation adopted by the Counselman case is approved.

The foregoing cases involved attempts to compel a witness to give oral testimony, but the other cases above cited have made it plain that a person is protected from furnishing evidence against himself through the medium of his books and papers.

²⁴⁶ In *People v. Combs*, 36 App. Div. 284, 55 N. Y. Supp. 276, the question was presented whether certain papers and records made or authorized by the defendant might be used against him. It was held that they were of a public and official nature and might be. But in the course of the discussion Judge Cullen wrote: "A defendant in a criminal prosecution cannot be compelled to give such an inspection (of books and papers); not because his papers are any more free from seizure than those of other citizens, but because under the Bill of Rights (section 13) he cannot be 'compelled in any criminal case to be a witness against himself.' . . . Therefore, a defendant in a criminal prosecution could not be compelled by subpoenas duces tecum or other process to produce his papers for the purpose of incriminating him, nor could he be subjected to any examination to disclose their existence or place of deposit. But if the prosecution can obtain possession of the papers of a defendant without violation of the immunity guaranteed by the Bill of Rights, it is permitted to offer these papers in evidence against the defendant."

In the *Boyd* case (116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746) it was held that a statute in effect requiring a person in a revenue case involving a forfeiture or penalty to produce his private books and papers for the purpose of

furnishing evidence against himself was unconstitutional. This case has been criticised. The prevailing opinion was based on the fourth amendment to the constitution against unreasonable search and seizure as well as the fifth amendment, identical with our own here under discussion. Whatever criticism has prevailed has been directed against the views expressed concerning the application of the former amendment. Neither the dissenting judges in that case nor those in any other court, so far as I am aware, then differed from or since have questioned the view therein affirmed with great vigor, that "to require such an owner (of goods involved in the customs case) to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself" (page 637).

²⁴⁷ There have not been overlooked the many cases industriously cited by the district attorney, and which are believed by him to be opposed to the views above expressed. Most of these cases may be classified either as affirming the constitutionality of laws permitting an examination of citizens for the purely civil purpose of discovering and listing taxable property, or as holding that evidence of observations, including conversations, made by experts for the purpose of expressing an opinion as to the sanity of an accused, and directions by the court in the course of a trial to an accused to exhibit himself for the purposes of identification will not be condemned as a violation of the constitution, and that evidence derived from an examination of the person of a prisoner for weapons or marks, or uncovered perhaps improperly in connection with the execution of legal process like a search-warrant, will not be rejected because of the method by which it has been secured. It would undesirably lengthen this opinion to analyze the particular facts and principles of law upon which those decisions have been based and thus to point out just what they did decide. It may, however, confidently and broadly be asserted that they did not decide, directly or indirectly, that the legislature could compel a person to submit himself or his private books for examination in an investigation of which the primary purpose was to discover that he had been guilty of offenses for which by the aid of the evidence thus discovered he could be punished criminally or by penalties.

And so I reach the conclusion that each of the questions formulated at the beginning of this opinion must be answered in the affirmative, and with the result of justifying the resistance which the relator offered to the attempt of the controller to invade the privacy of his books, papers and confidential business transactions with the hope of procuring against him some incriminating evidence.

While that question is not directly involved in this proceeding, it seems proper to state that the condemnation of the clause which has been considered, and which of course ²⁴⁸ carries with it condemnation of the other clauses respectively providing for mandamus to enforce the right to examine such books and papers, and making it a misdemeanor to refuse to allow an examination thereof, does not work any emasculation or destruction of the statute imposing taxes on stock transfers, and in the general scheme of which there is nothing to criticise. The sections other than the one including these clauses are so independent that obviously they are not affected by the elimination of the latter, and most, if not all, of the other provisions in the same section with those condemned are so complete and so independent that they may be separated from those which are objectionable and preserved.

The order appealed from should be affirmed.

Cullen, C. J., Gray, Werner and Willard Bartlett, JJ., concur.

Haight and Vann, JJ., dissent.

Order affirmed.

The Constitutionality of the New York Statute Taxing Stock Transfers is recognized in *People v. Reardon*, 184 N. Y. 431, 112 Am. St. Rep. 628.

The Constitutional Provision That No Person shall be Compelled to Testify against himself in a criminal cause precludes the seizure of one's private books and papers in order to obtain evidence against him: *State v. Davis*, 108 Mo. 666, 32 Am. St. Rep. 640. See in this connection, *Hammond Packing Co. v. State*, 81 Ark. 519, 126 Am. St. Rep. 1047; *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675; note to *State v. Height*, 94 Am. St. Rep. 345.

STONE v. PENN YAN, KEUKA PARK AND BRANCH-PORT RAILWAY.

[197 N. Y. 279, 90 N. E. 843.]

FOREIGN RECEIVER — Insurance Assessments. — Where a court has assumed charge of the assets and affairs of a mutual insurance company, it may levy assessments on members which the directors might have imposed, and in an action by the receiver in another state to recover an assessment the decree directing the levy is not subject to collateral attack, but the defendant may show that he is not liable upon his contract of insurance. (pp. 881, 882.)

INSURANCE—Place Where Made.—Where an Application for insurance is received from a corporation without the state by an insurance association in Pennsylvania, and a policy is there issued and

mailed to the applicant, the contract is made in Pennsylvania. (p. 883.)

INSURANCE — Foreign Company — Compliance With Law.

Where a corporation in this state contracts for insurance with a foreign association at its domicile, the association not doing or soliciting insurance business in this state, an enforcement of the contract by the receiver of the association cannot here be resisted on the ground that it has not complied with the insurance laws of this state. (pp. 883, 884.)

FOREIGN RECEIVER—Action in This State.—A foreign receiver may maintain an action in this state, upon the principle of comity, unless some public policy will be contravened or the rights of our citizens interfered with. (p. 885.)

Charles A. Hawley and Calvin J. Huson, for the appellant

Thomas Carmody, for the respondent.

280 GRAY, J. The action was brought by the plaintiff as receiver of the Electric Mutual Casualty Association of Philadelphia, a corporation organized under the laws of the state of Pennsylvania, having its principal office in the city of Philadelphia, to recover the amount unpaid of a premium on an insurance policy and the unpaid assessments upon policies of insurance issued by the association to the defendant. The defendant is a domestic corporation, operating an electric railway between the villages of Penn Yan and Branchport, in this state. The policies indemnified the defendant against legal liability for accidents occurring upon its railway, and they were issued under the following circumstances: The defendant's treasurer resided in the state of Massachusetts and the application for the first of the policies came from him at Penn Yan, in August, 1897, to the home office of the association in Philadelphia, which thereupon issued and sent the first policy. The application for the two subsequent policies, issued in September, 1898, and in September, 1899, were sent by the defendant's treasurer from his residence in Massachusetts and the association transmitted the policies applied for to that place. The transactions between the assured and the insurer were conducted through the postoffices. The defendant retained the policies transmitted by the insurer; but at the time of the appointment of the plaintiff as receiver it had not paid all of the face premium due on the last policy. In May, 1900, the insurer was adjudged by the court in Pennsylvania to be insolvent; the plaintiff was duly appointed receiver thereof and he duly qualified, and has been acting, as such receiver. The proceedings adjudging the insolvency of the association and the appointment of the plaintiff as receiver were regular according to the laws and practice of the state of Pennsylvania. The receiver, among other things, was directed to take charge of the estate and effects of the insolvent ²⁸¹ association and to collect the debts and property belonging to it.

Each of the policies issued provided, among other things, that the rate, upon which the premium thereon was based, was to be three per cent of the gross traffic receipts of the defendant, and "if the fixed premium rate charged by said association shall be insufficient to pay losses, the directors may charge a pro rata additional sum to make up said deficiency, but in no event shall the total amount of premium and liability exceed five per centum of the gross traffic receipts of the assured." In July, 1903, the court in Pennsylvania ordered and decreed that an assessment be levied upon all members, including the defendant, who held assessable policies in the association, and an assessment of two per cent was levied upon the gross traffic receipts, under the three policies issued to the defendant; which amounted, in the aggregate, to eleven hundred and thirty-nine dollars and thirty-three cents. Notice of the assessments was duly served by the plaintiff upon the defendant and the demand for their payment, and of the unpaid balance of the premium on the last policy, not having been complied with, the receiver commenced this action to recover their amounts.

In addition to the foregoing facts found by the referee, before whom the trial was had, it was also found, as a fact, that the association, of which the plaintiff is the receiver, had never complied with any of the requirements of the statutes of the state of New York obligatory upon insurance companies of other states seeking to transact business in this state. The referee directed judgment in favor of the plaintiff for the sum demanded, and the judgment entered in accordance with his direction has been affirmed by the appellate division, in the fourth department, by the unanimous vote of the justices. The defendant has further appealed to this court.

²⁸³ As the case comes up to this court, all questions of fact are conclusively settled by the action of the courts below. We are not concerned with any questions which relate to the manner of the application for, and of the issuance of, the policies of insurance; or to the subsequent adjudication of the insolvency of the insurer, the Electric Mutual Casualty Association, a corporation organized under the laws of the state of Pennsylvania, for the purpose of carrying on the business of accident insurance and of insuring its members on the mutual assessment plan; or to the appointment of the plaintiff as receiver, in proceedings instituted by the attorney general of the state of Pennsylvania, in the court of common pleas of Dauphin county, in that state, which were regular according to the laws and practice of that state; or to the decree ordering and levying an assessment upon all members, including this appellant, holding assessable policies. The defendant, notwithstanding it was not a party before the Pennsylvania court, was bound by the proceedings there had, which resulted

in the order for an assessment, so far as the necessity for making it was determined. The directors might have made it and the court, having assumed the charge of the assets and affairs of the corporation, could exercise their office, in that respect. The decree, however subject to direct attack, was not subject to collateral attack: *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. Rep. 810, 40 L. ed. 986; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; *Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367, affirmed 194 N. Y. 555, 87 N. E. 1120. In this suit by the receiver to recover the amount of the assessments upon the policies held by the appellant, while the decree of the foreign court is not open to attack, as to the matters determined thereby, the latter was not debarred from pleading, or showing, that it was not liable upon its contract, whether by reason of payment, or of release, or of the running of the statute of limitations, ²⁸⁴ or of any other legal defense. The decree of the foreign court was in rem, not in personam, and the receiver's action must rest upon the theory that, an assessment having been validly made, the appellant was liable upon its agreement in the contract of insurance. To this claim the appellant could interpose any defense, which established the cessation of its liability, or its nonenforceability. The appellant pleaded in defense the incapacity of the association to issue the particular policies, by reason of its having failed to comply with certain requirements of the insurance law of this state, obligatory upon foreign corporations transacting the business of insurance here, and other defenses, denying the capacity of the plaintiff to maintain the action and setting up the bar of the statute of limitations. No evidence, however, was offered on its part and the case was submitted to the trial court upon sufficient proof by the plaintiff, consisting in the records of the Pennsylvania court, in the Pennsylvania statutes, in stipulations as to certain facts and in admissions of the defendant bearing upon plaintiff's case. The case must be considered as made upon the decrees of the foreign court, having jurisdiction to make them, in proceedings regularly had under the laws of the state, which established the insolvency, the custody by the court, through the appointment of its receiver, and the necessity for an assessment upon the policies held by members of this mutual association, in order to discharge its liabilities, and upon the appellant's agreement in the contract with the insurer.

The first important question for our consideration, upon this appeal, is whether these policies of insurance represented contracts of the parties, made in the state of Pennsylvania, or in this state. The referee does not find upon this subject otherwise than by a statement of the facts, showing how they came to be issued. According to them, written applications

for the policies were mailed by the treasurer of the appellant to the association, at its office in Philadelphia; one from Penn Yan, in the state of New York, and two from Worcester, in the state of Massachusetts, the latter being the place of his ²⁸⁵ residence. Policies were issued, thereupon, by the association, which were mailed to the appellant, addressed to the places from which the applications had been forwarded. They were retained by the assured and remained in force during the periods specified in each policy. I think it to be clear that the contracts for insurance were made in the state of Pennsylvania; for it was there that the applications were received and acted upon. It was there that the policies were executed and issued. Upon being mailed to the appellant, they became effective and having been retained by the assured, there is, of course, no question of its acceptance of their terms and conditions. If Pennsylvania contracts, no question is raised as to their validity there and if valid there, then they are valid everywhere. There is no statute of this state which forbids its citizens from entering into contracts with foreign corporations, and any law to such effect would be of doubtful validity, within the provisions of the fourteenth amendment of the federal constitution: See *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832. Nor is there any such law restricting the corporations of the state. It is objected, however, that, assuming the validity of these contracts for insurance, nevertheless, because of the provisions of our insurance law, they are unenforceable in this state. The insurance law of this state provides that "no corporation . . . shall transact the business of insurance within this state without the certificate of the superintendent of insurance, certifying . . . that such corporation . . . has complied with all the requirements of law to be observed by such corporation . . . and that such corporation is authorized to transact the business of insurance specified therein in this state": Laws 1892, c. 690, as amended Laws 1893, c. 725, sec. 9. This prohibition is made specially applicable to foreign corporations by sections 29 and 30. There can be no question as to the power of the state to enact the prohibition and to impose any restrictions upon the operations of foreign corporations within its borders. By the comity existing between the states, corporations are permitted to do business ²⁸⁶ in other states than their own; but their operations must be subject to such laws of the foreign state as are made applicable: See *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 39 L. ed. 297; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; *Bard v. Poole*, 12 N. Y. 495; *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A., N. S., 127. Doubtless, if this association has brought itself within the purview of the

insurance law, it would follow that the plaintiff would be unable to maintain the action, by reason of the contract being a prohibited insurance transaction. But that is not the case. It had neither office, nor agency, within this state; nor does it appear to have solicited business here, or that there was any attempt to evade the operation of our law. As we have seen, the transaction was initiated and consummated at its home office. If it were possible to regard the transaction as business done in this state, still, I should say, within the principle of our decision in the Penn Collieries case (183 N. Y. 98, 75 N. E. 935, 2 L. R. A., N. S., 127), that the insurer was not transacting, or doing business here, within the meaning of the provisions of the insurance law referred to, or of section 15 of the general corporation law, which denies to a foreign corporation, not having its certificate of regularity, the right to sue here.

If, then, these insurance contracts were validly made and enforceable in the foreign state, is there any force in the objection that the case is not one "for the exercise of judicial comity"? I think not. If any policy of the state would be contravened by admitting the receiver to sue in our courts upon these contracts, the rule of comity could not be applied. But how can it be said that they are repugnant to any public policy? The most that can be argued is that the defendant had contracted for insurance with a foreign insurer, which had not qualified itself for transacting such a business in this state. But that objection is without good ground, when, as we have seen, the insurer was not in this state for the business of insurance and was not shown to be procuring it by means of solicitation, direct or indirect. The objection is unavailable, unless it can be made to appear that in permitting the enforcement ²⁸⁷ of the appellant's agreement, some public policy will be contravened, or that the rights of our citizens will be interfered with. Subject to these qualifications, the right of the plaintiff, as a foreign receiver, to maintain this action in this state, upon the principle of comity, is one which has long been recognized: *Dayton v. Borst*, 31 N. Y. 435; *Lowry v. Inman*, 46 N. Y. 119; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 484; 47 L. R. A. 725; *Hammond v. Knox*, 129 App. Div. 9, 109 N. Y. Supp. 367, affirmed, 194 N. Y. 555, 87 N. E. 1120. The statement in *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 484; 47 L. R. A. 725, can be repeated here, appropriately: "The plaintiff does not come here seeking to remove assets from this state to the possible prejudice of domestic creditors, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction." This case differs, in an important feature, from those cases where a foreign receiver is suing to enforce, not a common-law liability, but one which is peculiar:

to the foreign state, because founded upon some local statute. What is sought to be enforced by this action is an agreement of the appellant. It had assented to a prospective liability for an assessment, when entering into the contract with the association, and the promise to pay it sprang therefrom. Its agreement was that "if the fixed premium rate charged by said association shall be insufficient to pay losses, the directors may charge a pro rata additional sum, to make up said deficiency, but in no event shall the total amount or premium and liability exceed five per centum of the gross traffic receipts of the assured." The assessment, as fixed by the court, did not violate this agreement, and it having been competently made, a liability to the receiver therefor followed legally; which was, as well, enforceable under our laws, as under those of the state, where the contract was made. In *Mabon v. Ongley E. Co.*, 156 N. Y. 196, 50 N. E. 805, a case where the right of a foreign receiver to maintain an action for the appointment here of an ancillary receiver was denied, the opinion was careful to point out that, subject to the right of domestic creditors, he could reduce to possession all the property of the corporation, and that the courts, upon the principle of comity, were as open to him as to ²⁸⁸ a domestic receiver. "Every remedy," it was said by Judge Vann, "to gather in the assets is afforded, unless it would interfere with the policy of the state, or impair the rights of its own citizens" (page 201). In *Stoddard v. Lum*, 159 N. Y. 265, 70 Am. St. Rep. 541, 53 N. E. 1108, 45 L. R. A. 551, it was said that "the receivers and assignees of individuals and corporations domiciled in another state are permitted under interstate comity to enforce the contracts of such individuals and corporations in the state of the debtor's residence" (page 275).

I think that the plaintiff could maintain the action here to recover the unpaid balance of the premium due and the assessments made and, therefore, that the judgment appealed from should be affirmed.

Edward T. Bartlett, Vann, Willard Bartlett, Hiscock and Chase, JJ., concur; Cullen, C. J., absent.

Judgment affirmed, with costs.

A Receiver Appointed in Another State for an Insolvent Corporation may, in this state, maintain an action in its name upon a liability due to it. Through comity between states a representative of a court of one state will be permitted to sue in the courts of the other when the suit does not injuriously affect the interests of the citizens of the latter, nor violate its policy or laws: *Castleman v. Templeman*, 87 Md. 546, 67 Am. St. Rep. 363. But the right of a receiver to bring suits in a foreign jurisdiction to enforce a liability arising under the law of the state of his appointment cannot be conferred upon him absolutely by his order of appointment, but can arise only through an ex-

ercise of comity between states, and such exercise will be denied where it would be in contravention of the rights of citizens and opposed to equity: *Wyman v. Eaton*, 107 Iowa, 214, 70 Am. St. Rep. 193; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779.

If an Application is Made Out by an Insurer in Pennsylvania and sent by mail to an applicant in Wisconsin, who, in that state, fills out and signs the application and forwards it to the insurer's office in Pennsylvania, and directs a policy to issue, and the insurer thereupon issues its policy in the latter state and mails it to the insured in the former, who then signs the note, reciting that it is for the balance of the first premium and is payable in Pennsylvania, the contract of insurance is a Pennsylvania contract: Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919. See, also, the note to *Grevenig v. Washington Life Ins. Co.*, 104 Am. St. Rep. 488. And where a life insurance contract is made in a foreign state, to be performed there, it must be construed in accordance with the law of that state: *Peckham*, for an Opinion, 29 R. I. 250, 132 Am. St. Rep. 513.

NETOGRAPH MANUFACTURING COMPANY v. SCRUGHAM.

[197 N. Y. 377, 90 N. E. 962.]

PROCESS.—The Exemption of a Suitor or Witness from process is not a natural right, but a privilege having its origin in the necessity for protecting courts from interruption and delay and witnesses or parties from the temptation to disobey process. (p. 888.)

PROCESS.—The Exemption of Suitors and Witnesses from process is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him, and therefore the privilege should not be extended beyond the reason of the rule upon which it is founded. (p. 888.)

PROCESS—Privilege—Persons Under Legal Compulsion.—Since the reason of the rule exempting suitors and witnesses from process is to encourage voluntary attendance upon courts and to expedite the administration of justice, that reason fails when the suitor or witness is brought into the jurisdiction of the court while under arrest or other compulsion of law. (p. 888.)

PROCESS—Privilege.—A Person at Large on Bail is constructively in the custody of the law, and hence is not exempt from service of process in civil suits. (p. 890.)

BAIL.—When Bail is Given, the Principal is regarded as delivered into the custody or his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. (p. 889.)

PROCESS—Privilege of Witness or Suitor.—The administration of justice is best subserved by keeping the rule of privilege

within the reason upon which it rests. That reason fails unless the person claiming the privilege is a free moral agent who may come into or depart from the jurisdiction or not as he pleases. (p. 889.)

PROCESS—Privilege of—Person Charged With Crime.—Where a person at large on bail comes into the state for trial, and being acquitted remains within the jurisdiction of the court a short time, partly to consult his counsel about other indictments* that have not yet been moved for trial, he is not exempt from service of process in a civil suit. (p. 890.)

Louis Marshall, for the appellant.

Walter Jeffreys Carlin and Frederick H. Patterson, for the respondent.

378 WERNER, J. The defendant, a resident of the state of Ohio, came into this state voluntarily in April, 1907. While here he attended a legislative hearing in the city of Albany. At that time he was arrested on a warrant, issued by a magistrate in the city of New York, charging him with the crime of conspiracy. He was taken to the city of New York, where he gave bail for his appearance pending the examination. The examination resulted in his being held, and he subsequently gave bail to appear and answer the charge in whatever court it might be prosecuted. In June, 1907, an indictment **379** was found against him for conspiracy, and again he gave bail for his appearance at the trial. He returned to Ohio, and when the indictment was brought on for trial in the court of general sessions in the city of New York in March, 1909, he appeared and submitted himself to the jurisdiction of the court. His only purpose in coming into this state was to attend his trial upon the charge of conspiracy. A number of days were occupied in the trial, which resulted in the defendant's acquittal late in the afternoon of March 26, 1909. He remained in the city of New York until the following day, partly because he could not get a sleeping-car berth on any train leaving the city on the night of his acquittal, and partly for the purpose of consulting his counsel about other indictments against him which had not yet been moved for trial. At about 9 o'clock in the morning of the day after the defendant's acquittal he was served at his hotel with the summons and complaint in this action. There is no connection between the criminal charge upon which the defendant was tried and acquitted, and this civil suit for goods sold and delivered, which, for aught that appears, is brought in good faith. The learned court at special term held, and we shall assume, that defendant's stay in New York after his acquittal was for a proper purpose and not unreasonable in duration. These are the circumstances which give rise to this controversy in which the learned appellate division has certified to us the question: "Is the service of the summons and complaint upon the defendant . . . George R. Scrugham lawful?"

This question, based upon the undisputed facts of this record, is very narrow, but it relates to a subject which has for centuries engaged the attention of common-law courts under every conceivable variety of circumstances. Volumes of opinions have been written in which one can find all sorts of conflicting decisions and almost any dictum that one may be looking for. The ease with which the writer of an opinion upon even the simplest phase of this subject could drift into a general dissertation upon it is nicely illustrated in the voluminous ³⁸⁰ note to *Mullin v. Sanborn*, 25 L. R. A. 721, where the industrious author has gathered the cases from almost every state in the Union and from England. For present purposes it is enough to say that from the earliest times it has been the policy of the common law that witnesses should be produced for oral examination, and that parties should have full opportunity to be present and heard when their cases are tried. It is in furtherance of that policy and the due administration of justice that suitors and witnesses from abroad are privileged from liability to other criminal and civil prosecution, *eundo, morando, et redeundo*: Year Book, 13 Henry IV, Viner's Abridgment, "Privilege." It is not a natural right but a privilege which has its origin in the necessity for protecting courts from interruption and delay, and witnesses or parties from the temptation to disobey the process of the courts. "It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice": *Parke v. Marco*, 136 N. Y. 585, 32 Am. St. Rep. 779, 32 N. E. 989, 20 L. R. A. 45, citing *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568. It is not only not a natural right, but it is no derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him. The privilege should, therefore, not be extended beyond the reason of the rule upon which it is founded. Since the obvious reason of the rule is to encourage voluntary attendance upon courts and to expedite the administration of justice, that reason fails when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law. Such a suitor or witness does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise. That seems to be the ³⁸¹ basis for the exception to the general rule of privilege which is illustrated in cases where persons are brought into the jurisdiction of a court under ex-

tradition from other states or foreign countries: *Williams v. Bacon*, 10 Wend. 636; *Slade v. Joseph*, 5 Daly, 187; *Adriance v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317; *People v. Cross*, 135 N. Y. 536, 31 Am. St. Rep. 850, 32 N. E. 846. The privilege is held not to exist in such cases. From time immemorial it has been the law that persons actually in custody under criminal process are not exempt from service of process in civil suits: 1 Chitty's Criminal Law, 661; Foster's Criminal Law, 61, 62; Tidd's Practice, 306; 2 Archbold's Practice, 122.

This brings us to the concrete question whether there is any difference, so far as this question of privilege is concerned, between a person actually in custody and one who is at large under bail. The question is not free from difficulty, but we incline to the view that a person who is charged with or convicted of crime and is at large on bail, is constructively in the custody of the law. He is not in actual confinement, it is true, but he is in the custody of his bondsmen, who, by giving bail for him, have been constituted his jailers. "When bail is given, the principal is regarded as delivered into the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner": *Taylor v. Taintor*, 83 U. S. 366, 21 L. ed. 287. See, also, *Reese v. United States*, 76 U. S. 13, 19 L. ed. 541.

This concise and authoritative exposition of the law of bail leaves little to be said as to the status of a principal under a criminal bail bond. For many of the practical affairs of life he is as much at liberty as though he were ³⁸² not charged with crime. For the purpose of answering the charge, however, he is constructively in the custody of the law. His bailors have the right and power at any moment to become his jailers for the purpose of placing him in actual confinement. Under such circumstances, he cannot be said to be free to come at will, and when he submits himself to the directions of the courts having cognizance of the charge against him, he does not act voluntarily, but under compulsion of law. We are aware that this view is apparently at variance with some decisions in other jurisdictions, notably in England, but we think the administration of justice will be best served by keeping the rule of privilege within the reason upon which it rests. That reason fails unless the person claiming the privilege is a free moral agent who may come into or depart from the jur-

isdiction or not as he pleases. Despite the just tendency of courts to extend the rule so far as possible, it must not be carried to the extent of wholly preventing creditors from pursuing their ordinary civil remedies against debtors, and particularly when the latter involve no restraint of the debtor's person. Much might be said as to the propriety or wisdom of permitting a person just released under bail to be at once arrested on other process, as appears from the English cases relied upon by the defendant, but that is not the question before us, and such a discussion could have no application to a case where a person at large on bail is served with a simple summons which imposes no restraint whatever upon his person. His liberty is as great after service as it was before. He is just as free to depart from the jurisdiction as he was to enter it, and, under such circumstances, none of his rights are invaded.

The order of the appellate division should be affirmed, with costs, and the question certified to us answered in the affirmative.

Cullen, C. J., Edward T. Bartlett, Vann, Willard Bartlett, Hiscock and Chase, JJ., concur.

Order affirmed.

The Exemption of Witnesses and Parties to an Action from Service of process is the subject of a note to *Worth v. Norton*, 76 Am. St. Rep. 535. According to *Guynn v. McDanel*, 4 Idaho, 605, 95 Am. St. Rep. 158, a nonresident is not exempt from service of summons upon him in a civil suit against him while in attendance upon a court within the state as plaintiff in a suit therein. But according to *Martin v. Bacon*, 76 Ark. 158, 113 Am. St. Rep. 81, a person cannot be lawfully served with civil process while he is attending on a court in a state other than that of his residence, either as a party or a witness, or while going to or returning therefrom. In *Murray v. Wilcox*, 122 Iowa, 188, 101 Am. St. Rep. 263, it is decided that a nonresident defendant in a criminal prosecution attending the courts of the state for the purpose of his trial is exempt from the service of civil process while coming and departing, as well as while actually in attendance at court.

CLUTE v. CLUTE.

[197 N. Y. 439, 90 N. E. 988.]

COTENANCY—Duty of Tenant in Possession.—A cotenant in sole possession of and in receipt of all profits from the common property for many years is deemed to owe to his co-owners the duty of preserving the estate by making needful ordinary repairs and payment of taxes and other annually maturing liens such as interest on a mortgage. (p. 895.)

COTENANCY—Agency of Tenant in Possession.—A cotenant in sole possession of and in receipt of all profits from the common property for many years is in effect the agent of his co-owners, authorized to do what is necessary to preserve their estate, including the payment of taxes and the interest upon a mortgage. (p. 896.)

LIMITATION OF ACTIONS—Payment by Cotenant.—Where a cotenant occupies the common property for twenty-two years succeeding the maturity of a mortgage thereon, reaping the fruits therefrom with the knowledge and acquiescence of his brother and sister, his cotenants, his payment of interest on the mortgage may be deemed to be with the implied authority and consent of his co-owners, thus preventing the running of the statute of limitations in their favor. (p. 896.)

Danforth E. Ainsworth and John D. White, for the appellants.

John F. Clute, for the respondent.

⁴⁴¹ HAIGHT, J. This action was brought to foreclose a mortgage.

On the 4th of September, 1873, William Clute conveyed his farm in Albany county to his son John W. Clute, who, on the same day, executed and delivered to his father a purchase money mortgage for the sum of ten thousand dollars payable in eight years from the date thereof, with interest, which mortgage was recorded in the Albany county clerk's office in book No. 222 of Mortgages at page 50. William Clute died January ⁴⁴² 21, 1878, leaving no assets other than the mortgage in question, and leaving a last will and testament which was duly admitted to probate, in which he appointed his son Jacob H. Clute sole executor, who qualified as such and discharged the duties of such executor until his death in 1903. Thereupon the plaintiff, Catherine Clute, was appointed administratrix with the will annexed. John W. Clute, the mortgagor, entered into possession of the farm and paid the interest on the mortgage until his death, intestate, which occurred in February, 1882. He left surviving his widow, Mary B. Clute, with William H. Clute, George M. Clute, Edwin Clute, John Van Arnum Clute and Mary Elizabeth Clute, his only children and heirs at law. The widow having subsequently died, together with the son John Van Arnum Clute, who died unmarried and without children, the other children named

became seised as tenants in common of the premises described in the complaint, subject to the lien of the mortgage.

The referee has found as facts that the year before the death of John W. Clute the defendant George M. Clute entered into the possession of the premises under an agreement to work the same on shares as the tenant of his father; that after the death of his father he entered into an agreement with Jacob H. Clute, the executor of William Clute, by which George agreed to pay to Jacob as such executor one-half of the proceeds of the mortgaged premises, and that from that time until the commencement of this action he has been in the actual and exclusive possession of the premises and during all of such period has had the entire control thereof, paying all of the taxes, insurance and other charges thereon and has annually paid to Jacob H. Clute, as executor of William Clute, one-half of the proceeds of the mortgaged premises, which was received by Jacob H. Clute as executor of William Clute, deceased, as and for the interest upon said mortgage; that the interest upon the mortgage was thus paid to Jacob H. Clute as such executor until his death in 1903, and that no part of the principal sum of ten thousand dollars had been paid. And as conclusions of law the referee found:

443 "1. That the record of the mortgage sought to be foreclosed herein was constructive notice to the defendants William H. Clute, Mary Elizabeth Clute, George M. Clute and Edwin Clute and to each of them, of the existence of said mortgage and they and each of them are chargeable with such knowledge thereof, as reasonable inquiry would have disclosed.

"2. That all payments of interest on said mortgage made by the defendant George M. Clute to Jacob H. Clute, as executor of William Clute, deceased, mortgagee, were made on behalf of himself and the defendants William H. Clute, Mary Elizabeth Clute and Edwin Clute and were effectual to prevent the running of the statute of limitations in favor of them or either of them."

He further found as a conclusion of law the amount due upon the mortgage and ordered judgment for a foreclosure, etc.

The answer of the defendants denied that they had any knowledge or information as to the existence of the mortgage, except from hearsay, and that only recently; that upon information and belief it had been paid. They also denied that any interest had been paid upon the mortgage to Jacob H. Clute as executor by George, and alleged that Jacob H. Clute claimed to be the owner of the premises, and that the payments made to him were as such owner; and for a further defense they alleged that more than twenty years had run after the mortgage became due, and that, therefore, the action was barred under the statute of limitations.

Upon the trial the defendant George M. Clute was sworn as a witness for the plaintiff, and testified, in substance, that he went upon the farm to live in 1875; that his grandfather, William Clute, was then alive, and that in 1881 he entered into an arrangement with his father by which he was to work the place on shares, and at that time his father was the owner of it; that his father died in 1882, while George was still in the possession of the farm, and that after that he made a bargain with his uncle, Jacob H. Clute, who was formerly the county judge of Albany county, which was the same as that made with his father, in which his uncle told him that ⁴⁴⁴ he should work it just as he had and give him half of the crops or half of the money received for the crops every year, and this he continued to do until the death of his uncle Jacob, which occurred in 1903, he paying him each year one-half of the proceeds of the farm. He, however, testified that he had no knowledge of the existence of the mortgage, and that he did not make the payments on account of the principal or interest on the mortgage. Each of the brothers and sister of George also testified that they knew nothing of the mortgage and had not paid or known of any payments being made as interest upon it. There was other evidence given by the plaintiff consisting largely of declarations and admissions by George and his cotenants in common with reference to the family history and other knowledge of the existence of the mortgage, most of which was controverted. It, however, appears to be conceded by the cotenants that George occupied the premises during the entire twenty-two years succeeding the maturity of the mortgage, with their knowledge and acquiescence; that their mother and grandmother lived with him for a time; that his sister Mary Elizabeth made it her home during the summers when she was not engaged in teaching school, and that the other brothers were there from time to time, so that George's occupancy of the premises was with their concurrence and was not in hostility to them.

Our conclusions are that there was evidence which sustained the findings of the referee, and that the only question remaining for our determination is as to whether the payments of interest on the mortgage made by George to Jacob H. Clute, as executor of William Clute, deceased, were effectual to prevent the running of the statute of limitations in favor of the cotenants, William H., Mary Elizabeth and Edwin Clute.

Our attention has been called to no case in this state which expressly decides the question here presented. The chief cases upon which the appellants rely in this state are those of *Murdock v. Waterman*, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, and *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289. In the *Murdock* case the action was brought for the foreclosure of a mortgage, and the defense ⁴⁴⁵ interposed was that of the

statute of limitations. The property mortgaged was a lot upon which there were two dwelling-houses owned by the mortgagors. Subsequently one of the houses and the lot upon which it stood was sold and conveyed to Clarissa Waterman without any reference therein to the mortgage. Subsequently the other house and half of the lot descended to the defendants Harriet Robinson and Lucinda Lamb, who owned the same as tenants in common. In August, 1885, one dollar was paid upon the bond and mortgage by one of the tenants in common in the presence and with the knowledge and approval of the other tenant in common. It was held that this payment prevented the running of the statute as to the two tenants in common, but that it did not prevent the running of the statute against Clarissa Waterman. It will readily be seen that Clarissa Waterman, having purchased and received a conveyance of one-half of the premises without any reservation with reference to the mortgage, became the owner thereof in fee, and in case of foreclosure of the mortgage she had the right in equity to have the remaining premises first sold and the proceeds applied in payment of the mortgage. She was not, as against the owner of the other lot, under any obligation to pay the mortgage nor was she a tenant in common with the other defendants, nor bound by their acts, and consequently the statute had run so far as she was concerned. Chief Judge Andrews, in delivering the opinion of the court, examined many authorities upon the subject both in this country and in England, after which he concluded with the statement: "The guiding and controlling consideration is that the payment must be made by a party to the obligation, or by his authorized agent. If payment by one is relied upon to take the contract out of the statute as to another, it must be shown that the party who made the payment was in fact or in law the agent of the other in respect to his liability. When the person paying is bound, those in privity with him may be bound also" (page 69).

In *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289, the case was similar to that of *Murdock v. Waterman*, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418. In that case the mortgaged premises had also been divided and sold, and one of the purchasers had assumed the debt. It was held that where the mortgagor had made no payments on the mortgage debt for twenty years, the payments thereon by grantees of a portion of the premises, who had assumed the debt, did not arrest the operation of the statute of limitations in favor of the grantees of the other parcel, who had not assumed the payment of the mortgage debt and had neither made nor authorized the payment upon the mortgage.

It will readily be seen that the foregoing cases do not reach the question we have under consideration. In this case, as we

have seen, George had been left in the sole occupancy and possession of these premises for twenty-two years succeeding the maturity of the mortgage, with the knowledge, acquiescence and concurrence of his brothers and sister. He, being in sole possession and receiving all of the profits derived from the farm, is deemed to have undertaken to discharge certain duties to his cotenants which are analogous to that which a tenant for life owes to his remainderman—that of preserving the property by making needful, ordinary repairs, payment of taxes and other annually maturing liens, such as interest upon a mortgage: *Washburn on Real Property*, sec. 238; *Arthur v. Arthur*, 76 App. Div. 330, 78 App. Div. 486; *McAlear v. Delaney*, 19 Week. Dig. 252; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782, 6 N. E. 283; *Rothwell v. Dewees*, 2 Black (U. S.), 613, 17 L. ed. 309; *Peck v. Peck*, 110 N. Y. 64, 17 N. E. 383; *Griffith v. Robinson*, 14 Ill. App. 377; *Carter v. Penn*, 99 Ill. 390; *Eads v. Retherford*, 114 Ind. 273, 5 Am. St. Rep. 611, 16 N. E. 587; *Downer's Admrs. v. Smith*, 38 Vt. 464; *Cooley on Taxation*, 2d ed., 467.

In *Washburn on Real Property*, section 882, it is said with reference to the duty of one cotenant to the others that "their possession being common, and each having a right to occupy, not only will such possession, though held by one alone, be presumed not to be adverse to his cotenant, but it is ordinarily held to be for the latter's benefit, so far as preserving his title thereto, the possession of one tenant in common being deemed to be the possession of all." Also, it has been held "to be a fraud in one cotenant to suffer the common property 447 to be sold for taxes, and to purchase it in himself; and if he do so, the tax title inures to the common benefit." Again, at section 894, he says: "One tenant in common cannot force his cotenant to contribute to the cost of improvements; but the expenses which one tenant is subjected to for the preservation of the common property will, in equity, be ratably apportioned among all of the tenants. The expense, therefore, of necessary repairs, as well as the cost of preserving the title, as by paying off a mortgage, purchasing an outstanding title, paying taxes, assessments, and the like, will be apportioned among the several tenants, although it was borne in the first instance by one."

In *Dubois v. Campau*, 24 Mich. 360, it was held to be the duty of a tenant in common in possession of the whole estate "to keep down the taxes on the whole during his occupancy." Taxes are a lien and encumbrance upon the land, and if it be the duty of the tenant in common to pay the taxes, it would seem to follow also that it would become his duty to pay the interest maturing upon a mortgage, which also becomes a lien and encumbrance upon the land.

If George, by his sole occupancy and possession, reaping the fruits derived from the premises, owed a duty to his cotenants to preserve their title thereto, he, in the discharge of that duty for them, must be deemed authorized to pay the interest maturing from year to year upon the mortgage, as well as the taxes assessed thereon. He in effect became their agent, authorized to do that which was necessary to preserve their estate; and while there may not have been any express authorization by them to make such payments, such authority is fairly implied under the circumstances of this case. Such is the rule laid down by Chief Judge Andrews in the case of *Murdock v. Waterman*, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, to which we have already referred.

Our sister states are not in entire harmony with reference to payments which would prevent the running of the statute of limitations. In *Hollister v. York*, 59 Vt. 1, 9 Atl. 2, it was held that a payment of the interest or a part of the principal of a mortgage debt by one of several parties who are interested in the equity of redemption and who have had constructive ⁴⁴⁸ notice, repels the presumption that the mortgage has been paid and takes the case out of the operation of the statute of limitations, not only as to the payer, but also as to all of the owners of the equity. In *Jones on Mortgage* (at section 1198) it is said that: "A payment of interest or part of the principal renews the mortgage, so that an action may be brought to enforce it within twenty years or other period of limitation after such last payment. This is a rule universally recognized. Where there are several persons interested in the equity of redemption, such payment by one of them keeps alive the right of entry not only against him, but also against all other owners of the equity": *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118; *Richmond v. Aiken*, 25 Vt. 324; *Pears v. Laing*, L. R. 12 Eq. 41; *Roddam v. Morley*, 1 De Gex & J. 1; *Lawton v. Adams*, 13 Ohio C. C. 233; *Freeman on Cotenancy*, sec. 371.

In the case of *Aetna L. Ins. Co. v. McNeely*, 166 Ill. 540, 46 N. E. 1130, it was held that a payment by a widow on a mortgage indebtedness upon property in which she had a dower interest did not operate to remove the bar of the statute of limitations as against the owners of the fee. The case of *Keese v. Dewey*, 111 App. Div. 16, 97 N. Y. Supp. 519, is not distinguishable from the cases of *Murdock v. Waterman*, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418, and *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289, above referred to. The mortgage covered three separate parcels of real estate, one of which was owned by the defendant Martin Dewey. It was held that payments made upon the mortgage by the owners of the other parcels, without his knowledge or consent, did not prevent the running of the statute as to him.

We do not, at this time, propose to enter upon any analysis of the foregoing cases or to approve or disapprove of the conclusions reached therein; for, in disposing of this case, we prefer to adhere to the rule suggested by Chief Judge Andrews in the Murdock case and hold that since George, one of the cotenants, had occupied the premises for twenty-two years succeeding the maturity of the mortgage, reaping the fruits therefrom with the knowledge, acquiescence and concurrence of his brothers and sister, his cotenants, it became his duty to preserve their interests in the property by making needful ⁴⁴⁹ ordinary repairs, the payment of taxes and the other annually maturing liens, including the interest upon the mortgage, and that the payments so made are fairly deemed to have been made with the implied authority and consent of his cotenants, thus preventing the running of the statute of limitations.

Upon the trial a number of exceptions was taken to the admission and rejection of evidence. The testimony taken ranged over a wide field, quite remote from the issues involved in this case, and doubtless some of the rulings were erroneous, but we are unable to see how such rulings affected the result. Under the conceded facts the inquiry was virtually narrowed to the question as to whether the payments which George concededly made to his uncle Jacob were made to be applied upon the interest maturing upon the mortgage, and this depended upon the question as to whether the tenants in common knew of the existence of the mortgage. If they did then the payments would be presumed to have been made to apply thereon. It is true that the answer alleges that Jacob Clute claimed to be the owner of the premises, and consequently it is claimed that the payments were made to him as such owner. He, in fact, was the executor of his father's estate and as such held the mortgage in question, and if on the death of the father of the tenants in common they surrendered possession to him by George's entering into a lease with him to work upon shares, thus constituting Jacob a mortgagee in possession, and he was thus treated for upward of twenty years, George leasing the premises from year to year, working them upon shares and paying to him one-half of the proceeds, it is difficult to see how the situation of the tenants in common would be better than it now is; for after the expiration of twenty years the statute of limitations would have run with reference to them, preventing their right to redeem: Jones on Mortgages, sec. 1144.

The judgment should be affirmed, with costs.

Cullen, C. J., Werner, Hiscock and Chase, JJ., concur.

Gray and Willard Bartlett, JJ., dissent.

Judgment affirmed.

Limitation of Actions.—Part Payment of a Debt, to take the case out of the statute of limitations, must be made voluntarily by the debtor sought to be charged with the effect of it, or by someone authorized by him to make a new promise on his behalf: *Wolford v. Cook*, 71 Minn. 77, 70 Am. St. Rep. 315. According to *Cowhick v. Shipe*, 5 Wyo. 87, 63 Am. St. Rep. 17, neither a payment, an acknowledgment, nor a promise in writing will take a case out of the bar of the statute of limitations, unless made by the party to be charged thereby, or an agent authorized for that express purpose. An acknowledgment of an indebtedness which will toll the statutes of limitations should be made to the creditor, or someone representing him, and not to a stranger: *Wallber v. Caldwell*, 79 Neb. 418, 126 Am. St. Rep. 675. As to the effect of part payment by a joint debtor, see *Skinner v. More*, 64 Kan. 360, 91 Am. St. Rep. 244; *Patterson v. Collier*, 113 Mich. 2, 67 Am. St. Rep. 440; *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678; *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639; *Scott v. Christenson*, 49 Or. 223, 124 Am. St. Rep. 1041; *Shanks v. Louthan*, 79 Kan. 363, 131 Am. St. Rep. 294.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HARDIE-TYNES MANUFACTURING COMPANY v.
EASTON COTTON OIL COMPANY.

[150 N. C. 150, 63 S. E. 676.]

SALE.—The Measure of the Vendee's Damages for a Breach of Warranty on the sale of an engine is the difference between the value of the engine received and what it would have cost him to purchase such an engine as that described in the contract and warranty. (p. 900.)

SALE—Damages for Breach of Warranty.—The aim of the law, in case of a breach of warranty by the vendor of machinery, is to put the vendee, as nearly as practicable, in the position he would have occupied if the contract had been kept, so as to award him full indemnity for the breach. What the amount shall be must be determined by the jury, after careful regard to the nature of the case and to its special facts and circumstances. (p. 901.)

SALE—Damages for Breach of Warranty—Repairs.—The reasonable cost of repairs may in some cases indemnify a vendee of machinery for the vendor's breach of warranty; but the jury is not necessarily confined to this narrow limit, and may consider it as an element in connection with any other facts which will enable them to ascertain the true amount. (p. 901.)

W. A. Worth, for the plaintiff.

P. W. McMullan, for the defendant.

150 WALKER, J. This action was brought to recover damages for a breach of contract in the sale of an engine by the plaintiff to the defendant. It appears that the plaintiff agreed to sell and deliver to the defendant a Corliss engine of a certain description and weight, and that the engine, which was delivered under the contract, was not of that description or weight and was defective in other respects. The contract contains the following clause:

“Warranty.—It is understood and agreed that the foregoing specifications are intended to cover one of our stand-

ard heavy-duty girder-frame Corliss engines, as above specified, to be of the dimensions named, complete in all its parts, made throughout of first-class material and workmanship; to perform in a proper manner when properly handled, and to give the best results obtainable from an engine of this type under similar conditions."

The issues, with the answers thereto, were as follows:

1. "In what sum, if any, is the defendant indebted to the plaintiff?" Answer: "Two hundred and fifty-seven dollars and two cents, and interest from December 31, 1906."

2. "Did the plaintiff company warrant the engine in question, as alleged in the answer?" Answer: "Yes."

3. "Did the said engine conform to and satisfy the terms of said warranty, as alleged?" Answer: "No."

¹⁵¹ 4. "What are defendant's damages?" Answer: "Three hundred and twenty-five dollars."

Plaintiff moved for a new trial; the motion was overruled and judgment entered upon the verdict, whereupon plaintiff appealed.

The principal question in this case, and, indeed, the only one necessary to be considered by us, relates to that part of the charge of the court upon the measure of damages: which the plaintiff excepted, namely, "that the measure of defendant's damages is the difference, if the jury should find there was a difference, between the value of the engine received and what it would have cost the defendant to purchase such an engine as that described in the contract and warranty in the case." After giving this charge, the court fully instructed the jury as to the facts and circumstances they might consider in determining the value of the engine delivered and the cost of such an engine as is described in the contract, and to this part of the charge there was no exception. The question raised by the plaintiff's exception does not require much, if any, discussion, as the rule for measuring the damages in cases like this one has been settled by the decisions of this court. In *Parker v. Fenwick*, 138 N. C. 209, 50 S. E. 627, following the rule as laid down in *Huyett & Smith Mfg. Co. v. Gray*, 126 N. C. 103, 35 S. E. 236, the court says: "The true measure of damages is the difference between the value of the property received and what it would have cost the defendant to purchase such machinery as that described in the contract and warranty." In deciding these cases we adopted the rule as clearly stated in *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139, to this effect: "The price fixed in the contract at which the plaintiff agreed to take the machines, whether the transaction is viewed as an exchange of property at assumed valuations or as a purchase and sale for money, is not conclusive between the parties upon the question of damages recoverable for a breach. If there had been a total failure on the part

of the defendant to comply with the contract, and ¹⁵² it had refused to deliver any of the machines specified, the damages to the plaintiff would have been the amount of money with which at the time of the breach he could have supplied himself, by purchase from others, with the same number of similar articles of equal value. If the market price had in the meantime advanced, the recovery would be for more, or if it had fallen it would be for less, than the contract price; the rule to measure the loss in such cases being the difference between the contract and the market price. The same rule applies where the breach is partial and not total; and to make good the warranty as to condition, the cost of repairs and, as to freedom from liens, the cost of removing them, if that be the difference in actual value, between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damage. Whatever that difference in the actual circumstances of the case is shown to be is the true rule and measure of damages. Where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damage is what it would reasonably cost to supply the deficiency, without regard to the contract price": *Huyett-Smith Mfg. Co. v. Gray*, 129 N. C. 438, 40 S. E. 178, 57 L. R. A. 193; *Benjamin v. Hilliard*, 23 How. 167, 16 L. ed. 518. The aim of the law, generally speaking, is to put the injured party, as nearly as practicable, in the position he would have occupied if the contract had been kept, so as to award to him full indemnity for the breach: *Winston C. Machine Co. v. Wells-Whitehead Tobacco Co.*, 141 N. C. 284, 53 S. E. 885, 8 L. R. A., N. S., 255. What the amount shall be must, of course, be determined by the jury, after careful regard to the nature of the case and to its special facts and circumstances. The reasonable cost of repairs may in some cases indemnify the party entitled to compensation, but the jury are not necessarily confined to this narrow limit, but, as the court stated in this case, may consider that as an element, in connection with any other facts which will enable them to ascertain the true amount.

We have carefully examined the case, and find no error in the rulings of the court to which the other exceptions were taken.

No error.

The Ordinary Measure of Damages for Failure by a Seller of Goods to deliver them as agreed is the difference, if any, between the contract price agreed upon and their highest market price at the place and time agreed upon for the delivery: Marshall v. Clark, 78 Conn. 9, 112 Am. St. Rep. 84, and see cases cited in the cross-reference note thereto. As to the right of the vendee to recover for loss of profits, see Roberts, Wicks & Co. v. Lee, 125 Ky. 709, 128 Am. St. Rep. 265;

Harper Furniture Co. v. Southern Express Co., 148 N. C. 87, 128 Am. St. Rep. 588.

The Measure of Damages in an Action for Breach of Warranty on the sale of a chattel is, according to Berry v. Shannon, 98 Ga. 459, 58 Am. St. Rep. 313, the difference between the actual value of the article sold and its value if it had been as warranted: Berry v. Shannon, 98 Ga. 459, 58 Am. St. Rep. 313. See, also, Meyer v. Green, 21 Ind. App. 138, 69 Am. St. Rep. 344.

SAMPLE v. JOHN L. ROPER LUMBER COMPANY.

[150 N. C. 161, 63 S. E. 731.]

ESTOPPEL—Claimants Under Common Source of Title.—The general rule which precludes parties litigant from questioning the title under which they both claim is not in strictness an estoppel, but a rule of justice and convenience adopted by the courts to relieve parties from the necessity of going back of the common source and deducing title from the state. (p. 904.)

ESTOPPEL—Claimants Under Common Source of Title.—The rule that prevents parties litigant from questioning the title under which they both claim is subject to the exception that a defendant may show an outstanding title superior to the common source, and that he has acquired it. (p. 904.)

ESTOPPEL—Claimants Under Common Source of Title.—One who has purchased standing timber and has taken a deed therefor in recognition at the time of the grantor's claim to the fee may show in an action against him by the grantor for wrongful cutting of timber, that there was an outstanding superior title which he has acquired. (pp. 904, 905.)

LIMITATION OF ACTIONS.—A Continuous Trespass, within the meaning of the statute requiring an action therefor to be brought within a certain time from the original trespass, refers to trespasses caused by structures permanent in their nature, and does not refer to separate trespasses day by day for cutting timber. (p. 905.)

Aydlett & Ehringhaus, for the plaintiffs.

W. M. Bond, for the defendant.

¹⁶² HOKE, J. The complaint alleged, and there was evidence tending to show, that plaintiffs, on September 12, 1899, had sold to defendant the timber of given dimension to wit, measuring fourteen inches at the stump, standing on a large body of land in Tyrrell county, at a contract price of nineteen hundred dollars, with a right to cut and remove the same within a specified time—three years, with privilege of two years more by paying interest—and with the right further, to cut timber below the dimension given for the purpose of constructing tramways, etc., necessary and required for the cutting and removing of said timber; the defendant had entered on said land and had cut and r

moved the timber specified and had paid the contract price therefor.

The complaint further alleged, and there was evidence tending to show, that defendant was occupying said land under and by virtue of the contract, and had cut a large quantity of timber standing on same below said dimension and not covered and contained in the contract, causing much spoil and injury, to plaintiff's damage.

The contract on its face tended to show that plaintiffs, at the time of the sale, had deeds for the land and covenanted that they were the owners of the timber sold, and that they would warrant and defend the title to same, etc.

¹⁶³ Defendant moved to dismiss the action, on the ground that plaintiffs had shown no evidence of title to the land that would justify a recovery for damages done thereto by cutting timber not embraced within the contract stipulation. Motion overruled, and defendant excepted. Defendant contended, further, that the testimony tended to show a continuing trespass; and inasmuch as a part of the wrongful cutting alleged was shown to have been more than three years before the action was commenced, the entire wrong was brought within the protection of the statute of limitations. This position was overruled, and defendant excepted.

In the course of the trial defendant offered in evidence grants covering all or a portion of the land in question, issued to John Gray Blount, bearing date 1796; and, further: "2d. Deeds made in 1904, registered same year in said county, from the only heirs at law of John Gray Blount, who died about 1836, said deeds conveying the said lands to certain parties, and mesne conveyances from the said grantees, made in 1904, to defendant company, said conveyances being properly registered in Tyrrell county during the year 1904."

It was admitted by the plaintiffs that the said grant and deeds covered part of the lands mentioned in the contract, and that the parties who signed the said deeds to the grantees of the defendant company were, at the time of executing same, the only living heirs at law of John Gray Blount, who died many years before; that the said deeds were registered in said county after the said cutting of timber had commenced and before it was ended.

The court ruled that said title in the defendant was immaterial, and that, the defendant having entered these lands under the contract, the defendant could not deny the plaintiffs' title to the timber cut by the introduction of these deeds. Defendant excepted.

There was a verdict for two thousand dollars damages for wrongful cutting of timber on the land within three years next before action brought, and excluding any recovery for injury prior to that time by reason of the statute of limitations. Judgment on the verdict for plaintiffs. Defendant

appealed, and assigned for error: ¹⁶⁴ 1. The failure to dismiss the action as on judgment of nonsuit; 2. The ruling that the evidence offered was irrelevant and incompetent; 3. The refusal to hold that all recovery was barred because a part had been more than three years, and the evidence showed that the cutting was continuous.

In *McCoy v. Cape Fear Lumber Co.*, 149 N. C. 1, 62 S. E. 699, this court held, in effect, that where one having a deed for real property, or, being in possession, claiming to own the same in fee, conveys or grants to another a lesser estate in the property or a restricted interest therein, and there is evidence tending to show that the grantee took in recognition of the grantor's right as the true owner, the parties to such a transaction, in any litigation between them involving the title, come within the principle very generally recognized, that when it appears that both parties to a suit claim under the same title, neither, as a general rule, shall be heard to deny or question the validity of the common source of their respective claims. In the present case there is on the face of the instrument evidence which tends to show that the plaintiffs, claiming to be the owners of the property sold to the defendant a restricted interest therein, to wit the standing timber of given dimension, and that defendant bought the timber in recognition at the time of plaintiff's claim as owner of the land, and there was no error, therefore, in denying motion for nonsuit, made by defendant on the ground that there was no evidence tending to sustain plaintiff's claim of title. In the same case (*McCoy v. Cape Fear Lumber Co.*, 149 N. C. 1, 62 S. E. 699) the court referred to several well-considered decisions upholding the position that this principle, which prevented parties litigant from questioning the validity of the title under which they both claimed, was not in strictness an estoppel, but "a rule of justice and convenience, adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back of the common source and deducing title from the state." ¹⁶⁵ and that it was subject to exception that a defendant was allowed to show there was a title outstanding superior to this common source, and that he had acquired it: *Christenbury v. King*, 85 N. C. 229. In this case *Ashe, J.*, for the court, said: "It is well settled as an inflexible rule that where both parties claim under the same person neither of them can deny his right, and then as between them the elder is the better title and must prevail. . . . To this rule there is an exception when the defendant can show a better title outstanding and has acquired it."

Applying the principle indicated in this exception, we are of opinion that there was error in holding that the evidence offered, tending to show that defendant had acquired the title of John Gray Blount, was irrelevant and immaterial.

Such a position would be to give the general rule relied upon by plaintiffs to establish their title the force and effect of a strict estoppel; whereas it yields to the exception stated, that defendant is allowed to show a better title outstanding, and that he has acquired it, and if to a part of it he should be allowed to reduce the recovery by such part. It may be that, notwithstanding this proposed testimony, the plaintiffs' title may prove the true one, but we think the evidence offered tended at least to show that defendant had brought itself within the recognized exception as to part of the land, and it was error to exclude it or to hold that it had no significance. It may be well to note that this is not an action to recover possession of the land. It may be that in such case the defendant, having entered under plaintiffs' permit and license, would be required to surrender possession so acquired before asserting its claim; but this is an action for damages for wrongfully cutting timber, and, if defendant has in fact the true title, to allow recovery by plaintiffs would be to hold defendant responsible for cutting its own timber, a result that should not be sanctioned or allowed.

There is no merit in defendant's exception as to the statute of limitations. True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass and not thereafter; but this term, "continuing trespass," was no doubt used in reference ¹⁰⁶ to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of the wrong. In this case every wrong invasion of plaintiffs' property amounted to a distinct, separate trespass, day by day, and for any and all such trespasses coming within the three years the defendant is responsible.

For the error heretofore indicated there should be a new trial of the issues, and it is so ordered.

New trial.

Claimants Under a Common Source of Title are discussed in the note to *Rice v. St. Louis etc. Ry. Co.*, 47 Am. St. Rep. 75. While the general rule seems to be that where both parties to an action to recover possession of real property claim under a common source of title, neither is in a position to impeach it (*Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; note to *Gilliam v. Bird*, 49 Am. Dec. 383), one of two grantees of a common grantor may assert as against the other a title different from or paramount to that derived from the common grantor: *Philadelphia Brewing Co. v. McOwen*, 76 N. J. L. 636, 131 Am. St. Rep. 664.

WILLIS v. WHITE.

[150 N. C. 199, 63 S. E. 942.]

RAILROAD—Damages to Land Owner from Construction.—A contractor in constructing the track and roadbed of a railroad over private property, pursuant to the plans made by the company's engineers, is under the legal liability to use all reasonable efforts to protect the land and the crops growing thereon from damage, and for a negligent failure to meet this standard of duty both he and the railroad company are liable. (p. 907.)

RAILROAD—Liability of Contractor to Land Owner.—An independent contractor who has constructed a track and roadbed over private property for a railroad company, according to the plans made by its engineers, is not liable to the land owner for damages to his land and crops from improper drainage occasioned by the error of the engineers in fixing the size of a drain-pipe, which damages accrue after the completion of the work. (pp. 908, 909.)

RAILROAD—Liability of Contractor to Land Owner.—An independent contractor who has constructed a track and roadbed over property for a railroad company, in accordance with the plans of its engineers, is not liable for permanent damages to the land owner accruing after he completes the work and turns it over to the company. (p. 909.)

A MARRIED WOMAN may Maintain an Action Without Joining Her Husband for damages to her land occasioned by the improper construction of a railroad. (p. 910.)

The plaintiff, a married woman, conveyed to the Norfolk and Southern Railroad Company a right of way over her land upon which to construct its roadbed and track. The defendant contracted with the railroad company to construct the roadbed and track in accordance with plans and specifications made by the engineers of the company. The roadbed crossed a ditch in the plaintiff's field. The engineers determined the size of the drain-pipe to be placed under the roadbed at this point, and the defendant built according to the plans and specifications. The plaintiff alleged that the defendant removed the fence at the point of entrance to the land, and failed to construct cattle-guards and to provide means for keeping cattle off the land upon which a crop was growing, by reason of which cattle injured the crop; that defendant, by negligence in constructing the road, stopped up the ditches on the land by reason of which "it is now flooded when it rains, on account of the drains being stopped up and cut off," that the land is "sogged and sour" and its fertility destroyed, and that the injury is permanent. The defendant denied the allegations of the complaint, and set up as a bar to the action a release by the plaintiff's tenant for all claim of damages to the crop.

The evidence tended to show negligence on the part of the defendant in failing to protect the growing crop, and its consequent injury by cattle. There was also evidence that

the land was injured by reason of defective drainage. The defendant moved for a nonsuit, his motion was denied, and he excepted.

Among other instructions the court gave the following, to which the defendant excepted: "By having sold the defendant a right of way through her land, that carried with it the right to erect the railroad over her land, but in doing so the parties constructing it are required to use every reasonable means of protecting the land through which the railroad is constructed, and if the parties constructing it negligently fail to use such means as were reasonable and proper for protecting the land it would be held liable in damages. You will consider the evidence. Was the land flooded, and if so, could that have been prevented by the use of ordinary care on the part of the defendant in constructing the road? Could they have made arrangements to have taken off that water by the exercise of reasonable care?" The court also instructed the jury that if they found the issue in the affirmative, the measure of damages would be the difference in the value of the land with the roadbed constructed as it now is and the value of the land had the road been skillfully constructed, to which the defendant excepted. There was a verdict and judgment for three hundred and twenty-five dollars permanent damages. The defendant appealed.

R. A. Nunn, for the plaintiff.

Moore & Dunn, for the defendant.

202 CONNOR, J. We concur with his honor's view in regard to the measure of duty which the railroad company owed to the plaintiff in constructing its roadbed and track over her land. We further concur with him in the opinion that when defendant contractor entered upon the land for the purpose of constructing the roadbed and track, pursuant to the plans and specifications made by the engineers, it came under a legal liability to use all reasonable efforts to protect plaintiff's land and the crops growing thereupon from damage, and for negligent failure to meet this standard of duty both the railroad and defendant are liable. There was ample evidence to sustain the plaintiff's allegation and the verdict of the jury in this respect. The defendant's motion for judgment of nonsuit, therefore, was properly denied.

The question presented upon defendant's exceptions pointed to the third issue are much more serious. We do not find any evidence of negligence on the part of defendant in performing the work, constructing the roadbed, in accordance with the plans and specifications furnished to it by the company's engineer. The only evidence upon this

phase of the case comes from plaintiff's witness, Colvin, who says that he was the engineer. "White & Co. had nothing to do with the plan and diagram; they had to build the roadbed as I directed. I was in charge of that section and I represented the railroad company; they built this according to the lines I laid out. I put the size and position of the pipes on the map, and they put it in according to that. White & Co. had no authority over me. If there is any defect in the ditches I should say it was due to the plans of the railroad. They carried out the general plans as I made them." It is apparent, therefore, upon plaintiff's evidence—and there is none to the contrary—that whatever permanent damage plaintiff's land sustained is due to the mistake of the engineer in fixing the size of the drain-pipe. It is alleged in the complaint that defendant began work in June, 1906, and concluded January 1, 1907. It is manifest that for all damage sustained by injury to the crop of 1906 plaintiff has recovered in this action on the first and second issues. It is in evidence that plaintiff sued the ²⁰³ railroad company in another action for "damage and injury to crops growing on the land," and her tenant recovered pay from defendant for his interest in the crops of 1906. It is clear that full compensation has been recovered for all damage sustained prior to the institution of this action May 29, 1907. Is defendant, an independent contractor, liable for permanent damage to the land by reason of the mistake of the engineer of the railroad company in fixing the size of the drain? It was the absolute duty of the company to provide a sufficient drain through its roadbed and thereby avoid ponding water upon plaintiff's land. There is no question of negligence involved. The principle controlling the liability of the railroad is laid down by Shepherd, C. J., in *Staton v. Norfolk etc. R. R.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. Applied to this case, the railroad was entitled to construct its roadbed across plaintiff's land, but in doing so was not entitled to close up a ditch draining the land. It was under an absolute duty to provide means sufficient to permit the water to flow under or through the roadbed, as it did when the right of way was granted. For a failure to make such provision it was liable to an action when substantial damage was sustained—that is, the cause of action accrued from that time, and not from the time the roadbed was constructed: *Staton v. Atlantic Coast L. R. R.*, 147 N. C. 428, 61 S. E. 455, 17 L. R. A. N. S., 949; *Ridley v. Seaboard etc. R. R.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. The cause of action, therefore, is not for a trespass committed in building the road, but for injury caused by maintaining a nuisance whereby plaintiff's land is "sogged and sour." For this the plaintiff may.

as against the railroad company, recover in one action permanent damages, for the reason that the structure is permanent. The road, upon paying the judgment, acquires an easement to maintain its roadbed and track for the reasons set forth in Ridley's case (118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708) and many others, including *Beasley v. Aberdeen etc. R. R.*, 147 N. C. 362, 61 S. E. 453; *Revisal*, sec. 394. If defendant be liable at all for constructing the roadbed according to the plans and specifications furnished by the railroad company's engineers, it certainly cannot be so for any other damage than accrued prior to the completion of the work and delivery to the owner. There is much doubt whether, in the absence of any negligence in construction, a builder or contractor is liable to third parties for damages caused by mistake of ²⁰⁴ the architect or engineer. In *Pearson v. Zable*, 78 Ky. 170, a municipal corporation prescribed the plan for making street improvement, and employed defendants to perform the work, which resulted, by reason of the defective plan, in injury to an owner of adjoining lots. The court held that the town was liable, but, in respect to the contractor, said: "It is not alleged that the appellants did not grade the street in all respects as required by the ordinance and contracts, and we must therefore assume that they did. What they did having been done under authority of law, they are not responsible for injury resulting to the appellee in consequence of the failure to provide an outlet for the water accumulating in the street, or for the consequences resulting from it. It was not their duty, but the duty of the city, to provide plans for the work and to guard against unnecessary injury to the property." The distinction between liability for negligent construction and for injuries resulting from errors of the engineers is stated by the editor of the *American and English Encyclopedia of Law*, volume 16, page 208. The railroad company is not liable for injuries caused to persons or property by the wrongful act of the contractor "for failure to provide drains in constructing the railroad, whereby injuries result before the road is turned over to the railroad company. . . . An independent contractor is not liable, as a general rule, for injuries to a third person accruing after his completion of the work and its acceptance by the employer." There are exceptions to the general rule, but the present case does not come within them: *Curtin v. Somerset*, 140 Pa. 70, 23 Am. St. Rep. 220, 21 Atl. 244, 12 L. R. A. 322. It is manifest that upon the evidence in this case the only damage sustained by the plaintiff is caused by the failure of the engineers to provide for a drain of sufficient size. There is, so far as we can perceive, no evidence that the land was "sogged and soured" at the time the road was

completed and turned over to the company. No cause of action, therefore, accrued against the defendant, because there was no trespass on her property and no substantial injury sustained at that time. For damages resulting thereafter the company was liable for maintaining a nuisance resulting in injury. Under the common-law system of procedure the plaintiff's action would be trespass on the case and not *quare clausum fregit*.

205 Again, if defendant was liable at all, the damages could be assessed only to the time of the trial. The reasons upon which permanent damages are allowed to be assessed against a railroad company, or any other corporation having the right of eminent domain, do not apply to the defendant. It can acquire no easement or right to flood plaintiff's land or to continue the obstruction to the flow of the water, nor has it any right or power to go upon the company's roadbed and enlarge the drain. Its connection with the property came to an end when the work was completed. Its wrongful act, if wrongful at all, was in constructing the roadbed with an insufficient drain. It has no power to maintain or abate the nuisance. For injuries sustained by continuing the conditions injurious to plaintiff the railroad company alone is liable. If a contractor who constructed a building on the land of another according to plans and specifications is to be held liable to all who may come into the house, or all adjoining land owners, for injuries accruing after the completion of the building and its acceptance by the owner, as said by Paxson, C. J., in *Curtin v. Somerset*, 140 Pa. 70, 23 Am. St. Rep. 220, 21 Atl. 244, 12 L. R. A. 322 "it would be difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions." We incline very strongly to the opinion that if a motion had been made by defendant for judgment of nonsuit on plaintiff's second cause of action it should have been allowed. The testimony sent up is not very full, and we direct a new trial upon the third and fourth issues.

We concur with his honor's ruling in regard to the right of the feme plaintiff to maintain the action without joining her husband: *Revisal*, sec. 408. We also concur with his ruling in regard to the effect of the other actions brought by the tenant and the plaintiff.

The appellant will pay costs of this court, exclusive of printing.

Partial new trial.

The Liability of a Railway Company for the acts of an independent contractor constructing its roadbed is discussed in the note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 411. As to the liability of the railway company where it obstructs, by its roadbed or

its embankments, the flow of water to the injury of land owners, see *Davenport v. Norfolk etc. R. R. Co.*, 148 N. C. 287, 128 Am. St. Rep. 599; *Eagan v. Central Vermont Ry. Co.*, 81 Vt. 141, 130 Am. St. Rep. 1031; *Hughes v. Chicago, B. & Q. Ry. Co.*, 141 Iowa, 273, 133 Am. St. Rep. 164.

SLOAN v. HART.

[150 N. C. 269, 63 S. E. 1037.]

LESSOR—Delivery of Possession to Lessees.—A lessor impliedly covenants to give his lessees possession at the beginning of the term, and, notwithstanding his good faith, becomes liable to them for actual damages if a prior tenant wrongfully holds over. (pp. 912, 913.)

LESSOR—Delivery of Possession to Lessees.—For a breach of the implied covenant of a lessor to put his lessees in possession at the beginning of the term, the entire damages are to be recovered in a single action, and one recovery will bar any future action. (p. 914.)

LESSOR—Delivery of Possession to Lessees.—The measure of damages for a lessor's breach of his implied covenant to give his lessees possession at the beginning of the term is the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved. By rental value is meant, not the probable profits that might accrue to the lessee, but the value, as ascertained by proof of what the premises would rent for. (p. 915.)

Action for damages for breach of a lease contract. The court submitted these issues: 1. "Were the plaintiffs injured by the breach by defendants of their contract, as alleged in the complaint?" 2. "What damage, if any, are plaintiffs entitled to recover?" 3. "Did the defendants have the right to rent the stores to the plaintiffs according to the lease offered in evidence?" The jury answered the first issue "Yes," the second issue "Three hundred and seventy-three dollars and thirty-one cents," and the third issue "No." The defendants appealed from the judgment.

Robert Ruark, for the plaintiffs.

E. K. Bryan, for the defendants.

271 BROWN, J. The admitted facts are that on May 18, 1906, the defendants, through their agent, leased in writing to plaintiffs two stores, 19 and 21 South Front street, in the city of Wilmington, the term to begin October 1, 1906, and expire September 30, 1909, at a rental of sixty-six dollars and sixty-six and two-thirds cents per month, payable in advance. The premises had been theretofore leased to Josh Simon, whose

term expired September 30, 1906, but in his lease are these words: "It is further agreed that the owner or agents will have the right to place rent cards, 'For Rent,' on front of the house thirty days before the expiration of this lease, provided I do not agree to hold this property for another year." Simon refused to vacate on October 1st, and defendants endeavored to eject him by proceedings before a justice of the peace. Being unsuccessful, they appealed to the superior court, where the cause is now pending. The plaintiffs rented other stores, and bring this action to recover damages. The court charged the jury that it was the duty of the defendants to put the plaintiffs in possession on the date fixed for the beginning of the term, to which defendants excepted.

1. It is unnecessary to consider seriatim the many assignments of error, as we are of opinion that upon the admitted facts the plaintiffs are entitled to recover actual damages, and that a new trial is necessary upon that issue for error in the charge.

The appeal presents a question which has never been decided before in this state and upon which the courts of other states have differed materially in their judgments, and which is tersely expressed in the very able brief of the learned counsel for plaintiffs, as follows: "Did the lessors impliedly covenant with the lessees that the leased premises would be open to entry by the lessees at the date fixed for the beginning of the term?"

All authorities are agreed that if Josh Simon, the prior tenant, held over rightfully under the terms of his lease, the defendants would be liable, for to hold otherwise would be giving to the defendants the benefits of their own wrong.

²⁷² If defendants' failure to put plaintiffs in possession was caused by a wrongful holding over of the former tenant, then the authorities are in direct conflict.

If there was a finding that the plaintiffs had notice at the date of their lease of the terms of Simon's lease, we might be inclined to the opinion that nothing short of an express covenant to put the plaintiffs in possession at the date agreed would render defendants liable for damages for Simon's failure to vacate.

In the absence of evidence of such notice, and assuming for the purposes of this case only that the holding over of the former tenant is wrongful, we are persuaded by reason and authority to hold that when plaintiffs' lease was executed, on May 18th, the lessors impliedly covenanted to put the plaintiffs in possession on October 1st, and that there has been an admitted breach of that covenant, for which the lessors are liable in actual damages, notwithstanding that they acted in good faith. The leading case which holds that there is no implied covenant on the part of the lessor is the New York

case of *Gardner v. Keteltas*, 3 Hill, 330, 38 Am. Dec. 637. This case, which by some text-writers is stated to have declared the "American rule," has been followed by later decisions of the New York courts. An examination of the case, however, shows that there existed in New York at the time a statute such as does not exist in North Carolina, and the conclusion of the court appears to have been to some extent based upon that statute. However that may be, the New York case has been followed by respectable courts, without adverting to any peculiar statutory enactments in their respective states.

Investigation and reflection leads us to the conclusion that the decisions by the courts of Great Britain, made as early as 1829, are as well supported by authority and more strongly sustained by reason and abstract justice than is the judgment of the New York court.

The first of these decisions is summed up with quaint terseness by Baron Vaughan: "The court were all clearly of opinion that he who lets agrees to give possession, and not merely to give a chance of a lawsuit."

²⁷³ Beginning with that case of *Coe v. Clay*, 15 Eng. Com. L. 492, what is known as the "English rule" was announced—that is, that in the absence of express provision in the lease, the lessor impliedly covenants with the lessee that the premises shall be open to entry by the lessee at the time fixed for the beginning of the term. This case has been followed by cases of *Jenks v. Edwards*, 11 Ex. 775, *Hertzberg v. Beisenbach*, 64 Tex. 262, *L'Hussier v. Zallee*, 24 Mo. 13, *Reiger v. Welles*, 110 Mo. App. 166, 84 S. W. 1136, *Hughes v. Hood*, 50 Mo. 350, *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107, *Vincent v. Defield*, 98 Mich. 84, 56 N. W. 1104, *Cohen v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572, *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A., N. S., 1127, 14 Ann. Cas. 399, and *Huntington E. P. Co. v. Parsons*, 62 W. Va. 26, 125 Am. St. Rep. 954, 57 S. E. 253, 9 L. R. A., N. S., 1130.

The theory of the New York court is that if the lessee is prevented from taking possession by a tenant wrongfully holding over it is not the duty of the landlord to oust the wrongdoer, because the right to possession at the end of the outstanding term is in the lessee and not in the lessor, and that, therefore, when the landlord has given the tenant the right to possession he has done all the law should require him to do as against third persons not claiming under prior and superior rights derived from him: *Gardner v. Keteltas*, 3 Hill, 330, 38 Am. Dec. 637.

This decision has been followed in the states of New Hampshire, Maryland, Vermont, Illinois and Pennsylvania.

The theory of the English courts, and those of this country following their decisions, is that when a lease is made, the

beginning of which is fixed at some future date, it is within the contemplation of the parties and a part of their understanding, without which the lease would not have been made. that when the time comes for the lessee to take possession, according to the lease, the lessor shall have the premises open to the entry of the lessee, and that the latter is not liable for rent until he is afforded an opportunity to enter, and is under no obligation to maintain an action against a tenant holding over to recover possession.

This is the ruling of the courts of Missouri, Alabama, Indiana, Michigan, California, Arkansas, Nebraska and Texas. The ²⁷⁴ English rule appears to us to be better founded in reason and more consonant with good conscience, sound principle and fair dealing.

It is unnecessary to discuss the reasons pro and con, since they are fully given in the opinions of the several courts cited. The implied covenant referred to, however, does not extend beyond the time when the lease is to commence. If, after the time when the lessee is entitled to have the possession, according to the terms of the lease, a stranger trespass on or take possession of and hold the leased premises, that is a wrong done to the lessee, for which the lessor cannot be held responsible: *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107.

2. We come now to consider the question, What damages are the plaintiffs entitled to recover? The entire damages whatever they may be, for the breach of the implied covenant are to be recovered in this action, for a recovery in this will bar any future action. In that respect it differs from those cases wherein the servant sues the master for his wages when he has been wrongfully discharged in violation of his contract of employment. Then the servant may wait until the contract period has expired and sue for the whole amount, or he can bring repeated actions on each wage as it falls due under the contract: *Jarrett v. Self*, 90 N. C. 478; *Smith v. Cashie & Chowan R. & Lumber Co.*, 140 N. C. 375, 53 S. E. 233, 5 L. R. A., N. S., 439.

The failure to put the lessee in possession was one single act of omission which constituted a breach of the contract of lease and excuses him from tendering the rent. Therefore the damage is susceptible of immediate assessment, as the lapse of time is not necessary to develop it. It is a principle in the law of contracts, as well as torts, that where the right of a party is once violated the injury immediately ensues and the cause of action arises. The recovery will then embrace such legal damages as may be recovered for the breach. In its application to a tort the rule is very clearly stated in *Mast v. Sapp*, 140 N. C. 533, 111 Am. St. Rep. 864, 53 S. E. 350, 5 L. R. A., N. S., 379, 6 Ann. Cas. 384.

In assessing damages in cases of this character the principle of *Hadley v. Baxendale*, 9 Ex. 341. is upheld by the supreme court of Connecticut, as well as by the other courts that have passed on the question. This excludes the assessment of speculative ²⁷⁵ or consequential damages, and confines the recovery to such actual damages as may be reasonably supposed to have been within the contemplation of the parties at the time the contract was made. The measure of damages appears settled by practically all the authorities to be the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved: *Cohen v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A., N. S., 1127, 14 Ann. Cas. 399. In these cases practically all the precedents are collected.

For purpose of illustration only, we note that there is some evidence that the stores leased were worth in the market one hundred dollars per month. If that fact be established, the plaintiffs would be entitled to recover the present value of the difference between the rent they contracted to pay and the rent at one hundred dollars per month for the full term of the lease.

By rental value is meant, not the probable profits that might accrue to the plaintiffs, but the value, as ascertained by proof, of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined.

The learned counsel for defendants properly conceded this rule to be correct, but excepts to the charge of the court as to special damage because there is no special damage proven.

In this particular the judge below erred. Such special damage as may have been reasonably within the contemplation of the parties are allowed in this class of cases, but they must be both pleaded and proven before the court can submit them to the consideration of the jury.

They are required to be pleaded, so as to give notice of the character of plaintiff's claim, and they must be proven as pleaded: *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A., N. S., 1127, 14 Ann. Cas. 399. There is no allegation in the complaint of any special damage, and no evidence to support the claim. His honor therefore erred in submitting the question of such damages to the jury.

For this error we award a new trial upon the second issue.

Partial new trial.

Let each party pay his own costs of the appeal, including cost of printing, and the remainder of costs of appeal is to be equally divided.

LANDLORD'S DUTY TO PUT TENANT IN POSSESSION.***I. General View of the Law on the Subject, 916.****II. Discussion of the Two Irreconcilable Rules Followed in This Country.****a. The English Rule of Placing the Tenant in Possession, 917.****b. The American Rule of Merely Giving the Tenant a Right of Possession, 920.****I. General View of the Law on the Subject.**

The authorities relating to the subject of this note, though comparatively few in number, are in irreconcilable conflict. In other words, there are two conflicting rules on the subject, which are commonly known as the English rule and the American rule. According to the English rule, it is the duty of the landlord to put his tenant into the possession of the demised premises, while according to the American rule the landlord fully performs his duty if he gives the tenant a right to the possession of the premises. The weight of authority is in favor of the American rule, but some of the more recent decisions have been declared in favor of the English, on the ground that it appears to be the more sound doctrine, although the judges rendering the opinions do not seem to deem it necessary to state the reasons which make it so. In the investigation of this subject it is surprising to observe the remarkable similarity of some of the decisions in respect to the language used.

From the paucity of cases on the subject it is apparent that the question is still one of original impression in many of the states. Indeed, in most of the states which have declared which rule they will follow, the decision of the court has been based merely on the proposition whether they will follow the rule laid down in *Coe v. Chy.* 5 Bing. 440, 3 M. & P. 57, 7 L. J. C. P., O. S., 162, 30 R. R. 625 or that laid down in *Gardner v. Keteltas*, 3 Hill, 330, 38 Am. Dec. 637, without adverting to the reasons pro or con as to either of the rules.

The gist of the reason advanced in favor of the English rule is that under the American rule, in case the demised premises are in the possession of a person wrongfully holding over or of some trespasser at the beginning of the tenant's term, and the tenant is forced to resort to litigation to oust the one in such possession, all he obtains by his lease is a chance for a lawsuit. It is conceded that under the English rule it becomes the duty of the tenant to maintain his possession at his own expense after once being placed in possession. It is also conceded that if the premises are withheld by the landlord or someone holding a paramount title, that the tenant has a right of recovery against the landlord for a breach of his covenant of quiet possession. It must be conceded also that if the premises are withheld from the possession of the tenant by reason of the wrongful act of a trespasser or of some former tenant who wrongfully holds over, the tenant has a right to recover his damages from such person. In other words, the tenant is protected, no matter in what manner the possession is withheld from him. It is, of course, true that the tenant will

***REFERENCES TO MONOGRAPHIC NOTES.**

Covenant for quiet enjoyment: 53 Am. St. Rep. 118.

Right of entry of landlord after termination of lease: 69 Am. Dec. 754.

When tenant is guilty of holding over: 70 Am. St. Rep. 533.

Measure of damages recoverable by lessee who is prevented from taking possession or is afterward evicted by lessor: 100 Am. Dec. 423.

suffer delay in obtaining possession if he is forced to sue for it, but so would the landlord under the same circumstances. It is not, we believe, customary for a person who contracts in respect to any subject to insure the other party against lawsuits. Indeed, both the landlord and tenant have a right to presume that a former tenant will vacate at the end of his term, and that no one will unlawfully prevent the new tenant from going into possession. To sue or be sued is a privilege or misfortune which may occur to anyone. We believe that the American, or New York rule as it is sometimes called, under which it is held that there is no implied covenant that the premises shall be open to entry by the tenant at the time fixed for the beginning of the term, but merely that the tenant shall have a right to the possession at that time is more in accord with substantial justice to both the landlord and tenant, and in accordance with the general course of business dealings in respect to insurance against the chances of a lawsuit in a court of justice.

II. Discussion of the Two Irreconcilable Rules Followed in This Country.

a. **The English Rule of Placing the Tenant in Possession.**—Under what is commonly called the English rule, and which is followed in this country by the courts of a considerable number of the states, it is held, in the absence of stipulations to the contrary, that there is an implied covenant in a lease, on the part of the landlord, that the premises shall be open to entry by the tenant at the time fixed by the lease for the beginning of the term: *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107; *Rose v. Wynn*, 42 Ark. 257; *Cohn v. Norton*, 57 Conn. 480, 18 Atl. 595, 5 L. R. A. 572; *Spencer v. Burton*, 5 Blackf. 57; *Clark v. Butt*, 26 Ind. 236; *Hammond v. Jones*, 41 Ind. App. 32, 83 N. E. 257; *L'Hussier v. Zallec*, 24 Mo. 13; *Hughes v. Hood*, 50 Mo. 350; *Kean v. Kolksehneider*, 21 Mo. App. 538; *Rieger v. Welles*, 110 Mo. App. 173, 84 S. W. 1136; *Kerr v. Whitaker*, 3 N. J. L. 670; *Albey v. Weingart*, 71 N. J. L. 92, 58 Atl. 87; *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A., N. S., 1127, 14 Ann. Cas. 399; *Sloan v. Hart*, 150 N. C. 269, ante, p. 911, 63 S. E. 1037, 21 L. R. A., N. S., 239; *Hertzberg v. Beisenbach*, 64 Tex. 262; *Coe v. Clay*, 5 Bing. 440, 3 M. & P. 57, 7 L. J. C. P., O. S., 162, 30 R. R. 699; *Jinks v. Edwards*, 11 Ex. 775, 4 R. R. 303.

A dictum to the same effect is found in *Schreiner v. Stanton*, 26 Wash. 563, 67 Pac. 219. In *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952, it was held in an action for breach of a lease that, where the landlord knew at the time the lease was made that he would not be able to deliver possession as required by the lease, and that the tenant intended to use the premises for a certain kind of business and to prepare to commence business at the beginning of the term, he is liable for all damages which could be reasonably considered to be the natural and proximate result of the breach.

The implied covenant does not, however, extend to any period beyond the day when possession is to be delivered. If after that time a stranger trespasses or obtains possession or withholds it from the tenant, his remedy is against the stranger and not against the landlord: *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107; *Sloan v. Hart*, 150 N. C. 269, ante, p. 911, 63 S. E. 1037, 21 L. R. A., N. S., 239; *Hertzberger v. Beisenbach*, 64 Tex. 262. A lease of premises to one tenant before the expiration of the lease to a tenant in possession

at the time, but which is not to take effect until the expiration of the term of the tenant in possession does not divest the landlord of such right of possession as is necessary for him to maintain proceedings to oust the former tenant in case he holds over: *Vincent v. De field*, 98 Mich. 84, 56 N. W. 1104. The landlord may, however, protect himself against the uncertainties of a tenant in possession wrongfully holding by not agreeing to deliver the possession until the premises are vacated by such tenant. Thus, where a unilateral contract to lease provided that the term should commence "from the date of occupancy, which shall commence as soon as vacated by the present occupants," and the landlord was not able to eject them as soon as contemplated, he is not liable to the new tenant for a failure to deliver possession prior to such vacation by the tenants in possession: *Rhodes v. Purvis*, 74 Ark. 227, 85 S. W. 235. Of course, where the landlord expressly covenants to put the tenant in possession at a specified time, he is liable for a breach of his covenant where a trespasser goes into possession, and thereby prevents the tenant from obtaining possession: *Snodgrass v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601. The tenant who is prevented from occupying the leased premises by a wrongdoer may, if he wishes, sue the wrongdoer to recover the possession and damages for the detention, but if he does so he cannot afterward resort to his remedy against the landlord: *Hughes v. Hood*, 50 Mo. 350.

In *King v. Reynolds*, 67 Ala. 229, 42 Am. Rep. 107, which appears to be the leading case in this country affirming the English rule, the court, after citing some of the cases affirming the American rule, said: "With all due respect for the eminent jurists by whom the decisions in [*Cozens v. Stevenson*] 5 Serg. & R. [421], and in [*Gardner v. Keteltas*] 3 Hill [330, 38 Am. Dec. 637], were pronounced, it appears to us that in one phase of the question the argument is faulty. The principle applicable to the case of the lessee's eviction by the lessor himself, or by a title paramount to that of the lessor, certainly rests on impregnable grounds. Such eviction is a breach of the implied covenant in every lease in general terms for quiet enjoyment, and at once bars the lessor's right to recover rent, and confers on the lessee a right of action, for the lessor's breach of covenant. And when the lessee cannot maintain his possession, in consequence of the lessor's want of title to uphold his, the lessee's possession, the latter need not wait for eviction, but may yield possession, and sue his lessor for the breach—he taking on himself the onus of proving the inability of the lessor to protect his possession by a valid title. And so, when there is no impediment to the possession at the time fixed by the terms of the lease for the lessee to take possession, it is no breach of the covenant of quiet enjoyment if a trespasser without title subsequently enter and evict the lessee in whole or in part. The lessee must meet such intrusions as that. But how about the implications at the time—the very moment—fixed by the terms of the lease for the lessee to take possession? Who is responsible if there is a trespasser, or tenant holding over, then in possession? Must the lessor clear the possession, or is this duty cast on the lessee? . . . The authorities being in conflict, how does the question stand on principle? As was said in *Coe v. Chay*, 5 Bing. 413 M. & P. 57, 7 L. J. C. P., O. S., 162, 30 R. R. 699—decided long before *Gardner v. Keteltas* was—one who accepts a lease expects to

enjoy the property, not a mere chance of a lawsuit. A lease for a year, or term of years, is not a freehold. It is a chattel interest. The prime motive of the contract is, that the lessee shall have possession; as much so, as if a chattel were the subject of the purchase. Delivery is one of the elements of every executed contract. When a chattel is sold, the thing itself is delivered. When realty is the subject, still there must be livery of seisin. Formally, parties went upon the land, and there symbolical delivery was perfected. Now, the delivery of the deed takes the place of this symbolical delivery. Still, it implies that the purchaser shall have possession; and without it, it would seem the covenant for quiet enjoyment is broken. Up to the time the lessee is entitled to possession under the lease, the lessor is the owner of the larger estate, out of which the leasehold is carved, and ownership draws to it the possession, unless someone else is in actual possession. The moment the lessor's right of possession ceases by virtue of the lease, that moment the lessee's right of possession begins. There is no appreciable interval between them, and hence there can be no interregnum, or neutral ground between the two attaching rights of possession, for a trespasser to step in and occupy. If there be actual, tortious occupancy, when the transition moment comes, then it is a trespass or wrong done to the lessor's possession. If the trespass or intrusion have its beginning after this, then it is a trespass or wrong done to the lessee's possession; for the right and title to the property being then in the lessee for a term, it draws to it the possession, unless there is another in the actual possession: Taylor on Landlord and Tenant, secs. 14, 15; 3 Washburn on Real Property, 117, 118."

And in the recent case of *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382, 111 N. W. 359, 9 L. R. A., N. S., 1127, 14 Ann. Cas. 399, the court, in giving its reasons for following the English rule, said: "We deem it unnecessary to enter into an extended discussion, since the reasons pro and con are fully given in the opinions of the several courts cited. We think, however, that the English rule is most in consonance with good conscience, sound principle, and fair dealing. Can it be supposed that the plaintiff in this case would have entered into the lease, if he had known at the time that he could not obtain possession on the 1st of March, but that he would be compelled to begin a lawsuit, await the law's delays, and follow the case through its devious turnings to an end before he could hope to obtain possession of the land he had leased? Most assuredly not. It is unreasonable to suppose that a man would knowingly contract for a lawsuit, or take the chance of one. Whether or not a tenant in possession intends to hold over or assert a right to a future term may nearly always be known to the landlord, and is certainly much more apt to be within his knowledge than within that of the prospective tenant. Moreover, since, in an action to recover possession, against a tenant holding over, the lessee would be compelled largely to rely upon the lessor's testimony in regard to the facts of the claim to hold over by the wrongdoer, it is more reasonable and proper to place the burden upon the person within whose knowledge the facts are most apt to lie. We are convinced, therefore, that the better reason lies with the courts following the English doctrine, and we therefore adopt it, and hold that, ordinarily, the lessor impliedly covenants with the lessee that the premises leased shall be open to

entry by him at the time fixed in the lease as the beginning of the term."

The above rule practically prohibits the landlord from leasing the premises while in the possession of a tenant whose term is about to expire because, notwithstanding the assurance on the part of the tenant that he will vacate on the expiration of his term, he may change his mind and wrongfully hold over. It is true that the landlord may provide for such a contingency by suitable provisions in the lease to the prospective tenant, but it is equally true that the prospective tenant has the privilege upon insisting that his prospective landlord expressly agree to put him in possession of the premises if he imagines there may be a chance for a lawsuit by the tenant in possession holding over. It seems to us that to raise by implication a covenant on the part of the landlord to put the tenant into possession is to make a contract for the parties in regard to a matter which is equally within the knowledge of both the landlord and tenant.

b. The American Rule of Merely Giving the Tenant a Right of Possession.—Under what is called the American rule the landlord is not bound to put the tenant into actual possession, but is bound only to put him into legal possession, so that no obstacle in the form of a superior right of possession will be interposed to prevent the tenant from obtaining actual possession of the demised premises. If the landlord gives the tenant a right of possession he has done all that he is required to do by the terms of an ordinary lease, and the tenant assumes the burden of enforcing such right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over: *Playter v. Cunningham*, 21 Cal. 229; *Gazzolo v. Chambers*, 73 Ill. 75; *Cobb v. Lavale*, 89 Ill. 331, 31 Am. Rep. 91; *Field v. Herrick*, 101 Ill. 110; *Sigmund v. Howard Bank*, 29 Md. 324; *Pendergast v. Young*, 21 N. H. 234; *Mechanics' etc. Ins. Co. v. Scott*, 2 Hilt. 550; *Gardner v. Keteltas*, 3 Hill, 330, 38 Am. Dec. 637; *Becker v. De Forest*, 1 Sweeney, 525; *Imbert v. Hallock*, 23 How. Pr. 456; *Mirsky v. Horowitz*, 46 Misc. Rep. 257, 92 N. Y. Supp. 48; *Cozens v. Stevenson*, 5 Serg. & R. 421; *Underwood v. Birchard*, 47 Vt. 305. Under this rule where the tenant fails to obtain possession of the premises because of a former tenant wrongfully holding over, he is left to his remedy against such wrongdoer and not against the landlord. The landlord has not covenanted against the wrongful acts of another, and he cannot be held responsible for them unless he has fully and expressly so contracted: *Sigmund v. Howard Bank*, 29 Md. 324. In one of the leading cases declaring the American rule, the court, speaking through Mr. Chief Justice Tilghman, said: "We are all clearly of opinion that the law implies no promise to deliver possession from the words of this lease. It is a bare demise for two years, without mention of the lessor's undertaking to deliver possession, although it is expressly said that at the date of the lease the house and wharf were occupied by Hagg. If a lease be made by the words 'grant or demise,' it amounts to a covenant by the lessor that he will make satisfaction to the lessee if he is lawfully evicted: 5 Coke, 17. So covenant lies on the word 'demise,' if the lessor had no power to demise, although the lessee neither entered nor was evicted: Hob. 12. So, also, covenant lies against the lessor, if he does an act which destroys or defeats the effect of his grant (as if he grant the use of a way and afterward

stops it): 1 Saund. 322. But a covenant, by the word 'demise,' is not broken by the eviction of the lessee, unless it be an eviction by good title; *Nokes v. James*, Cro. Eliz. 674; 4 Coke, 80b. Now, in the present instance, there was no defect in the title conveyed by the lessor to the lessee. Hugg was the tenant of the defendant, and held over unlawfully. It was in the power of the plaintiff to recover the possession by virtue of his lease, and, in fact, he did recover it. He had, therefore, no cause of action against the defendant": *Cozens v. Stevenson*, 5 Serg. & R. 421.

The case which is considered the sponsor of the American rule is that of *Gardner v. Keteltas*, 3 Hill, 330, 38 Am. Dec. 637. The lease in that case merely contained the ordinary covenant of title and quiet enjoyment. The court said: "All that either of the covenants mentioned exact of the lessor is, that he shall have such a title to the premises, at the time, as shall enable him to give a free, unencumbered lease for the term demised. There is no warranty, express or implied, against the acts of strangers; hence, if the lessee be ousted by one who has no title, the law leaves him to his remedy against the wrongdoer, and will not judge that the lessor covenanted against the wrongful acts of strangers unless the covenant be full and express to the purpose: *Noke's Case*, 4 Rep. 80; *Dudley v. Folliott*, 3 Term Rep. 584; *Hayes v. Bickerstaff*, Vaugh. 118; *Platt on Covenants*, 314, and the cases there cited. I admit, the covenant of quiet enjoyment means to insure to the lessee a legal right to enter and enjoy the premises, and if he is prevented from entering into the possession by a person already in, under a paramount title, the action may be sustained. That was decided in *Ludwell v. Newman*, 6 Term Rep. 458. In such a case, no ouster or expulsion is necessary on which to predicate a suit, as the lessee is not bound to enter and commit a trespass: *Holder v. Taylor*, Hob. 12; 1 Saund. 322a, note 2; *Platt on Covenants*, 327; *Grannis v. Clark*, 8 Cow. 36; and see 25 Wend. 446. But if the party holding is a wrongdoer, the remedy of the lessee is as perfect and effectual to dispossess him after as that of the lessor was before the execution of the lease. This is clearly so as it respects the remedy by ejectment, and, I apprehend, equally so as it regards the more summary proceedings under the statute. . . . But whether this be so or not, upon the well-settled construction of the covenants of title and quiet enjoyment it is not the duty of the landlord, when the demised premises are wrongfully held by a third person, to take the necessary steps to put his lessee into possession. The latter being clothed with the title by virtue of the lease, it belongs to him to pursue such legal remedies as the law has provided for gaining it, whether few or many."

The question was also squarely presented to the supreme court of California, and the court, speaking through Mr. Justice Cope, said: "The language of the covenant is, that the lessees paying the rent shall peaceably and quietly have, hold, and enjoy the premises for the term mentioned. This is the form usually adopted in such cases, and there is no doubt that a covenant of this character insures to the lessee a legal right to enter and enjoy the demised premises. The plaintiff contends that it amounts to an undertaking that the lessee shall be permitted to enter quietly and without suit, and that it devolves upon the lessor to remove any obstruction to his entry by putting him in possession. The defendant contends that it only implies a legal right to enter, and is not a guaranty against damages

resulting from the wrongful act of a third person who may happen to be in possession. This we regard as the correct view; and although the authorities are not entirely uniform, we understand the law upon the subject to be perfectly well settled: *Taylor on Landlord and Tenant*, 147; *Rawle on Covenants for Title*, 147. The lessor is responsible upon the covenant for his own acts, and for the acts of others claiming by title paramount to the lease, but he is not responsible for the acts of a mere trespasser. The effect of these acts may be to deprive the lessee of the benefit of the lease, but the remedy is against the person by whom the acts were committed, and not against the lessor": *Playter v. Cunningham*, 21 Cal. 229. Notwithstanding the clear statement of the California court in declaring in favor of the American rule, the courts of other states have frequently declared that the California court sustains the English rule. This error is caused by an erroneous conception of the case of *Rice v. Whitmore*, 74 Cal. 619, 5 Am. St. Rep. 479, 16 Pac. 501, which is sometimes cited as deciding in favor of the English rule. In that case, however, the lease in question, as shown by the opinion of the court, required the landlord to put the tenant in possession of the premises, and hence no question of such a duty under an implied covenant could arise nor was the question discussed. No reference was made to the above case of *Playter v. Cunningham*, 21 Cal. 229, in the opinion of the court, nor were any of the cases on the subject of the implied rule referred to. All that was decided was that a valid lease may be made of land then in possession of the landlord's tenant, under an unexpired lease, and that the landlord is answerable in damages to his tenant for a breach of contract if he fails to substantially carry out the terms of his contract.

But where the landlord fails to put the tenant into possession, he can recover no rent: *Brandt v. Phillippi*, 82 Cal. 640, 23 Pac. 122. The failure to put the tenant into possession of the demised premises justifies the tenant in refusing to be bound by the lease and in rescinding the contract: *Dengler v. Michelsen*, 76 Cal. 125, 18 Pac. 138; *Reed v. Reynolds*, 37 Conn. 469; *Spencer v. Burton*, 5 Blackf. 57. An acceptance of the leased premises after the time when the landlord was bound to deliver possession under the express terms of the lease does not constitute a waiver of the tenant's right to damages suffered by him prior to such acceptance: *Huntington etc. Co. v. Parsons*, 62 W. Va. 26, 125 Am. St. Rep. 954, 57 S. E. 253, 9 L. R. A., N. S., 1131. Where the landlord, after leasing the premises to a tenant by parol, but before such tenant has taken possession, leases the same premises to another and puts the latter in possession, the first tenant is not required to offer to pay the rent as it would accrue under his lease in order to maintain a suit against the landlord for breach of the contract: *Berrington v. Casey*, 78 Ill. 317.

Where the tenant in possession at the time when the landlord rents the premises to another holds over because of the failure of his landlord to give him the statutory notice to terminate the tenancy, there is a breach of the landlord's covenant to give the tenant a right of possession. In other words, the landlord, by omitting to give a notice which he alone could give, has disabled himself from putting his new tenant into legal possession, and has prevented the tenant from obtaining actual possession: *Goerl v. Damrauer*, 27 Misc. Rep. 555, 58 N. Y. Supp. 297. Where the lease provides for the payment of rent before possession is delivered to the tenant, it imports a

duty to deliver actual possession upon such payment: *Harris v. Greenberger*, 50 App. Div. 439, 64 N. Y. Supp. 136. Where the lease is not of a particular portion of the premises, but of a privilege to do business on a portion of the premises to be designated by the landlord, it is the duty of the landlord to oust a prior tenant who holds over after the expiration of his lease: *Deluise v. Long Island R. Co.*, 65 App. Div. 487, 72 N. Y. Supp. 988.

WINDLEY v. SWAIN.

[150 N. C. 356, 63 S. E. 1057.]

JUDGMENT—When Binds Married Woman.—Where title to land is in the name of the husband, and a judgment for the purchase money is recovered against him, and, in an action by his wife to establish the interest of herself and children in the property, a consent decree is given which recognizes the validity of the judgment against the husband and declares it to be in full force and effect, a sale of the land under such judgment passes a good title, there being no evidence that any separate estate of the wife has ever been invested in the property. (p. 926.)

JUDGMENT—When Regarded as Entirety.—A Married Woman will not be permitted to assert her claim to property under one clause of an entire judgment and repudiate a lien upon the property declared and established by another clause. (p. 927.)

EJECTMENT—Equities of Defendant.—Under the Ordinary Allegations in an action to recover land, and a general denial on the part of the defendant, facts indicating an equity in favor of the defendant cannot be entertained. (p. 927.)

Small, MacLean & McMullan, for the plaintiff.

Ward & Grimes, for the defendants.

³⁵⁷ HOKE, J. The proceedings in the court below, and the exceptions noted for error by defendant, appearing in the case on appeal, are as follows: The defendant J. T. Swain filed no answer. It was admitted by defendant Martha A. Swain that the defendant J. T. Swain had the legal title and possession at the time of the judgment taken against him by A. D. MacLean, subject as between her and said J. T. Swain to such estate as she might be entitled, as set out in her complaint, filed November 1, 1904, in her suit against him, R. T. Hodges, sheriff, and A. D. MacLean. The plaintiff introduced the record, consisting of summons, judgment, transcript of judgment, and execution, in the case of A. D. MacLean v. J. T. Swain, and the entire record, except the affidavits and exhibits in the subsequent case of Martha A. Swain v. J. T. Swain, R. T. Hodges and A. D. MacLean.

The plaintiff also introduced a deed from the sheriff, by virtue of the execution sale, as above set out, to plaintiff, regu-

lar in form and execution, and admittedly conveying to plaintiff in fee simple.

It is admitted that defendant is now in possession, and by plaintiff that defendant, at the time of rendition of the above judgments, and now, was and is a married woman and not a free trader. Plaintiff rested.

³⁵⁸ Defendant moved for judgment as of nonsuit, and requested the court to charge the jury that plaintiff was not entitled to recover and to answer the issue "No." The court refused the motion and the said prayer. Defendant excepted. First exception.

The court then charged the jury, if they believed the evidence, to answer the issue submitted, to wit, "Is plaintiff the owner and entitled to the possession of the land described in the complaint?" "Yes." Defendant excepted. Second exception.

The jury answered the issue "Yes," and there was judgment thereon, to which defendant excepted and appealed to the supreme court. Third exception.

Appellant groups her exceptions and assigns error thereof as follows:

Exception 1: The refusal of the court to nonsuit the plaintiff, on all the evidence, for that the judgment in *Martha A. Swain v. J. T. Swain, R. T. Hodges and A. D. MacLean* did not warrant the sale of the land under execution issuing therefrom, as plaintiff in said cause was under coverture and said judgment was void as to her.

Exceptions 2 and 3: For same cause and upon same ground.

On the trial it was made to appear that, on August 30, 1904, a judgment was obtained in a justice's court against the male defendant for two hundred dollars and interest, the summons and judgment reciting that it was for the purchase money of the land in controversy, and same was duly docketed in the superior court of Beaufort county the day following, August 31st. A venditioni exponas issued, in the form provided by the statute (Revisal, sec. 627), and the property was advertised by the sheriff, when the feme defendant instituted her action in the superior court of Beaufort county against her husband, J. T. Swain, the plaintiff in the judgment, and the sheriff, and filed a complaint, alleging, in substance, that she and her husband had bought this property for a home, and that, of the balance due for purchase money, one hundred and fifty dollars, the male defendant had paid ³⁵⁹ nothing, but that she herself had paid the debt down to fifty dollars, which last sum her husband had paid off with his own money, and there was nothing due for the purchase money of the land and they did not owe the plaintiff in the judgment anything except for professional services, and the entire proceeding was a scheme on the part of her husband and the plaintiff in the

judgment to deprive herself and children of their home, and asked that the sale be restrained and her own and children's rights in the property declared and established. These allegations were fully denied by the parties charged, and at December term, 1905, the cause coming on for hearing, the same was compromised and adjusted, and pursuant thereto judgment was entered as follows:

"This cause coming on to be heard at December Term, 1905, before his Honor, Thomas J. Shaw, Judge presiding, the parties being present in person, with their attorneys: It is now, by consent of both parties, given in open court, considered and adjudged that the matters in controversy, as recited in the pleadings, be settled and adjudicated as follows: That the defendant J. T. Swain execute a deed to his children, George S. Swain, Mary M. Swain, Jesse T. Swain and David Sylvester Swain, conveying to them and their heirs, in fee simple, the lot or parcel of land described in the deed from C. S. Doughty and wife to J. T. Swain, recorded in the register's office of Beaufort County, in book 93, pp. 352-353, which is hereby referred to, saving and reserving unto the said Martha A. Swain and J. T. Swain, jointly, an estate for the remainder of their natural lives in the said land and for the life of the survivor of them. Upon failure of defendant to execute such deed, this judgment shall operate as a conveyance in lieu thereof.

"It is further ordered that the judgment against the property referred to in the pleadings be reduced to \$100, together with such interest and costs as have accrued thereon, and that the same is declared in full force and effect.

"It is further ordered that each party pay his or her proper costs of this suit, to be taxed by the clerk, and that the temporary restraining order heretofore granted be dissolved.

"THOS. J. SHAW,

"Judge Presiding."

³⁰⁰ Default having been made in the payment of this judgment of one hundred dollars, a venditioni exponas was issued, in proper form, the property sold, and the plaintiff in the present suit became the purchaser and took a deed for the property, which is the title under which he makes the present claim. On these facts the court is of opinion that the plaintiff was entitled to recover the property, and the ruling of his honor below to that effect should be sustained.

It was objected chiefly on part of feme defendant that, inasmuch as it appears on the face of the record that feme defendant was and is a married woman, no valid judgment could be obtained against her, and that the same should not be allowed to stand. There are decisions in this state to the effect that when it appears on the face of the pleadings that a defendant was a married woman at the time a contract was

entered into, and judgment in personam has been entered against her, the same will be set aside on direct application, though the defense of coverture was not formally pleaded: *Green v. Ballard*, 116 N. C. 144, 21 S. E. 192, cited with approval in *Moore v. Wolfe*, 122 N. C. 711, 30 S. E. 120. It was not required in these cases to decide whether such a judgment was void or only voidable, and in that event effective until set aside, where innocent third parties were concerned. And there are well-considered decisions with us to the effect that while a judgment against a married woman stands as the formal and final deliverance of a court having jurisdiction of the causes and the parties, the same is binding upon her: *Grantham v. Kennedy*, 91 N. C. 148; *Vick v. Pope*, 81 N. C. 22; *Greene v. Branton*, 16 N. C. 500.

There is doubt, however, if the principle referred to in these authorities is involved here at all; for, in order to uphold his title, the present plaintiff is not required to resort to any judgment in personam against the feme defendant, and he has made no effort to do so. The title to the property was in the husband of feme defendant, and the creditor had a valid judgment against the husband, duly docketed and showing on its face that it was for the purchase money. Nothing has ever occurred to destroy or weaken the binding force of this judgment to the amount of one hundred dollars and interest, the amount outstanding when the sheriff's sale took place; on the contrary, in the suit instituted by the feme defendant to establish the interest of herself and children ³⁶¹ in this property the consent decree recognizes the validity of this judgment and declares, in express terms, in reference to it: "It is further ordered that this judgment be reduced to one hundred dollars, together with such interest and costs as have accrued thereon, and that the same is declared in full force and effect." The judgment further directs that the husband shall execute a deed to the children of these parties, in fee simple, subject to a life estate reserved to the husband and the wife and the survivor of them. Under and by virtue of this judgment against the husband, which has always been a binding lien upon the land, the lot was sold and the present plaintiff became the purchaser, and, in our opinion, as stated, the sheriff's deed, made under and by virtue of this sale, conveyed to him a good title.

No evidence has ever been offered which shows or tends to show that any separate estate of the feme defendant has ever been invested in this property, and even the allegations to this effect in her original suit against the creditor and her husband in regard to this matter are very vague and unsatisfactory. On the contrary, as will be noted in the case on appeal the feme defendant, under a general denial in the answer, rests her claim on the rights arising to her under and by virtue of

the very decree we are now asked to ignore and set aside. This decree, as we have seen, recognizes the validity of the judgment under which the present plaintiff purchased, and no principle of law or equity would require or permit that the feme defendant should assert her claim to the property under one clause of an entire judgment and repudiate a lien upon it declared and established by another.

Even if there were facts presented giving indication of an equity in her favor, the same could not be entertained on the present pleadings, which, as stated, contains the ordinary allegations in an action to recover land and a general denial on the part of defendant: *Webb v. Borden*, 145 N. C. 188, 58 S. E. 1083; *Buchanan v. Harrington*, 141 N. C. 39, 53 S. E. 478.

There is no error, and the judgment below is affirmed.

No error.

VALIDITY OF JUDGMENTS AGAINST MARRIED WOMEN.*

- I. Development of the Law Respecting Judgments Against Married Women, 927.**
- II. Validity of Judgments Against Married Women at Common Law.**
 - a. The General Rule, 929.
 - b. Whether Record must Show Coverture.
 1. In General, 936.
 2. Necessity to Plead Coverture, 937.
 - c. Where in Respect to Her Separate Estate, 939.
 - d. Where Debt or Obligation was Contracted While a Feme Sole, 939.
 - e. Where Feme Sole Marries Pending the Suit, 940.
 - f. Where Husband Dies Pending the Suit Against Wife, 940.
- III. Where the Judgment is by Confession or Default.**
 - a. By Consent or Confession, 940.
 - b. By Default, 941.
- IV. Validity Where Statutes Exist Modifying or Removing Common-law Disabilities of Married Women, 942.**
- I. Development of the Law Respecting Judgments Against Married Women.**

The history of the law in relation to the subject of this note is the history of the emancipation of married women from the disabilities imposed upon them by the common law as it was administered during the days of Blackstone. In the majority of states, statutes,

***REFERENCES TO MONOGRAPHIC NOTES.**

- Judgments against married women: 55 Am. Dec. 599.
- Conflict of laws as affecting capacity of married woman to sue and be sued: 85 Am. St. Rep. 577.
- Maintainability of suits between husband and wife: 78 Am. St. Rep. 274.
- Power of married women to contract under American statutes: 99 Am. Dec. 599.
- Liability of married woman on contract valid where made but not where suit brought: 46 Am. St. Rep. 448.
- Liability of married women for torts: 131 Am. St. Rep. 180.
- Estoppel against married women: 57 Am. St. Rep. 169.
- Vacation of judgments against infants, lunatics and married women: 60 Am. St. Rep. 656.

commonly called Married Woman's Acts, exist by virtue of which married women have been placed upon the same contractual plane with men. In some states, however, the statutes of this class are not so broad in their terms as in other states, and hence it is a matter of construction in determining to what extent the common law has been modified in relation to the right to obtain a valid judgment against a married woman. Of course, in those states where the Married Woman's Act is sufficiently broad so as to give to a married woman the same contractual ability as that of a man, a judgment for her against her stands on the same basis as that of such a judgment in relation to a man.

At the common law, marriage made the husband and wife one person in law. The legal existence of the woman was suspended or merged in that of the husband: *Henneger v. Lomas*, 145 Ind. 237, 44 N. E. 462, 32 L. R. A. 848. In describing the status of a married woman at the common law, with respect to the right to obtain a judgment against her, the court in *Spencer v. Parsons*, 89 Ky. 577, 25 Am. St. Rep. 555, 13 S. W. 72, said: "Generally, a feme covert has no personality in law. She is not recognized by it, save in a few excepted cases, so that a personal judgment can be taken against her. The contracts of an infant are, in general, voidable only, while those of a married woman are void. True, she may, under certain circumstances, bind her separate estate, but not herself personally, the reason being that she has no personal identity in law. It does not follow, because, as an exceptional case, a personal judgment may go against her for her tort, or upon a contract made by her when single, the reason being, that her status at the making of it is regarded as following it to its completion, that therefore all personal judgments against her are merely erroneous, and not void. If she has no legal status in court, certainly it should have no jurisdiction to render a judgment binding her personally. Her existence is merged in that of the husband, and she can make no contract binding herself personally or subjecting her to a judgment in personam. Her contract is void in law. In equity it may be enforced against her separate estate if she so intended; but she incurs no personal liability by it, because she has, legally speaking, no personal existence, and it must be satisfied out of her estate by proceedings in rem. She is by law incapacitated from retaining an attorney, and no personal liability arises, because she has no legal existence. There is, therefore, so far as she is concerned, no person within the court's jurisdiction. If a personal judgment be rendered upon a claim, the alleged liability is merely placed upon an advanced footing; and if originally it was void as to her, then the unauthorized judgment should not estop her from resisting it, from the fact that she was not *se juris*, and had no such legal existence as authorized a personal judgment."

In equity, however, the rule was somewhat different than at law, for in an equity court a wife was regarded as having a separate personality for some purposes, and could be sued in that court in respect to her separate estate: *Lombard v. Morse*, 155 Mass. 134, 29 N. E. 203, 14 L. R. A. 273.

The general rule on the subject of this note was stated in Freeman on Judgments, section 150, as follows: "Those disabilities arising from infancy, from coverture, or from mental infirmities which

render parties incapable of being bound by their contracts do not have the effect of exempting any person from the control of the courts. Reasoning from the hypothesis that a judgment is a contract, a few of the courts have held that parties exempt from the force of their agreements could not be bound by a judgment. . . . Notwithstanding the decisions to which we have referred, the preponderance of authority is in favor of the rule that a judgment against a married woman is not void; and that when erroneous because based upon a contract which she was not competent to make, or from any other reason, it is still binding upon her until set aside upon appeal, or by some other appropriate method."

Under the enabling statutes which exist in most of the states by which the disabilities of married women have been completely removed, a married woman is bound by a judgment in the same manner as any other person. But if the enabling statute does not completely remove her common-law disabilities, then to the extent that the judgment relates to matters concerning which the common law still applies to her, the validity of the judgment must be tested by the rules of the common law, prevailing in that jurisdiction.

II. Validity of Judgments Against Married Women at Common Law.

a. **The General Rule.**—Undoubtedly any contract which a married woman may lawfully execute may be lawfully enforced against her by the personal judgment of a court of competent jurisdiction: *Fawcner v. Scottish-American Mortgage Co.*, 107 Ind. 555, 8 N. E. 689. And where the married woman has been relieved of the disabilities of coverture by proceedings authorized by the statutes of the state, and has thereby become a free trader or invested with all of the rights of a feme sole, she may be subjected to a personal judgment: *Parker v. Roswald*, 78 Ala. 526; *McCue v. Sharp*, 20 Ky. Law Rep. 216, 45 S. W. 770; *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518. By the preponderance of authority the rule is declared that a judgment against a married woman is not void, and even though voidable under certain circumstances, is nevertheless valid until reversed on appeal or set aside by some appropriate proceeding: *Gambette v. Brock*, 41 Cal. 78; *Emery v. Kipp*, 154 Cal. 83, 129 Am. St. Rep. 141, 97 Pac. 17, 19 L. B. A., N. S., 983, 16 Ann. Cas. 792; *Glover v. Moore*, 60 Ga. 189; *Mashburn v. Gouge*, 61 Ga. 512; *Burk v. Hill*, 55 Ind. 419; *Wright v. Wright*, 97 Ind. 444; *Guthrie v. Howard*, 32 Iowa, 54; *Keith v. Keith*, 26 Kan. 26; *Spalding v. Wathen*, 7 Bush, 659; *Wilson v. Coolidge*, 42 Mich. 112, 3 N. W. 285; *Vantilburg v. Black*, 3 Mont. 459; *Vick v. Pope*, 81 N. C. 22; *Grantham v. Kennedy*, 91 N. C. 148; *Hart v. Manahan*, 70 Ohio St. 189, 71 N. E. 696; *Smith v. Borden*, 17 B. I. 220, 33 Am. St. Rep. 867, 21 Atl. 351, 11 L. B. A. 585; *Cruger v. Daniel*, *Riley Eq.* 102; *Howell v. Hale*, 5 Lea, 405; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Carson v. Taylor*, 19 Tex. Civ. App. 177, 47 S. W. 395.

But in some of the earlier cases in a few states it has been declared that a personal judgment against a married woman upon a contract or other obligation which she is incapable of undertaking by reason of the disabilities imposed upon her by the common law is void and unenforceable: *Lewis v. Yale*, 4 Fla. 418; *Rubel v.*

Bushnell, 91 Ky. 251, 15 S. W. 520; Wells v. Norton, 28 La. Ann. 300; Morse v. Toppan, 3 Gray, 411; Griffith v. Clarke, 18 Md. 457; Ma-gruder v. Buck, 56 Miss. 314; Davis v. Foy, 7 Smedes & M. 64; Higgins v. Peltzer, 48 Mo. 152; Burns v. Capstick, 46 Mo. App. 37; Swayne v. Lyon, 67 Pa. 436; Flanagan v. Oliver Finnie Grocer Co., 98 Tenn. 599, 40 S. W. 1079; White v. Foote Lumber etc. Co., 29 W. Va. 385, 6 Am. St. Rep. 650, 1 S. E. 572; Turk v. Skiles, 38 W. Va. 404, 18 S. E. 561; Norton v. Meader, 4 Saw. 603, Fed. Cas. No. 10,351. The trend of modern legislation enlarging the rights of married women has modified the force of many of these older decisions. This in Shupp v. Hoffman, 72 Md. 359, 20 Am. St. Rep. 476, 20 Atl. 5, the court, referring to Griffith v. Clarke, 18 Md. 457, one of the leading cases holding such judgments to be void, said: "The judgment in this case was rendered in 1858. Since that decision, however, there have been many changes by acts of assembly in this state in reference to the rights and liabilities of married women, and the law has been materially modified by this legislation since that case: Ahern v. Fink, 64 Md. 161, 3 Atl. 32. In the case at bar, the judgment is valid on its face, it not appearing in the record that the defendant was a married woman, the presumption being that the cause of action was founded upon a contract which she was competent to make, under the recent legislation in this state."

Such judgments have been declared void in some comparatively recent cases. Thus it has been declared that a decree against a feme covert, in an ordinary foreclosure suit, for the payment of any balance which may remain due after an application of the proceeds from the sale of the mortgaged land, is a personal decree and void: Randall v. Bourguardez, 23 Fla. 264, 11 Am. St. Rep. 379, 2 South. 313. So, also, a judgment against a married woman upon a claim not authorizing judgment against her has been declared void, and no proceeding to reverse or vacate it is necessary to entitle her to successfully resist its enforcement where it does not appear that she set up her coverture as a defense to the action, and that the court, before rendering judgment, passed upon such defense: Spencer v. Parsons, 89 Ky. 577, 25 Am. St. Rep. 555, 13 S. W. 72. In most cases the courts have merely declared a personal judgment against a married woman to be erroneous or improper: Reed v. King, 23 Iowa, 500; Kirby v. Childs, 10 Kan. 639; Snodgrass v. Hyder, 95 Tenn. 568, 33 S. W. 764.

In Gambette v. Brock, 41 Cal. 78, one of the leading cases on the subject, the court, in sustaining the validity of a judgment against a married woman, said: "The judgment in the justice's court was clearly valid until reversed, and cannot be impeached in a collateral action on the ground alleged. The justice had jurisdiction of the subject matter of the action, and of the person of the defendant, whose coverture was made an issue in the cause. This issue was decided against her by the justice, and, for aught that appears, may have been properly so decided on that trial for want of proof of the marriage. But however erroneous the judgment may have been, it was not void. There would be no safety in purchasing at judicial sales under judgments rendered after due service of process on female defendants, if the title of the purchaser could be defeated by proof in a collateral action that the defendant in the judgment was a married woman at the time of the institution of the suit, or that she was

incapable in law of contracting the debt for which the judgment was rendered. The fact that the court had jurisdiction of the subject matter, and of the person of the defendant, is sufficient to establish the validity of the judgment until reversed or set aside."

In *Higgins v. Peltzer*, 49 Mo. 152, which is one of the leading cases holding such judgments to be void, the court, in justifying its adherence to that rule, said: "It is very clear, to my mind, that the respondent was not competent to employ an attorney or make a defense in her own name. She was sued in a legal proceeding upon a personal contract altogether void at law; and shall the entry of an unauthorized judgment against her by default for nonappearance be allowed to prejudice her? The principle that a party cannot impeach a judgment in a collateral proceeding does not apply to a case where the defendant is a feme covert and not sui juris. As the respondent labored under a total disability and could neither contract nor be sued at law, I think the judgment of the law commissioner's court was void."

In the case of *Norton v. Meader*, 4 Saw. 603, Fed. Cas. No. 10,351, the court, in holding that there was a want of jurisdiction to render a personal judgment against a married woman upon her contract, referred to one of the ancient reasons urged for this rule, although the holding seems to have been based on precedent. The court said: "By the general law a married woman cannot be personally bound by her contract; nor can she, by the general law, be subjected on her contract to a personal judgment. It matters not upon what consideration the contract is made; that inquiry cannot be had, nor the further inquiry whether equity may not furnish some relief from the separate property of the party. However these inquiries might result, no personal judgment could follow; for such judgment upon the contract no court is competent to render. In this respect the jurisdiction of every court is limited. Various reasons are assigned for this limitation, some of which would not be applicable under our altered laws. Reeves, in his treatise on *Baron and Femme*, states 'that no action at law can be maintained against her. For the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern.' 'And for the same reason,' he continues, 'there can be no personal decree against her in chancery. It must be one that reaches her property only.' Whatever may have been the reason originally assigned for the limitations upon the authority of the courts, the existence of the limitations is unquestionable."

In a Florida case the court based its reason for holding that no personal judgment could be awarded against a married woman on the ground that she was by the common law incapable of making a contract which would bind her personally either in law or in equity. And the court stated that whenever coverture avoids a contract which a wife has attempted to make, it will likewise bar a personal recovery against her, even though the action be one *ex delicto* based on the ground of fraud connected with the transaction: *Prentiss v. Paisley*, 25 Fla. 927, 7 South. 56, 7 L. R. A. 640. But this course of reasoning has been quite vigorously assailed by other courts, which declare that although the contract of the married woman may be void, a judgment based on it is not necessarily void. Thus in *Chollar v.*

Temple, 39 Ark. 238, in dismissing this argument as unsound, the court observed: "The matter is not jurisdictional, for circuit courts may always by service obtain jurisdiction of the persons of married women; and always could in some, and may now in many, cases reverse judgments against them jointly with their husbands. If it be an improper case, as this certainly was, it should have been shown, or the judgment would not even be erroneous, the error not appearing of record. 'If,' says Mr. Chitty (Pleadings, p. 59), 'a feme covert be sued upon her supposed contract made during coverture, she may, in general, plead the coverture in bar, or give it in evidence under the general issue, or under non est factum, in the case of a deed.' And one or the other she should do, especially where her coverture, as in this case, did not appear from the note, complaint, writ, return, or in any other manner."

The same conclusion was announced by Mr. Chief Justice Hemphill in the well-considered case of *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769. Much of the argument in favor of holding judgments against married women void is based on the declaration in the case of *Morse v. Toppan*, 3 Gray, 411, in which the court says "that a judgment is in the nature of a contract; it is a specialty, and creates a debt, and to have that effect it must be taken against one capable of contracting a debt." The doctrine of the case just cited was, however, ignored in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, which was a case where it was applicable if sound. In *Wadsworth v. Henderson*, 16 Fed. 447, the court, in dealing with this phase of the subject, observed: "A judgment is a contract in the sense that it may be sued upon in another judicial tribunal, but it is not a contract in that it can only be rendered against a party then capable of contracting a specialty debt. It is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered: *Freeman on Judgments*, sec. 4. If a judgment is a contract, and can only be rendered against one who is then capable of contracting, by the laws of the forum there could not be a judgment on a contract made in another state unless by the law of the forum that contract would be valid. This would destroy the rule of comity and international law, which makes the validity of a contract and the capacity of the contractor depend on the place where the contract is made or is to be performed, or the domicile of the contractor, as the case may be, and not upon the law of the forum."

The rule that a judgment against a married woman is voidable only is often, however, governed to a large extent by the fact that she is allowed under many circumstances to sue and be sued as though she were not married. Under such circumstances, if she is sued upon a contract she has no capacity to make or against which she has some other valid objection, she has a right to interpose her objections in the due course of the proceeding. If, however, she refrains from doing so, and suffers the case to go to judgment against her, the mere circumstance that she was not originally bound will not suffice to render the judgment void: *Wilson v. Coolidge*, 42 Mich. 112, 3 N. W. 285.

A judgment against a married woman is not void because the husband was not made a party to the action, although the statute required him to be joined: *Emery v. Kipp*, 154 Cal. 83, 129 Am. St. Rep. 141, 97 Pac. 17, 19 L. R. A., N. S., 983, 16 Ann. Cas. 792. If a

married woman is doing business under a company name, a judgment against her by such name is not less invalid than if entered against her by her proper name: *White v. Foote Lumber etc. Co.*, 29 W. Va. 385, 6 Am. St. Rep. 650, 1 S. E. 572. A married woman will not be permitted to assert her claim to property under one clause of an entire judgment and repudiate a lien upon the property declared and established by another clause of the same judgment: *Windley v. Swain*, 150 N. C. 356, ante, p. 923, 63 S. E. 1057.

At the common law there are, however, many circumstances under which it is conceded that a judgment may be rendered against a married woman. In adverting to this fact the court in *Merrill v. St. Louis*, 12 Mo. App. 466, said: "It has been frequently said by the supreme court, and perhaps also by this court, that a general judgment against a married woman is void. These expressions must be regarded as stating a general rule, and are to be considered with reference to the questions before the court. We cannot impute to the learned judges who have used such expressions ignorance of elementary rules which are taught in every law school and laid down in every treatise on the relation of husband and wife. There are several cases in which a general judgment against a married woman is not void at common law, and in which the common law has not been changed in Missouri. Among these may be mentioned the case of a judgment rendered against husband and wife in a suit on an antenuptial contract of the wife (*Gruen v. Bamberger*, 11 Mo. App. 261); also a judgment against husband and wife for a tort of the wife committed during or before coverture: *Marshall v. Oakes*, 51 Me. 308; *Hildreth v. Camp*, 41 N. J. L. 306; *Carsin v. Delany*, 38 N. Y. 178; *Wagener v. Bill*, 19 Barb. 321; *Dailey v. Houston*, 58 Mo. 361; 2 *Kent's Commentaries*, 149; *Schouler on Husband and Wife*, sec. 134. In these cases the judgment and the execution run against both husband and wife, and, at common law, the bodies of both might be taken under it: *Newton v. Boodle*, 9 Q. B. 963; *Hall v. White*, 27 Conn. 488; *Langstaff v. Rain*, 1 Wils. Q. B. 149; *McKinstry v. Davis*, 3 Cow. 339, 15 Am. Dec. 269; *Potts v. Mellor*, 2 Strange, 1167; *Evans v. Chester*, 2 Mees. & W. 847; *Finch v. Dud-din*, 2 Strange, 1237. If the husband die pending the suit, it survives against the wife: *Hyde v. S——*, 12 Mod. 247; *Wright v. Leonard*, 11 Com. B., N. S., 258, 266 (per Willes, J.); *Schouler on Husband and Wife*, sec. 136. If the marriage be dissolved, either by death or divorce, it survives against her, but not against him: *Capel v. Powell*, 17 Com. B., N. S., 743. If she survive the husband, and the judgment remained unsatisfied, we suppose it survives against her, and the execution may be issued against her upon it."

If a personal judgment can be rendered against the wife when sued separately, it may also when sued jointly with her husband: *Jones v. Glass*, 48 Iowa, 345. A wife who has a separate estate may make that estate liable for her obligations, but she cannot be subjected to a personal judgment on a note executed by her husband and herself: *Sweeney v. Smith*, 15 B. Mon. 325, 61 Am. Dec. 188. In a suit to foreclose a mortgage executed by a married woman to secure a note executed by her, no personal judgment can be rendered against her: *Adams v. Bartell*, 46 Tex. Civ. App. 349, 102 S. W. 779. Likewise it has been held erroneous in a suit to foreclose a mortgage executed by the husband and wife to secure a note, to enter a joint

judgment against the husband and wife upon the note: *Daniels v. Henderson*, 5 Fla. 452. And it has been declared that in a foreclosure suit against husband and wife, a personal judgment cannot be rendered against the wife where it is not alleged in the petition that the debt was one for which her separate property was liable: *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Gaynor v. Blewett*, 86 Wis. 399, 57 N. W. 44; *Franke v. Neisler*, 97 Wis. 364, 72 N. W. 887. Where a husband gives a note for his own debt, and the wife signs it as surety merely, and executes a mortgage to secure it on her own real estate, a personal judgment cannot be rendered against her on foreclosure for any deficiency after sale of the premises, where it is not disclosed that in executing the note and mortgage it was the intention to bind her property generally: *Grand Island Banking Co. v. Wright*, 53 Neb. 574, 74 N. W. 82. And where the married woman was not a party to the notes secured by a mortgage executed by herself and husband to secure the debts of a firm of which he was a member, it was held an error to render a personal judgment against her in a suit to foreclose the mortgage: *Moffitt v. Roche*, 77 Ind. 42. Likewise where notes signed by the wife, but secured by a mortgage executed by her husband and herself were void as to her, it was held no personal judgment could be rendered against the wife in respect to the transaction: *Buck v. Scott*, 47 Ind. 299. A decree of foreclosure of a mortgage executed by the husband alone is not binding on the separate estate of the wife, although she is a party defendant and joins with her husband in answering in the suit. The answer is regarded as that of the husband alone, notwithstanding her joinder in it: *Bird v. Davis*, 14 N. J. Eq. 467. In Florida, the court vacated a deficiency judgment which had been entered against the wife in ignorance of her coverture, four years thereafter, in the absence of laches or the intervention of the rights of third parties: *Rice v. Cummings*, 51 Fla. 535, 40 South. 889. But in Michigan it was held in a foreclosure suit on a note and mortgage executed by a husband and wife that after a personal decree had been rendered against them, the wife would not be allowed, on an application for an execution for the deficiency arising after the sale of the premises, to interpose a defense that she was a married woman when the note was given, and that it was not given with reference to her separate estate, since such a defense should have been interposed before decree: *Christian v. Soderberg*, 124 Mich. 54, 82 N. W. 819. So, also, in Tennessee a judgment against a husband and wife on a contract made by the wife during coverture was declared binding on the wife until set aside by a direct proceeding: *Adcock v. Maim* (Tenn. Ch.), 38 S. W. 99. Where, however, the notes sued on were not executed by the wife, and the only allegation in the complaint against herself and husband in respect to her was that she was his wife, no personal judgment can be rendered against her, since under the statute she is not liable for the debts of her husband: *Freundt v. Hahn*, 28 Wash. 117, 68 Pac. 184. But in a suit on a joint note of a husband and wife given for a community debt, a personal judgment may be recovered against both husband and wife, and the community and separate property of either may be taken in execution on the judgment: *Lumberman's Nat. Bank v. Gross Co.*, 37 Wash. 18, 79 Pac. 470. In the case cited the court very pertinently said: "It seems to us that any other rule would lead to the utmost an-

tainty and confusion. Under the law of this state a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose. Her signature to a contract imports the same obligation as the signature of any other person, viz., that a judgment may be taken against her for failure to perform, and that her separate property may be taken in execution to satisfy the judgment."

In all the domain of the law there is nothing more amazing to us than the vitality of the notion that a judgment may in some instances be deemed void because she against whom it was rendered was then a married woman. In so far as this is asserted on the ground that the contract sued upon was void on account of her incapacity to make it, or for any other reason, the contention scarcely merits consideration, for all must concede that the validity of a cause of action is a question for the court to which it is first presented, and being expressly or impliedly affirmed by that court, does not remain open for the consideration of some other court to which the question may be collaterally presented for the purpose of avoiding the effect of a judgment. Nor, in our opinion, can a judgment be held void on the ground of the possible or presumed coercion by the husband, nor of the difficulty of a married woman employing an attorney, or doing the other acts indispensable to an effective defense. As to an idiot who never had intelligence, or a lunatic though confined for his own safety and that of a public, or an infant, "mewling and puking in his nurse's arms," there is no doubt he is within the jurisdiction and process of the courts, and that a judgment against him is not void, though the impossibility of his personally making any defense is indisputable. The only logical ground for disregarding a judgment against a married woman because of her coverture is to affirm, as does *Spencer v. Parsons*, 89 Ky. 577, 25 Am. St. Rep. 555, 13 S. W. 72, that she "has no personal identity at law," "no legal status in court," and that "her existence is merged in that of her husband." This amounts to saying that for the purposes of legal proceedings she does not exist. This is undoubtedly not generally true. She may be guilty of the same crimes as if unmarried, and be prosecuted and punished accordingly: *State v. Nelson*, 29 Me. 329; *State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *Commonwealth v. Murphy*, 2 Gray, 510; *Brazil v. Moran*, 8 Minn. 236; *Johnson v. McKeon*, 1 McCord, 578, 10 Am. Dec. 698, note to *Bibb v. State*, 33 Am. St. Rep. 91. She may commit every tort within her physical capacity, and be sued and subjected to a personal judgment for the resulting damages, though it is true her husband must be joined with her as a defendant: *Kosminsky v. Goldberg*, 44 Ark. 401; *Prentiss v. Paisley*, 25 Fla. 927, 7 South. 86, 7 L. B. A. 640; *Smith v. Taylor*, 11 Ga. 20; *Ball v. Bennett*, 21 Ind. 427; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *Handy v. Foley*, 121 Mass. 259; *Cassin v. Delany*, 38 N. Y. 178; *Wheeler & Wilson Mfg. Co. v. Heil*, 115 Pa. 487, 2 Am. St. Rep. 575, 8 Atl. 616; *Head v. Briscoe*, 5 Car. & P. 484, 24 Eng. Com. L. 667; *Hyde v. —* S., 12 Mod. 246, Holt, 101; *Vine v. Saunders*, 5 Scott, 359, 4 Bing. N. C. 96, 6 D. P. C. 233, 3 Hodges, 291, 7 L. J. C. P., 30, 2 Jur. 136. The joining of the husband is, however, a mere matter of procedure, and not indispensable to the jurisdiction of the court: *Emery v. Kipp*, 154 Cal. 83, 129 Am. St. Rep. 141, 97 Pac. 17,

19 L. R. A., N. S., 983, 16 Ann. Cas. 792. Therefore, the contention that a married woman, in the eyes of the law, does not exist, and therefore is not subject to the jurisdiction of the court, is not maintainable.

b. Whether Record must Show Coverture.

1. *In General.*—In a few of the older cases the courts took the position that a judgment against a married woman was void if the record did not disclose such facts as would show that the judgment was in respect to a transaction for which a judgment could be obtained against her under the rules of the common law. In other words, that the presumption was against its validity: *Cary v. Dix*, 51 Miss. 593; *Magruder v. Buck*, 56 Miss. 314; *Caldwell v. Walker*, 18 Pa. 79, 55 Am. Dec. 592; *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679; *Baker v. Singer Mfg. Co.*, 122 Pa. 363, 15 Atl. 458; *Wallace v. Rippon*, 2 Bay, 112. In Pennsylvania this rule was subsequently abrogated by a statutory enactment declaring that such judgments should be attended with substantially the same effect and presumption of validity as if the married woman was a feme sole: *Littster v. Littster*, 151 Pa. 474, 25 Atl. 117; *Stahr v. Brewer*, 186 Pa. 623, 65 Am. St. Rep. 883, 40 Atl. 1016. The proper distinction in cases of this sort was shown in the case of *Emmett v. Yander*, 62 Ind. 548, the court saying: "The note and mortgage were necessary exhibits, filed with the complaint, and thus became a part of the complaint. We think, therefore, that it appears upon the face of the complaint that Edith A. Emmett was a married woman at the time she executed the note; if so, the note is void, and the complaint founded upon it insufficient to sustain the personal judgment rendered against the wife.

"Such a judgment must be distinguished from one rendered against a married woman on a void note, when the judgment appears valid on the face of the record. In such a case, we have held the judgment good, where the complaint did not show the coverture at the time the contract was made: *Long v. Dixon*, 55 Ind. 352. In the case of *Burk v. Hill*, 55 Ind. 419, a judgment against a married woman was attacked collaterally, to invalidate a sale of lands made under it, and it was held that, the judgment being valid on its face, she was estopped from attacking it in that way."

The court of North Carolina also declared in favor of the rule that the fact of coverture should appear in the record. Thus in *Green v. Ballard*, 116 N. C. 144, 21 S. E. 192, the court said: "Where the fact of coverture appears in the complaint, or notice, as in our case, treated as a complaint, it is expressly and directly held in the following cases that a personal judgment is a nullity and void, and may be set aside at any time by motion of the feme defendant, although no plea or answer was filed: *Griffith v. Clarke*, 18 Md. 457; *Higgins v. Patton*, 49 Mo. 152; *Swayne v. Lyon*, 67 Pa. 436. In *Baker v. Garriss*, 125 N. C. 218, 13 S. E. 2, the coverture appeared from the complaint and answer also, and the judgment was refused, and it was insisted, upon the authority of *Vick v. Pope*, supra [81 N. C. 22], that coverture must be pleaded, and the court said: 'This is undoubtedly true, for when the disability does not appear upon the face of the complaint, the plea must, of course, be by way of answer, as otherwise the fact of coverture can never be known.' It is the fact of coverture, appearing to the court in the record, that will not permit a personal

judgment to be entered against the feme covert on her simple contract to pay money; and we can see no reason why it should not have the same effect whether it appeared in the complaint or in the answer, and we are of opinion that his honor erred, and that he should have set aside the personal judgment against E. A. Ballard; and it is so ordered."

But under the exceptions to the general rule, by which a married woman may bind herself by contract under certain circumstances, it is not quite accurate to say that no personal judgment can be rendered against her where the record shows her coverture. The proper rule is that where it appears from the record that the defendant is a feme covert, the trial should proceed as if the defense of coverture had actually been pleaded, and judgment should not be awarded against her unless the plaintiff brings his case within the exceptions entitling him to judgment: *Moore v. Wolfe*, 122 N. C. 711, 30 S. E. 120.

It is true that where the record shows that the defendant in the judgment was a married woman every person claiming under it is chargeable with notice of that fact. But, after all, the legal conclusion to be drawn from it in connection with the other circumstances was for the court pronouncing the judgment, and for such appellate tribunals as might be called upon to review it. It is not for persons having no authority to exercise any jurisdiction whatever over the case, to review it, at their peril, for the purpose of determining whether it was rightly decided. For the decision, even if erroneous, was but an error in the exercise of jurisdiction and not a proceeding in the absence of jurisdiction. If the trial court had the power to decide the question at all, its power to decide incorrectly and to render judgment against the married woman was not less ample than its power to decide correctly and in her favor.

2. Necessity to Plead Coverture.—The weight of authority is to the effect that if a married woman fails to plead the defense of coverture to an action against her upon a contract to which such coverture would be a defense, the judgment is binding against her: *Landers v. Douglas*, 46 Ind. 522; *Van Metre v. Wolf*, 27 Iowa, 341; *Von Schrader v. Taylor*, 7 Mo. App. 361; *Vantilburg v. Black*, 3 Mont. 459; *Linton v. Jansen* (Neb.), 95 N. W. 675; *Vosburgh v. Brown*, 66 Barb. 421; *Rutherford v. Ray*, 147 N. C. 253, 61 S. E. 57; *Smith v. Borden*, 17 B. I. 220, 33 Am. St. Rep. 867, 21 Atl. 351, 11 L. R. A. 585; *Carter v. Kaiser* (Tenn. Ch.), 48 S. W. 265; *Woodfolk v. Lyon*, 98 Tenn. 269, 39 S. W. 227; *Phelps v. Brackett*, 24 Tex. 236. But where it clearly appears throughout the proceedings in the case that the defendant is a feme covert, the defense of coverture will not be deemed to have been waived by a failure to plead it: *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881. In Kentucky it was held in *Parsons v. Spencer*, 83 Ky. 305, that the failure of a married woman to plead coverture as a defense to an action against her would not estop her in another action from asserting that the judgment was void, the court saying: "It is true that every presumption is in favor of the judgment, and that the onus is therefore upon the party impeaching it; but in this instance, it may or may not be void. For aught that appears, it may have been rendered for the tort of the wife, or for a debt created by her before marriage; or she may have been a feme sole at its rendition, and it therefore not void. Upon the other hand, if, for instance, it were based upon a note or obliga-

tion of such a character as would ordinarily support only an ordinary action, then as the note or obligation would be void as to her, a judgment on it against her would also be void. . . . We are aware that it is a general principle that a party cannot impeach a judgment upon any ground which might have been pleaded as a defense; and that it has been said that, in order to insure safety to a purchaser at a judicial sale, made under a judgment rendered against a female defendant, after due service of process, she cannot be heard to say collaterally, or in another action, that she was married when the judgment was rendered, or incapable of contracting the alleged debt upon which it was rendered.

"If, however, as is unquestionably true, a judgment is void if the court rendering it had no jurisdiction for want of service of process, then it seems to us that it should be equally so if the one served with process is incapacitated by law from retaining an attorney, or has no such legal existence as authorizes a personal liability. In the one case the court has no jurisdiction, and in the other there is nothing within its jurisdiction which has a legal existence. By the judgment the alleged liability is simply placed upon a higher footing; and if before this it was void as to her, then the unauthorized judgment should not prejudice or conclude her, because she was not *sui jura*, and had no such legal existence in court as authorized a personal judgment."

The conclusion of the court in *Stevens v. Deering* (Ky.), 9 S. W. 292, was also to the same effect. The question whether a married woman who is authorized by the statute to sue and be sued as a single woman can deliberately refuse to plead her coverture when sued upon an obligation given before the passage of the statute giving her such rights, and when she has been beaten on the issues she saw fit to raise, obtain a reversal because of the fact of her coverture, was raised in *Turner v. Gill*, 105 Ky. 414, 49 S. W. 311. The court in deciding that under such circumstances she must plead her coverture in order to attack the judgment on that ground, said: "Section 114 of the Code of Practice provides that parties must before trial form a material issue concerning each cause of controversy. Section 386 also provides that judgment shall be given for the party whose pleadings entitled thereto, though there may have been a verdict against him. Pursuant to these sections, it has been held that the defendant is bound by his pleadings, and the court cannot consider a defense which he failed to set up in his answer: *Dennison v. Bowler*, 16 Ky. Law Rep. 399. We see no reason why appellant *Turner* should not be governed by the same rule. She has been authorized to sue and be sued as a single woman, and stands before the law in this respect just as a divorced woman or a widow would have stood, prior to the passage of the statute referred to, if sued upon an obligation made during her coverture. 1 Chitty on Pleadings, page 449, thus lays down the rule: 'Coverture at the time when the supposed contract was entered into must be pleaded in bar.' It seems to us that this must necessarily be the rule under our Code of Practice, which requires the parties to state in their pleadings the facts relied on for their cause of action or defense. The appellant *Turner* has had her day in court, and we see no reason for setting aside the judgment against her, because of a defense she failed to plead, that would not apply to any other litigant; for by the statute

she is given, in effect, the rights of a single woman. . . . Previous to the passage of this act a married woman had no power to enter her appearance to an action, or to employ an attorney, or to make a contract binding herself personally. She could bind her estate, but could create no personal liability by contract. Her existence was merged in her husband, and she could only appear in an action by him. Under this system it might well be that a personal judgment against a married woman would be unauthorized in a suit on a contract made by her, and be set aside on appeal, for the reason that a judgment is but a contract of record, and she could create no personal liability by this contract, as she had no power to create a personal liability by contract. But when she may contract and sue and be sued as a single woman, the reason for this rule ceases, and she is bound by the judgment, just as she would be by any other contract made at the time it is entered."

c. **Where in Respect to Her Separate Estate.**—Ordinarily, under statutes allowing a married woman to enter into contracts in respect to her separate estate, a judgment in relation to such a transaction cannot be rendered against her personally, but only one in the nature of a decree in rem against her separate estate: *Walker v. Jessup*, 43 Ark. 163; *Foertsch v. Germuiller*, 9 App. D. C. 351; *Snodgrass v. Hyder*, 95 Tenn. 568, 32 S. W. 764. Such judgments sometimes specify that the amount thereof is to be collected out of her separate estate: *Baldwin v. Kimmel*, 16 Abb. Pr. 353; or state that they are limited to the separate property of the wife in respect to which the transaction related: *Seeman v. Weippert*, 49 Mo. 61; *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128. But the failure of a judgment against a husband and wife to specifically authorize execution against the wife's separate property does not invalidate it or prevent satisfaction thereof out of such property: *Love v. McGill*, 41 Tex. Civ. 471, 91 S. W. 246. Under the Missouri statute making the wife liable with the husband for necessities furnished to the family, it was held that no personal judgment could be rendered against the wife, and that the statute merely rendered her personal property liable to execution for such a debt when she was made a party to the suit which resulted in the judgment: *Harned v. Shores*, 75 Mo. App. 500. As to her separate property, a valid judgment against a married woman is as effective as an adjudication as though she were sole: *Nave v. Adams*, 107 Mo. 414, 28 Am. St. Rep. 421, 17 S. W. 958. But a judgment against a married woman will not bind her separate estate unless the claim or debt on which it is based would have been a charge on the estate if the judgment had not been rendered: *Chatterton v. Young*, 2 Tenn. Ch. 768.

d. **Where Debt or Obligation was Contracted While a Feme Sole.**—At the common law, in an action for a debt contracted by the wife while sole, judgment is ordinarily rendered against both husband and wife: *Gray v. Thacker*, 4 Ala. 136; *Ellis v. Clarke*, 19 Ark. 420, 70 Am. Dec. 603; *Wisdom v. Newberry*, 30 Mo. App. 241. But under statutory enactments modifying the common-law rule, it often happens that judgment may be rendered against the wife alone for obligations incurred while a feme sole and satisfied out of her separate estate: *Madden v. Gilmer*, 40 Ala. 637; *Travis v. Willis*, 55 Miss. 557. In *Adams v. Bartell*, 46 Tex. Civ. App. 349, 102 S. W. 779, it was declared that where at the time a married woman executed a note and

mortgage to secure the same she was a feme sole, a decree of foreclosure and personal judgment is properly rendered against her, although she has since married. Where a husband and wife are sued upon an obligation executed by the wife while sole, it is not necessary to show that the husband received property through his wife, but if a recovery is had against them, the judgment as to the husband should be levied only upon property which he has obtained through the wife. *Medley v. Tandy*, 85 Ky. 566, 4 S. W. 308.

e. **Where Feme Sole Marries Pending the Suit.**—Where the defendant was a feme sole at the time of the commencement of the suit, her marriage during its pendency does not abate the suit, and the plaintiff may proceed to obtain judgment against the defendant without noticing the marriage: *Phillips v. Stewart*, 27 Ga. 422; *Sackett v. Wilson*, 2 Blackf. 85; *Rosevelt v. Dale*, 2 Cow. 123. The status of the husband who marries the feme sole defendant is a suit involving land is that of a purchaser of the property pendent lite. *Koehler v. Bernicker*, 63 Mo. 368.

f. **Where Husband Dies Pending the Suit Against the Wife.**—If the husband dies pending a suit against him and his wife, and the plaintiff prevails, a personal judgment may be rendered against her. *Boggers v. Richards' Admr.*, 39 W. Va. 567, 45 Am. St. Rep. 933, 2 S. E. 599, 26 L. R. A. 537. And where the defendant was a feme sole when the suit was commenced against her, but marries pending the suit and the husband dies before the rendition of judgment and while the suit was being prosecuted jointly against them, the action continues to survive against the wife: *Parker v. Steed*, 1 Lea, 206.

III. Where the Judgment is by Confession or Default.

a. **By Consent or Confession.**—The tendency under recent statutes and modern practice has been steadily in the direction of holding that a judgment against a married woman is not absolutely void, even though it may be regarded as voidable. The capacity of a married woman to confess judgment depends upon, and is coexistent with, her capacity to contract: *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028. In the case just cited the court, after referring to the cases on the general subject of judgments against married women, observed: "In most of the cases cited where this question has been discussed the judgment was not entered by confession, but only after due notice to the married woman in the case itself. On principle it might well be urged that there is a plain distinction between a judgment entered by confession under a power of attorney where the married woman has no actual notice after she signs the note with the power of attorney attached, and a judgment entered on an ordinary note or contract after notice of the actual proceedings has been given to the married woman. In the latter case she can appear and plead coverture if she desires, and then, under the common law, the plea must be upheld, while in the first case she has no such opportunity, and may never know of the judgment until long after it is entered."

At common law a married woman was held to have no power to make a confession of judgment: *Stevens v. Dubarry*, Minor. 373; *Patton v. Stewart*, 19 Ind. 233; *Coe v. Ritter*, 86 Mo. 277; *Whitman v. Delano*, 6 N. H. 543; *Brittin v. Wilder*, 6 Hill, 242; *Shallcross v. Smith*, 81 Pa. 132; *Swayne v. Lyon*, 67 Pa. 436. And the same rule was naturally declared in relation to judgments confessed under a

warrant of attorney signed by the married woman: *Henchman v. Roberts*, 2 Har. 74; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *Keen v. Coleman*, 39 Pa. 299, 80 Am. Dec. 524; *Wallace v. Rippon*, 2 Bay, 112. If the married woman is entitled to enter into the contract or obligation to which the warrant of attorney is attached, judgment may be confessed against her under such warrant: *Haywood v. Shreve*, 44 N. J. L. 94; *Crosby v. Washburn*, 66 N. J. L. 494, 49 Atl. 455. A married woman may confess judgment on an antenuptial debt which would be otherwise enforceable against her: *Travis v. Willis*, 55 Miss. 557. Though a confession of judgment by a married woman was void at the time when rendered, still where the judgment was revived at a time when the disabilities attached to married women had been removed by statute, its validity becomes established, and it becomes effective for all purposes: *Crenshaw v. Julian*, 26 S. C. 283, 4 Am. St. Rep. 719, 2 S. E. 133. Where, however, the disability of coverture has been either wholly or partially removed by statute, as is the case in most of the states, a married woman may confess a valid judgment against herself in respect to a suit which is covered by the enabling statute: *Truesdail v. McCormick*, 128 Mo. 39, 28 S. W. 885; *Crosby v. Washburn*, 66 N. J. L. 494, 49 Atl. 455; *Canandaigua First Nat. Bank v. Garlinghouse*, 53 Barb. 615; *Koechling v. Henkel*, 144 Pa. 215, 22 Atl. 808; *Cordray v. Galveston* (Tex. Civ. App.), 26 S. W. 245.

In the absence of fraud in its procurement or other special cause shown, a consent decree is as binding on a married woman as on any other person who is *sui juris*: *Winter v. Montgomery City Council*, 79 Ala. 481. A decree of court procured to be made by a married woman cannot be set aside at her instance after the termination of her coverture on the sole ground of her want of power to consent to the decree by reason of her coverture, where for a long period of time she has enjoyed the fruits of the decree and she is the only person who complains of it. Under such circumstances she is estopped from asserting the invalidity of the decree: *Bigham's Appeal*, 123 Pa. 262, 10 Am. St. Rep. 522, 16 Atl. 613.

b. **By Default.**—Much of what was stated in the subdivision of this note discussing the necessity for the wife to plead her coverture as a defense in order to avail herself of it (II, b) is apropos to the validity of default judgments against married women. In those jurisdictions where coverture must be pleaded in order to be available as a defense to the action, a default judgment against a married woman will naturally be binding on her. Under such circumstances the judgment in its operations and effect is the same as if rendered against a feme sole: *Elson v. O'Dowd*, 40 Ind. 300; *Burk v. Hill*, 55 Ind. 419; *Guthrie v. Howard*, 32 Iowa, 54; *Kellogg v. Window*, 100 Iowa, 552, 69 N. W. 875; *Shanklin v. Moody*, 23 Ky. Law Rep. 2063, 66 S. W. 502; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606, 52 N. W. 787; *Vantilburg v. Black*, 3 Mont. 459; *Hanse v. Fiero*, 56 Hun, 463, 10 N. Y. Supp. 494; *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93; *Sheppard v. Kendle*, 3 Humph. 81; *Carter v. Kaiser* (Tenn. Ch.), 48 S. W. 265; *Focke v. Sterling*, 18 Tex. Civ. 8, 44 S. W. 611. The above rule is based on the doctrine that the judgment or final order of a court having jurisdiction of the parties and subject matter, however erroneous, irregular or informal it may be, is valid until reversed or set aside.

But it has been held in a few cases that a judgment by default rendered against a married woman is a nullity: *Griffith v. Clark*, 18 Md. 457; *Morse v. Toppan*, 3 Gray, 411; *Higgins v. Pelzer*, 49 Mo. 152; *Cary v. Dixon*, 51 Miss. 593; *Dorrance v. Scott*, 3 Whart. 30. 31 Am. Dec. 509; *Norton v. Meader*, 4 Saw. 603, Fed. Cas. No. 10331. In *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93, the court reviewed the cases last cited, and was of the opinion that the courts rendering the decisions referred to would not necessarily hold such default judgments of no effect in all cases; as, for instance, where the debt was contracted while a feme sole, and concluded as follows: "Placing the case, however, on the broader ground that the debt was of such a character that the plea of coverture would have been a complete defense, our duty to hold the judgment not to be void, and thus to adhere to *Callen v. Ellison* [13 Ohio St. 446, 82 Am. Dec. 445], is very plain; for the doctrine there enunciated is, as Mr. Freeman and Mr. Bishop show (*Freeman on Judgments*, sec. 150; 2 Bishop on *Married Women*, sec. 386), sustained by the better reason and greater weight of authority. And a somewhat laborious examination of the cases leads us to the same conclusion."

Under the enabling statutes which empower a married woman to contract and sue and be sued, a default judgment rendered against a married woman on a note executed prior to the statute and at a time when she had no such power to contract is nevertheless valid, since the defense under the statute, the defense of coverture, must be pleaded and taken advantage of like any other affirmative defense: *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481.

IV. Validity Where Statutes Exist Modifying or Removing Common-law Disabilities of Married Women.

Although in most of the states the enabling acts, commonly called Married Woman's Acts, are framed in such broad terms as to place married women upon the same footing as a man, as far as the rendition of a judgment against her is concerned, still there are some states in which the statutes of this character are not so comprehensive. Where the statute is restrictive in its terms, occasions arise where the application of the common-law rules in respect to judgments against married women are applicable.

Where the statute enables a married woman to sue and be sued as a feme sole, a personal judgment may be rendered against her in the same manner as any other person: *Arkansas Stables v. Samstag*, 73 Ark. 517, 94 S. W. 699; *Gilman v. Matthews*, 20 Colo. App. 170, 77 Pac. 366; *Fawcner v. Scottish-American Mtg. Co.*, 107 Ind. 555, 3 N. E. 689; *Miner v. Pearson*, 16 Kan. 27; *Tarr v. Friend*, 6 Kan. App. 43, 49 Pac. 633; *Wren v. Ficklin*, 109 Ky. 472, 59 S. W. 746; *Herring v. Johnston*, 24 Ky. Law Rep. 1940, 72 S. W. 793; *Rogers v. Hopper*, 94 Mo. App. 437, 68 S. W. 239; *Barton v. Beer*, 35 Barb. 78; *Jones v. Merritt*, 23 Hun, 184; *Society of Friends v. Haines*, 47 Ohio St. 423, 25 N. E. 119; *Smith v. Smith*, 20 R. I. 556, 40 Atl. 417; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

Sometimes, however, the enabling statute has restricted her ability to sue and be sued to transactions in respect to her separate property. Under such circumstances her liability under her contracts is changed so far only as the express terms of the statute provide: *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128. In other words, some

of the older statutes of this character did not empower the wife to do more than contract in respect to her separate property without the interference of her husband, and as incidental to that power allowed her to be sued in respect to such transactions without her husband being joined: *Stockton v. Farley*, 10 W. Va. 171, 27 Am. Rep. 566. Such was, in fact, the effect of the statutes in New York of 1848 and 1849, which appear to have served as the models for the earlier statutes in other states: *Cobine v. St. John*, 12 How. Pr. 333. Of course, under enabling statutes which allow a married woman to deal with her separate property in the manner indicated above, personal judgments may be rendered against her: *Walker v. Jessup*, 43 Ark. 163; *Wisdom v. Newberry*, 30 Mo. App. 241; *Patrick v. Littell*, 36 Ohio St. 79, 38 Am. Rep. 552.

The laws protecting the separate property of married women and giving them the right to sue as if sole are enabling or remedial acts, and should be so construed as to accomplish the purpose of their enactment: *Beagles v. Beagles*, 95 Mo. App. 338, 68 S. W. 758. Hence the liability of a married woman on a contract made within the scope of her statutory capacity to contract is to be determined by the same rules as those applied to persons of full capacity: *McKell v. Merchants' Nat. Bank*, 62 Neb. 608, 87 N. W. 317. But where the contract is one which she is not empowered to make by the enabling statute, the validity of the judgment based on the contract will be determined by the rule of the common law in force in that jurisdiction: *Swing v. Woodruff*, 41 N. J. L. 469. Enabling acts empowering a married woman to sue and be sued are prospective in their operation, and leave the parties in the same situation in respect to past transactions as they were previous to their enactment: *Van Rheeden v. Bush*, 44 Mo. App. 283; *Rogers v. Lynch*, 44 W. Va. 94, 29 S. E. 507. But where an action was brought before the enabling act took effect, but issues were not completed until after that time, a personal judgment may rendered against the married woman in the absence of a plea by her that she was under the disability of coverture when the debt was contracted: *Bethel v. Durall*, 22 Ky. Law Rep. 1801, 61 S. W. 699.

MELVIN v. PIEDMONT MUTUAL LIFE INSURANCE COMPANY.

[150 N. C. 398, 64 S. E. 180.]

INSURANCE.—A Partial Payment of Back Dues on a lapsed policy will not work a reinstatement of the insured, under a stipulation for reinstatement on the payment of "all back dues." (p. 944.)

INSURANCE.—Where an Insured, in Arrears six weeks, pays four weeks' back dues, and dies two days later, no recovery can be had on his policy, which provides that "on a failure to pay the weekly premiums for five weeks, all claims on the company are by such arrears forfeited," and that a reinstatement shall occur on the payment of "all back dues," but only after sixty days from paying the back dues and on condition that the insured shall be in good health when they are paid and for five weeks thereafter. (pp. 944, 945.)

Action by the beneficiary on a policy of insurance. A motion for nonsuit under the Hinsdale act was overruled, and the defendant excepted. The case was submitted to the jury on these issues: 1. "Did the insured fraudulently misrepresent his age in the application for the policy in controversy?" Answer: "No." 2. "Is the defendant indebted to the plaintiff, and if so, in what amount?" Answer: "Yes; forty-five dollars, the amount of the policy."

Thomas H. Sutton, for the plaintiff.

Sinclair & Dye, for the defendant.

399 HOKE, J. The policy declared on contains a stipulation, made a part of the contract of insurance, in terms as follows:

"5. Whenever the insured shall fail to pay the weekly premium on this policy for five weeks, and shall be due five weeks' premium, all claims on the company are by such arrears forfeited; but the insured may be reinstated by paying up all back dues, and shall be entitled to full benefits sixty days from date of paying such dues, provided the insured shall be in good health when such dues are paid and for five weeks thereafter."

There was evidence showing that on January 18, 1908, the deceased was indebted for six weeks' unpaid weekly dues and premiums, and on that day he paid four weeks of such arrears which was received by the agent and by him turned over to the superintendent, who entered the same on the company's books to the credit of the insured, and on January 20, 1908, the insured died.

The court below was of opinion that the plaintiff was entitled to have the issue of defendant's liability submitted on the question of waiver, by reason of the payment of the four weeks' back dues and the receipt of same by the company, but we do not think this is a correct view of the case on the facts presented. By the terms of the contract, "On a failure to pay the weekly premiums for five weeks, all claims on the company are by such arrears forfeited," and, at the time the payment on these six weeks of back dues was made, the rights of the insured, under his policy, had ceased: *Freckman v. Royal Arcanum*, 96 Wis. 133, 70 N. W. 1135; *Supreme Lodge v. Keene*, 6 Tex. Civ. App. 267, 25 S. W. 1084; *Carlson v. Supreme Council*, 115 Cal. 466, 47 Pac. 375, 35 L. R. A. 643. While provision for reinstatement is contained in the policy, the stipulation is that such reinstatement shall occur on the payment of "all back dues"; and the authorities are very generally to the effect that, under such a stipulation, a partial payment of back dues will not work a reinstatement: *Continental Ins. Co. v. Willet*, 24 Mich. 268; *Hudson v. Knicker-*

bocker L. Ins. Co., 28 N. J. Eq. 167; Supreme Lodge v. Ceters, 95 Va. 610, 29 S. E. 322. Certainly no such result could be allowed unless there was evidence of some understanding or authorized agreement to that effect. Apart from this, by the express provisions of the contract, a reinstatement is only to ⁴⁰⁰ occur after sixty days from paying the back dues and on condition that the insured shall be in good health when such dues are paid and for five weeks thereafter. He died in two days after the partial payment was made.

We are of opinion that the defendant's motion for nonsuit should have been allowed, and it is so ordered.

Reversed.

The Reinstatement of an Insured Person, after a forfeiture of his rights under the policy by reason of nonpayment of dues or premiums, is considered in the note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 577. Subsequent cases on this question are *Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 112 Am. St. Rep. 862; *Lane v. Fidelity Mut. Life Ins. Co.*, 142 N. C. 55, 115 Am. St. Rep. 729.

HOCKFIELD v. SOUTHERN RAILWAY COMPANY.

[150 N. C. 419, 64 S. E. 181.]

EVIDENCE.—When Paragraphs of an Answer Put in Evidence by the Plaintiff are complete in themselves, it is not error to exclude distinct averments in his own interest made in another part of the answer by the defendant. (pp. 946, 947.)

CARRIER—Notice of Arrival of Goods.—A Transfer Company, in the habit of hauling goods for a consignee and others, is his agent only as to goods actually hauled, and notice to it of the arrival of goods is not notice to him. (p. 947.)

PLEADING—Amendment.—A Complaint in an Action Against a Carrier for the value of goods whose transportation was delayed, and for the statutory penalty for the delay, may be amended, in the discretion of the court, to include the penalty imposed by statute for failure to give notice of the arrival of the shipment. (p. 947.)

PLEADING—Amendment Interposing Statute of Limitations. The refusal to allow an amendment pleading the statute of limitations is within the discretion of the court and not reviewable. (p. 947.)

INTERSTATE COMMERCE.—Where an Interstate Shipment is Missent, rebilling the goods from one point in a state to another point therein is an intrastate matter. (p. 947.)

INTERSTATE COMMERCE—Penalty for Failure to Deliver Goods.—A penalty imposed by statute upon a carrier for failure to deliver goods after their transportation has been fully completed is not a burden on interstate commerce. (p. 947.)

CARRIER—Storage Charges on Goods Wrongfully Withheld.—A carrier cannot counterclaim for warehouse charges on goods which it has wrongfully withheld and refused to deliver. (p. 948.)

Civil action commenced before a justice of the peace. The plaintiff did not file any written complaint. The summons required the defendant "to answer the complaint of plaintiff for the nonpayment of two hundred dollars and interest from August 21, 1907, until paid—ninety-seven dollars, value of box of pants shipped him by Manhattan Pants Company, and one hundred and three dollars, penalty for delay in such case provided in section 2632, Revisal of 1905." The defendant filed an answer in writing denying its indebtedness to plaintiff, and set up a counterclaim for twenty-five dollars for storing the box of goods. The justice gave judgment for ninety-three dollars value of the goods, and fifty dollars. An appeal was taken to the superior court. The plaintiff was permitted to amend and allege that "the defendant received at Durham, North Carolina, the box of pants addressed to plaintiff at Durham; that the defendant, upon the arrival of said box of goods so addressed to plaintiff, as consignee, failed to notify plaintiff of its arrival and the charges thereon, as required by section 2633 of the Revisal, and for such failure demands the sum of fifty dollars as penalty imposed by said section 2633 of the Revisal."

The following issues were submitted to the jury: 1. "What is the value of the case of pants shipped to plaintiff?" Answer: "Ninety-three dollars." 2. "Did defendant unlawfully refuse to deliver the case of pants to plaintiff?" Answer: "Yes." 3. "Did defendant, upon the arrival of the case of pants, notify plaintiff, the consignee, of the arrival and the charge for transportation upon the same?" Answer: "No." 4. "What damage, if any, by way of penalty, is plaintiff entitled to recover of defendant?" Answer: "Fifty dollars." 5. "What amount, if anything, by way of counterclaim, for storage, is defendant entitled to recover of the plaintiff?" Answer: "Nothing."

Judgment was given accordingly, and the defendant appealed.

Manning & Foushee, for the plaintiff.

Guthrie & Guthrie, for the defendant.

⁴²¹ CLARK, C. J. The plaintiff introduced two of the four paragraphs of the answer filed before the justice of the peace. The defendant offered the other two paragraphs. In *Lewis v. Norfolk & W. R. R.*, 132 N. C. 382, 43 S. E. 919 it is said: "Where a paragraph of an answer admits a specific fact, and in another part of the same paragraph denies the allegations of the corresponding paragraph of the complaint the plaintiff is entitled to introduce the admission without introducing the part denying the allegations of the complaint." Here the paragraphs of the answer put in evidence by the plaintiff were complete in themselves, and it was not error

exclude the distinct averments in its own interest made by the defendant. It could put on evidence in support of them at the trial: *Stewart v. North Carolina R. R. Co.*, 136 N. C. 385, 48 S. E. 793.

A transfer company was in the habit of hauling goods for plaintiff and others, but that only made it the agent of plaintiff as to goods actually hauled. There was no evidence that the transfer company was told to haul these goods, and it was not error to exclude a question asked of an agent of such transfer company to show notice given to him of plaintiff's goods being in the depot, when there was no evidence that such notice, if given, was communicated to the plaintiff. The plaintiff testified that he applied for the goods in person repeatedly.

The court allowed the plaintiff to amend its complaint and the defendant to amend its answer, but not to plead the statute of limitations. The amendment did not set up a cause of action wholly different, but merely amended the complaint to claim the penalty of fifty dollars under the Revisal, section 2633. Such amendment was in the discretion of the court, as was also the refusal of an amendment pleading the statute of limitations: *Parker v. Harden*, 122 N. C. 111, 28 S. E. 962; *Goodwin v. Caraleigh P. & Fertilizer Co.*, 123 N. C. 162, 31 S. E. 373.

The fourth exception is abandoned. The fifth exception presents the contention that this is an interstate shipment and that the Revisal, section 2633, does not apply. It is true that the shipment originated at Baltimore, Maryland, but it seems to have gotten ⁴²² "missent," and left its route, which was via Dunn, North Carolina, thence over the Durham and Southern Railroad to Durham, North Carolina. The defendant's answer avers that by reason of said error or mistake the Atlantic Coast Line Railroad Company "rebilled" the goods from Selma to Durham over defendant's line, and that it received and transported the goods by virtue of said Selma to Durham bill of lading, and that the original waybill, or bill of lading, from Baltimore to Durham never came into its possession. Clearly this is an intrastate matter. But if it had been an interstate transaction the penalty imposed by the Revisal, section 2633, has nothing to do with interstate transportation, but deals only with the neglect of duty of the defendant after the transportation was fully completed and the goods lay in its warehouse—not in the cars at Durham. The plaintiff demanded his goods again and again, but the defendant would not make out its freight charges nor deliver the goods. The penalty laid by the Revisal, section 2633, has been held not a burden on interstate commerce (*Harrill v. Southern R. R. Co.*, 144 N. C. 532, 57 S. E. 383); and, indeed, the failure to deliver freight is not interstate commerce: *Morris-Scarboro-Moffitt Co. v. Southern Express Co.*, 146 N. C. 67, 59 S. E. 667, 15 L. R. A., N. S., 983.

Exception 6 is for refusal to permit defendant to amend its answer so as to plead the statute of limitations. This was a matter of discretion and not reviewable.

The defendant still has the goods, and the plaintiff has been sued by consignor and been forced to pay their value, with court costs added. There is no possible ground for defendant's counterclaim for warehouse charges on goods it wrongfully withheld and refused to deliver.

No error.

Notice of the Arrival of Goods Given to a Drayman, merely authorized to haul them from the depot to the store of the consignee, is not notice to the latter: *Berry v. West Virginia etc. R. R. Co.*, 44 W. Va. 538, 67 Am. St. Rep. 781.

A Statute Providing That a Penalty be Paid the Consignee by a carrier doing business within the state, for failure to admit and pay a claim for loss of freight while in its possession, within a certain time, is not unconstitutional as an unlawful interference with interstate commerce, even as applied to an interstate shipment: *Charles v. Atlantic Coast Line R. R. Co.*, 78 S. C. 36, 125 Am. St. Rep. 762.

RICHARDSON v. RICHARDSON.

[150 N. C. 549, 64 S. E. 510.]

CURTESY—Right to Rents—Change in Law.—The right of a husband to the usufruct, or rents and profits, of his wife's land is contingent upon the birth of issue. It is a mere expectancy or possibility of which the legislature may deprive him at any time before the event occurs upon the happening of which the interest will become vested. (p. 950.)

CURTESY—Change in Law Curtailing Estate.—Where a marriage was contracted before, but no children were born until after the adoption of a constitutional provision giving married women the power, among other things, of disposing of their property by will, the wife may by will deprive the husband of any interest in her estate as tenant by the curtesy and bar his right to rents after her death under a lease executed by them. (p. 951.)

CURTESY—Change in Law Curtailing Estate.—At the common law the husband, upon marriage, was seised in right of his wife of a freehold interest in her lands during their joint lives, and either as tenant by marital right or as tenant by the curtesy initiated. He was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. But a radical change has been effected by the constitution and statutes of North Carolina. (p. 951.)

HUSBAND AND WIFE.—A Lease of Land by a Husband and Wife, executed with no privy examination of the latter, is void as to her, and passes no interest to him in the rents and profits of the land. (p. 953.)

J. A. Lockhart and F. J. Cox, for the plaintiff.

Robinson & Caudle, for the defendants.

⁵⁴⁹ WALKER, J. This action was brought to recover the value of five bales of cotton which have been sold, the parties agreeing ⁵⁵⁰ that the proceeds shall be held to await the determination of this case. Judgment was entered for the defendants, and the plaintiff appealed.

The facts are that the plaintiff and Charlotte Leak were married in 1867, she being then seised of land in Anson county, known as the Brown Creek tract and containing eight hundred and seventy-eight acres, which is described by its metes and bounds in the record. They had five children, the oldest of them having been born in November, 1868. In December, 1905, the said Charlotte Richardson and her husband leased the land, by a written agreement, for the term of five years, to R. J. Beverly, who agreed to deliver, as rent, five bales of cotton on the first day of November of each year during the term. Charlotte Richardson died in October, 1907, leaving a will, by which she devised and bequeathed all of her property and estate to persons other than the plaintiff. The lessee delivered to Charlotte Richardson, just before her death, two thousand and four pounds of cotton, it being part of the rent for the year 1907, and after her death the lessee delivered the remainder of the cotton in full payment of the rent for that year.

The question presented for our consideration is whether the plaintiff, the husband of Charlotte Richardson, or the defendant, John S. Richardson, Jr., her executor, is entitled to receive the proceeds of the sale of the cotton.

The plaintiff contends that by virtue of the marriage and the ownership of the land by his wife he acquired a vested interest as tenant by the curtesy initiate, in all crops grown upon the same, without regard to the fact that the first child of the marriage was born after the adoption of the constitution of 1868, and that he is therefore entitled to the rent due by the terms of the lease; while the defendants assert title to the rent upon the ground that, by the constitution of 1868, the land, with its rents and profits, became the separate property of the wife, the testatrix of the defendant Richardson, as the plaintiff's right or interest in the land as tenant by the curtesy was a contingent one until the birth of issue, which occurred after the adoption of the constitution, and therefore there was no interference with any vested right of the plaintiff by the provision of that instrument that the property of the wife acquired before marriage ⁵⁵¹ shall belong to her as her separate estate, with the power to dispose of it by will, and also by deed, with the written consent of her husband, as if she were unmarried: Const., art. 10, sec. 6. We must therefore determine what is the husband's interest in his wife's property by the rules of the common law, as modified by the constitution, if, under the facts of this case, any change in

those rights as they existed at common law has been wrought by that instrument.

Blackstone says: "There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife issue and death of the wife." He is referring here, of course, to a tenancy by the curtesy consummate. In regard to the time when the husband first becomes vested with an interest or estate in his wife's land he says: "As soon, therefore, as any child is born, the father began to have a permanent interest in the lands; he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy initiate; and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant": 2 Blackstone's Commentaries, 127. This is in harmony with the former decisions of this court. As is said in *Morris v. Morris*, 94 N. C. 613: "The husband by the birth of issue, became tenant by the curtesy initiate to a separate estate, for his own life, in his wife's land, the usufruct or profit of which, during that period, was absolutely and exclusively his own property. This has not been questioned in this state since the decision in *Williams v. Lanier*, 44 N. C. 30, and others following that case: *Halford v. Tetherow*, 47 N. C. 393; *Childers v. Bumgarner*, 53 N. C. 297; *McGlennery v. Miller*, 90 N. C. 215; *Osborne v. Mull*, 91 N. C. 203." We see, therefore, that the husband's right to the usufruct, or rents and profits of the land, is contingent upon the birth of issue. It is a mere expectancy or possibility, and when this is the case the legislature may deprive him of his expectant interest at any time before the event occurs, upon the happening of which it would become vested. We said in *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272, 9 L. R. A., N. S., 1145: "So long as the interest remains contingent only, the legislature may act, for a bare expectancy or any estate depending for its existence ⁵⁵² on the happening of an uncertain event is within its control, not being a vested right which is protected by constitutional guaranties. If this be so, the nature of estates and their enjoyment must, to a certain extent, and indirectly, be subject to legislative control and modification in order to promote the public welfare: *Smith on Statutory and Constitutional Construction*, 412. In this country estates in tail have very generally been turned into estates in fee simple by statutes, the validity of which is not disputed: *DeMill v. Lockwood*, 3 Blatchf. 56, Fed. Cas. N. 3782; *Lane v. Davis*, 2 N. C. 277; *Minge v. Gilmour*, 2 N. C. 279." Judge Cooley, in his treatise on Constitutional Limitations, seventh edition, at page 513, puts the very case now have under consideration, and thus states the law applicable to it: "At the common law, the husband, immediately on the marriage, succeeded to certain rights in the real estate

personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away. But other interests were merely in expectancy. He could have a right as tenant by the curtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts, and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely—that is to say, until it becomes initiate—the legislature must have full right to modify or even to abolish it. And the same rule will apply to the case of dower, though the difference in the requisites of the two estates is such that the inchoate right to dower does not become property or anything more than a mere expectancy at any time before it is consummated by the husband's death. In neither of these cases does the marriage alone give a vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition."

⁵⁵³ We are therefore of the opinion that the plaintiff acquired no right to the cotton as rent for the land of his wife by virtue of any estate in him as tenant by the curtesy initiate, because of the constitutional provision (article 10, section 6), by which it is declared that a married woman's real and personal property shall be and remain her sole and separate estate, and that she may devise and bequeath the same, thus depriving her husband of any interest therein: *Walker v. Long*, 109 N. C. 510, 14 S. E. 299; *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127. As that article of the constitution was a valid enactment, under the facts and circumstances of this case, the plaintiff has no interest, either as tenant by the curtesy initiate or consummate in rent which was reserved in the lease, his wife having bequeathed the same to other persons: *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127.

It is true that at common law the husband, upon the marriage, was seised in right of his wife of a freehold interest in her lands during their joint lives, and that either as tenant by marital right or as tenant by the curtesy initiate he was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. But radical changes in this respect were effected by the act of 1848 (Revisal, sec. 2097). Construing this act, in *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84, the court said: "Whatever may be the rights of the husband in the wife's land after she

may die intestate, the authorities concur in the view that the husband holds no estate during the life of the wife as tenant by the curtesy initiate which is subject to execution and which he can assert against the wife. He has the right of ingress and egress and marital occupancy, but can assume no dominion over her land, except as her properly constituted agent." In *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, we find the following reference to the act: "By virtue of the act of 1848 and the further modification made by the constitution of 1868, the tenancy by the curtesy initiate is stripped of its common-law attributes until there only remains the husband's bare right of occupancy with his wife, with the right of ingress and egress (*Manning v. Manning*, 79 N. C. 300), and the right to the curtesy consummate contingent upon his surviving her. . . . The husband is still seised in law of the realty of his wife, shorn ⁵⁵⁴ of the right to take the rents and of the power to lease her lands. . . . He has by the curtesy initiate a freehold interest, but not an estate in the property." It would seem that the more recent decision in *Taylor v. Taylor*, 112 N. C. 134, 16 S. E. 1019, is a direct authority against the claim asserted by the plaintiff. In that case the court, speaking by Shepherd, C. J., says: "In all of these cases the actual decision (as distinguished from several expressions founded upon the common law) may, it is thought, be reconciled with the recent ruling of this court in *Jones v. Coffey*, 109 N. C. 515, 14 S. E. 84, that under the act the husband has no right which he can assert against the wife in her real property. This appears to be in accord with the early declaration of the court that the 'sole object of the act was to provide for her home, of which she could not be deprived, either by the husband or by his creditors.' Conceding that the cases may not be altogether harmonious, we must adopt the later decisions, and according to these the plaintiff is entitled to recover; for, admitting that a divorce a mensa et thoro cannot, as it is claimed, affect the property rights of the parties (*Taylor v. Taylor*, 93 N. C. 418, 53 Am. Rep. 460), the defendant as against the wife, had no property rights whatever, but simply a right of ingress and egress for the purpose of enjoying her society, and these he has forfeited during the coverture or until a reconciliation, by his own misconduct. Taking the other view, however, and admitting that the husband had a right to the rents and possession of the land during coverture, we think that such rights must yield when they come in conflict with the paramount rights of the wife, as indicated by the act of 1848."

It appears in this case that there was a written lease, signed by the plaintiff and his wife, but there was no privy examination of the latter, as required by the act of 1848 (*Revisal* § 2097), and also by the *Revisal*, section 2096. The lease was

therefore void as to the wife, and passes no interest to the husband in the rents and profits of the land, if otherwise he would have acquired an interest.

Our conclusion is that there was no error in the judgment of the court.

Affirmed.

The Law of Curtesy is the subject of a note to *Donovan v. Griffith*, 128 Am. St. Rep. 474.

The Constitutionality of Statutes Affecting the Estate of a Husband in his wife's property, or of the estate of the wife in her husband's property, is the subject of a note to *Rose v. Rose*, 84 Am. St. Rep. 437. A statute enlarging the dower estate is unconstitutional as against one who has contracted with the husband for a judgment lien on the property, although the judgment is not actually entered until after the passage of the statute: *Davidson v. Richardson*, 50 Or. 323, 126 Am. St. Rep. 738. But a statute providing that a wife's inchoate interest in her husband's land shall become vested when the land is sold at judicial sale does not deprive him of his property without due process of law: *Green v. Estabrook*, 168 Ind. 123, 120 Am. St. Rep. 349.

MORGANTON HARDWARE COMPANY v. MORGANTON GRADED SCHOOL.

[150 N. C. 680, 64 S. E. 764.]

MECHANIC'S LIEN.—A Public School Building is not subject to a statutory lien for materials furnished for its construction, in the absence of an expression in the statute indicating a contrary legislative intention. (pp. 954, 955.)

Riddle & Huffman, S. J. Ervin and J. T. Perkins, for the plaintiffs.

Avery & Ervin, for the defendants.

680 WALKER, J. The plaintiffs furnished materials to L. W. Cooper, who had contracted to build a schoolhouse for the defendant 681 the Morganton Graded School, and they filed, and now claim, a lien upon the building for the materials so furnished. The only question for our consideration is whether a public school building is subject to a statutory lien for materials furnished for its construction. This question we must answer in the negative, if we apply the principle declared in former decisions of this court and are governed by the great weight of authority in other jurisdictions: *Snow v. Commissioners*, 112 N. C. 335, 17 S. E. 176; *Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. C. 359, 42 S. E. 857. In 27 Cyc. 25, it is said that such a lien does not attach to public school buildings, and many authorities are cited in the notes to

sustain the proposition. In *Neal-Willard Co. v. Trustees*, 121 Ga. 208, 14 S. E. 978, it is said: "As a general rule, in the absence of some expression in the statute making it evident that the legislature intended it so to apply, a mechanic's lien statute will not be construed to give a lien upon public buildings or other public property devoted to public use. Thus, a lien cannot be acquired or enforced against a public school building, or the lot on which it is situated, a courthouse, a city hall, a public bridge which is part of a public highway, or the waterworks of a municipality. In some cases the reason given for this rule is that to hold otherwise would be contrary to public policy, while in others the rule has been considered to be based upon the fact that the ordinary methods provided by statute for the enforcement of the lien cannot be pursued against public property, and hence, there being no mode of enforcing the lien, it cannot exist; and it has also been held that the provisions of the mechanic's lien law could not be applied to public school buildings, because the relation sustained by a school district to the school property was not that of owner within the meaning of the statute, and hence a contract with the district could not give rise to the lien"; citing 20 Am. & Eng. Ency. of Law, 295, 296. The counsel admitted that as a general rule, a public building is not the subject of a lien for work done or materials furnished, in the absence of some expression in the statute showing the intention of the legislature to be otherwise, but they contended that the rule did not apply when the title to the property is vested in a board of trustees. This contention is fully answered in the case of *Neal v. Trustees*, just cited, and ^{also} especially in *Trustees v. City Council*, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151, where it is said: "In view of the legislation to which we have referred, there can be no question as to the public character of the institution originally. The property vested in the trustees was public property and was committed to them for a public purpose. No private interest of any kind was acquired. The beneficial interest was in the public, and the trustees were merely agents of the state for the administration of the fund and the management of the institution. Since that time there has been no legislation changing the public character of the trust or parting with the control of the state over the institution or the fund connected with it. Mere noninterference with the control exercised by the trustees could not affect the rights of the state or devalue the institution or the property of its public character." The question is carefully discussed in *Fatout v. Commissioners*, 102 Ind. 232, 1 N. E. 389, where the court, citing *Board of Commrs. v. O'Connor*, 86 Ind. 531, 44 Am. Rep. 338, says: "In the mechanic's lien law of this state there is no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use; and, in the absence of such a provision,

we must hold, in conformity with the weight of authority elsewhere, that such a lien can neither be acquired nor enforced upon or against such property held for such use. The doctrine of the case last cited is decisive, as it seems to us, of the question we are now considering, adversely to the validity of the mechanic's lien which Fatout claims to have acquired and is seeking to enforce upon and against the public schoolhouse erected by him, in the case in hand. For there is no public property held for a more sacred public use than a public schoolhouse of a public school corporation, under the constitution and laws of this state. In *Lessard v. Inhabitants of Revere*, 171 Mass. 294, 50 N. E. 533, the same conclusion was reached, which was based upon a full citation of the authorities. Holmes, J., for the court, said that: "The general current of decisions is against the lien when the property upon which it (the lien) is asserted is held for public use." We do not find anything in our statute indicating a purpose on the part of the legislature to change the general rule of law as thus established by the decisions of the courts in other states, and, as we think, also by the decisions of this court.

⁶⁸³ The court erred in adjudging upon the findings of fact that the plaintiffs had acquired any lien upon the property of the defendant the Morganton Graded School, and its judgment, as to that defendant, is therefore reversed.

The Principal Case is Supported by the recent cases of National Fireproofing Co. v. Huntington, 81 Conn. 632, 129 Am. St. Rep. 228; *Eureka Stone Co. v. First Christian Church*, 86 Ark. 212, 126 Am. St. Rep. 1088.

CURRIER v. RITTER LUMBER COMPANY.

[150 N. C. 694, 64 S. E. 763.]

MASTER AND SERVANT.—A Servant Wrongfully Discharged after serving a few days under a contract for one year may recover damages for the entire year, less what he might have earned upon reasonable effort. (p. 956.)

MASTER AND SERVANT.—A Contract for Personal Service may be Terminated at the will of either party, when no time is fixed and no stipulated period of payment is made. (p. 956.)

Robertson & Benbow and Busbee & Busbee, for the plaintiff.

Shepherd & Shepherd, Fred S. Johnston and L. C. Bell, for the defendant.

⁶⁹⁴ BROWN, J. The material points in this appeal are embraced in the second and fourth issues—that is to say, whether there was a contract of employment for the entire

year of 1897. The action is brought upon the assumption that there was such a contract of employment, and the plaintiff seeks to recover damages for the entire year, although he did no work after the first few days in July, 1907. If there were such a contract and he was wrongfully discharged, he would be entitled to such damages less what he might have earned upon reasonable effort: *Smith v. Cashie & Chowan Lumber Co.*, 142 N. C. 26, 54 S. E. 788.

⁶⁹⁵ His honor instructed the jury that upon the letters and other undisputed testimony there was no such contract for the entire year of 1907, but that the employment was from month to month. It is admitted that the correctness of this ruling is the only question presented.

In contracts for personal service the English rule is that when no time is fixed and no stipulation as to payment made it is presumed to extend for a year. In this country, when no time is fixed and no stipulated period of payment made, the contract is terminated at the will of either party: 20 Am. & Eng. Ency. of Law, 14; *Soloman v. Wilmington Sewerage Co.*, 142 N. C. 439, 55 S. E. 300, 6 L. R. A., N. S., 391; *Edwards v. Seaboard & R. R.*, 121 N. C. 490, 28 S. E. 137.

The evidence of the contract is wholly in writing, in the form of correspondence, and there is no evidence of any other contract subsequent thereto.

We think his honor's interpretation of the letters is correct and in accord with the case of *Edwards v. Seaboard & R. R.* 121 N. C. 490, 28 S. E. 137.

No error.

The Law Presumes a Hiring for Personal Services to be at Will, if no definite period is expressed in the contract and there are no facts or circumstances showing a different intention: *Weidman v. United Cigar Stores Co.*, 223 Pa. 160, 132 Am. St. Rep. 727.

The Remedies of an Employé Wrongfully Discharged are considered in the note to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515. As to the measure of his damages, see the recent cases of *Fitzpatrick etc. Ginning Co. v. McLaney*, 153 Ala. 586, 127 Am. St. Rep. 71; *Ware Bros. Co. v. Cortland Cart etc. Co.*, 192 N. Y. 439, 127 Am. St. Rep. 914.

STATE v. CALE.

[150 N. C. 805, 63 S. E. 958.]

CRIMINAL LAW.—The Plea of Former Conviction is not treated in many respects as one involving the substantial question of guilt or innocence, but as approaching more nearly the determination of a civil issue, and by consent it may be entertained and determined at the same time with a plea of not guilty, and when so agreed upon may be heard and decided by the court. (pp. 958, 959.)

CRIMINAL LAW.—Defects in the Process, as where the warrant of arrest is unsigned and the deputation to the special officer is unwritten, if the accused appears or is brought before a court having jurisdiction, in no way affect the judgment rendered, whatever may be the rights of the defendant against the officers. (p. 959.)

CRIMINAL LAW.—Former Jeopardy—Collusive Conviction.—A conviction is not void and unavailable on a plea of former jeopardy, because alleged to be collusive and not adversary, where the defendant informed the magistrate that he had had a fight for which he must suffer, and requested the trial to be set for a time convenient to himself and employes, and the affidavit was made at the instance of the justice by a third person designated as a state's witness, witnesses were summoned and examined, the assaulted person and his relations were notified to attend, but did not appear, although the case was delayed a while for their coming, and the defendant was adjudged guilty and fined one dollar. (pp. 960, 961.)

Attorney general for the state.

G. M. T. Fountain, for the defendant.

⁸⁰⁵ HOKE, J. Defendant entered the plea of "not guilty" and "former conviction," it having been agreed by consent that the two pleas could be heard together. After the evidence was all in, there being no material dispute in the same on the question of former conviction of simple assault, it was further agreed that the court ⁸⁰⁶ should submit the question of assault with a deadly weapon to the jury and take a verdict thereon, subject to the determination of the plea of former conviction by the court as on facts agreed, in case there was a verdict of simple assault only. The jury rendered a verdict of not guilty of assault with a deadly weapon, but guilty of simple assault; thereupon the court found the facts as to the alleged former conviction, and the same seem to be correctly epitomized in the following statement:

The defendant had a fight with one Grover Harrell, in No. 9 Township, on March 14, 1908. On March 15, 1908, the defendant saw J. L. D. Corbett, a justice of the peace, and told him that he had a fight and expected he would have to pay for it and asked that, if a warrant was issued for him, the justice would make it returnable about 12 o'clock M., as he and his hands were at work in the woods and would be at home at that time for dinner. He also gave the names of those present at the fight, among which was the name of Silas Crisp, who

worked with the defendant and who is a cousin of the prosecuting witness, Grover Harrell. During the morning Crisp was seen by the justice in the town and required to make the usual affidavit upon which to have a warrant for an affray. The usual warrant was issued, but, while Crisp actually swore to the affidavit, neither he nor the justice signed the affidavit or warrant. There being no constable or other officer in said township authorized to serve process, the justice delivered the warrant to one Walston, directing him to summon the prosecuting witness, Grover Harrell, and also his brother, who was at the fight, and his father, as well as the witnesses for the defendant. Walston went to the house of the prosecuting witness with the warrant and upon the return reported to the justice that the Harrells said they would not attend. Neither the authority to Walston to execute nor his return were in writing. The defendant was not arrested, but while Walston had gone to summon the witnesses the justice saw the defendant and informed him of the warrant at the time of trial, and the defendant voluntarily attended. The justice delayed the trial until 2 o'clock P. M., to see if the prosecuting witness would attend. He did not appear, and the justice examined several witnesses who saw the ⁸⁰⁷ fight, two of whom were not related to the defendant, but were cousins of the prosecuting witness. He also examined Dr. C. B. Walton, who had seen and talked with the prosecuting witness since the fight, and, upon the testimony of all these, adjudged the defendant guilty and that he pay a fine of one dollar and six dollars and sixty-five cents costs. This judgment was in writing and signed by the justice, and was paid. The witnesses examined by the justice were defendant's witnesses in this trial, and the justice who tried him was his friend in the superior court and aided his counsel in the trial and was surety for his appearance at September term, 1907.

Upon these facts the court overruled the plea of former conviction, and, on the verdict of guilty rendered by the jury, imposed a fine of one dollar and defendant excepted and appealed.

According to the strict rules of criminal procedure, the pleas of "not guilty" and "former conviction" could not be entertained and determined before one and the same jury; and it is further recognized and established that, on a plea of former conviction, when material questions of fact are involved in the issue, as in the case of dispute as to the identity of the parties, the determination of such plea is for the jury. But, as shown in a learned opinion by the present chief justice, in *State v. Ellsworth*, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699, the plea of former conviction is not treated in many respects as one involving the substantial question of guilt or innocence of defendant, but as one approaching more nearly the deter-

mination of a civil issue, and by consent it may be entertained and determined at the same time with a plea of not guilty, and, when so agreed upon, may be heard and decided by the court. There was no error, therefore, in the method by which the cause has been determined: *State v. Taylor*, 133 N. C. 755, 46 S. E. 5; *State v. White*, 146 N. C. 608, 60 S. E. 505; *State v. Ellsworth*, 131 N. C. 773, 92 Am. St. Rep. 790, 42 S. E. 699; *State v. Ackerman*, 64 N. J. L. 99, 45 Atl. 27.

While we hold that the proceedings below have been in all respects regular, we do not take the same view of the facts ⁸⁰⁶ relevant to defendant's plea of former conviction which seems to have impressed the learned judge who tried the cause below. From the facts it appears that defendant, convicted and fined in the present proceedings for a simple assault on Grover Harrell, has heretofore been convicted and fined for the same offense before a justice of the peace, and has paid the fine and the costs incident to that prosecution. The justice's court had jurisdiction of the crime, the parties and the offense are the same, and, unless the proceedings before the justice were a nullity, the defendant has a constitutional right to go quit of further molestation by reason of this charge. A second conviction in such case would be contrary to the law of the land.

True, the warrant of the justice was unsigned and the deputation of the special officer was unwritten, and the statute in express terms requires the one (Revisal, sec. 3158), and by fair intendment would seem to require the other (Revisal, sec. 935), certainly when the precept is written, and, except in cases of great emergency, this last form should be observed; but both of these requirements are for the better protection of the officers, general or special, and for the protection and security of the defendant. When considered in reference to process by which a defendant may be brought into court on a criminal charge, they may be waived by him; and if a defendant voluntarily appears or is forcibly brought before a court having jurisdiction to hear and determine the cause, and such court does hear and decide it, whatever may be the rights of the defendant against the officers, in the absence of other objection, the defects suggested in the process do not in any way affect the validity of the judgment rendered: *Commonwealth v. Henry*, 7 Cush. 512; *Bishop's New Criminal Procedure*, sec. 235, subsec. 1; 12 Cyc. 303.

In *Commonwealth v. Henry*, 7 Cush. 512, Metcalf, J., for the court, said: "As the magistrate had jurisdiction, and everything was right except the process, we are of opinion that the defendant, by not objecting to the process while before the magistrate, waived all objections to it, and the ruling of the court was correct."

And in Bishop, *supra*, the author says: "From the principles ⁸⁰⁹ stated, it seems if a warrant of arrest is insufficient or void, yet, if the accused person is brought before the magistrate under it, he is not therefore to be set at liberty, whatever may be his rights as against the officer and others connected with its proceedings."

Nor do we think it permissible to hold the proceedings before the justice void, under the doctrine recognized and applied with us in the case of *State v. Moore*, 136 N. C. 581, 48 S. E. 573, to the effect that a conviction of a person before a justice of the peace which is collusive and not adversary is void. In that case it appeared and was admitted that defendant swore out a warrant against himself, and that the justice, without notice to the injured party or to anyone else, and without hearing any evidence except defendant's own statement, disposed of the case. And on these facts Justice Walker, in his well-considered opinion, states the principle and the reason upon which it is properly made to rest, as follows: "If one procures himself to be arrested and prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith, and if the proceeding is really instituted and managed by himself, he is, while thus holding his fate in his own hand, in no jeopardy. The state is no party in fact, but only such in name. The magistrate, under such circumstances, adjudicates nothing. 'All is a mere puppet show, and every wire is moved by the defendant himself.' The judgment, therefore, is a nullity and is no bar to a real prosecution: 1 Bishop's Criminal Law, 6th ed., sec. 1010. In *Halloran v. State*, 80 Ind. 586, the court fully sustains and approves the doctrine as thus substantially laid down by Bishop, and adds: 'If the whole case is controlled and managed by the accused, there are no adverse parties, and when this is so, there cannot in the true sense of the term be a former conviction or acquittal.' "

But no such facts are presented in the case we are considering. It is true the defendant is said to have first notified the magistrate of the occurrence, but the case states the facts as to this notice to be that defendant told the justice he had had a fight and would have to suffer for it, and only asked if a warrant was issued it would be made returnable at 12 o'clock, as ⁸¹⁰ defendant and his hands would at that hour be in from the woods, where they were at work. The affidavit was made, at the instance of the justice, by one Crisp, who is marked on the warrant as a state's witness, several eye-witnesses of the occurrence were summoned and examined and Grover Harrell, the assaulted party, and his brothers, who had been present at the fight, and his father, were notified to attend, and the case was delayed some time for their com-

ing; and, referring to the trial, the case further states: "None of them (Grover Harrell, his brothers, etc.) appeared, and the justice examined several witnesses who saw the fight. Two of them were not of kin to the defendant, but were cousins of Grover Harrell, and also Dr. C. B. Walton, who had seen and talked with Grover Harrell since the fight occurred." And thereupon defendant was adjudged guilty and that he pay a fine of one dollar and costs amounting to six dollars and sixty-five cents. As the case appears to us, there was no evidence of collusion, and there does not seem wittingly or unwittingly, to have been any imposition, for the court made the same disposition of the case as the trial justice. We are of opinion, therefore, and so hold, that there was a valid trial and disposition of this cause before the justice of the peace; and, on the facts presented and agreed upon, the plea of former conviction should have been determined in defendant's favor.

This will be certified, to the end that the verdict of guilty rendered by the jury be set aside, the plea of former conviction sustained, and that defendant go without day: State v. Taylor, 133 N. C. 755, 46 S. E. 5.

Reversed.

Walker, J., concurs in result.

A Defendant Who Voluntarily Goes Before a Justice of the Peace, swears to a complaint charging himself with an assault, and confesses himself guilty, cannot thereafter plead the judgment against himself, rendered in such a proceeding, as a bar to a subsequent prosecution for the same offense: De Bord v. People, 27 Colo. 377, 83 Am. St. Rep. 89, and see cases cited in the cross-reference note thereto.

SIMMONS v. RESPASS.

[151 N. C. 5, 65 S. E. 516.]

HOMESTEAD—Widow of Second Marriage.—Under a constitutional provision that "if the owner of a homestead die, leaving a widow, but no children, the same" shall inure to her benefit, the widow of a second marriage of a man who dies without children by her is not entitled to a homestead if he leaves children, though they are adults, by his first wife. (p. 963.)

Ward & Grimes, for the defendant.

No counsel contra.

* HOKE, J. Petition to sell land for assets, heard on appeal from the clerk * of the superior court and on case agreed. The facts agreed upon were as follows:

1. That on or about the — day of July, 1908, Fred. Respass died intestate in the county of Beaufort and seised of the lands described in the petition in this cause.

2. That the said Fred. Respass left debts aggregating three hundred and fifty dollars, and it is necessary to have a sale of his real estate to make assets with which to pay those debts.

3. That N. L. Simmons is the duly appointed and qualified administrator of the said Fred. Respass.

4. That said Fred. Respass was married twice, and by his first marriage he had two children, to wit, John B. Respass and Esther Respass, who are over twenty-one years of age.

5. That their mother, the first wife of Fred. Respass predeceased him, having died — years ago.

6. That about February, 1908, said Fred. Respass intermarried with Hattie Respass, one of the defendants, and was living with her in the relation of husband and wife at the time of his death.

7. That he has no children as the issue of the marriage with the said Hattie Respass.

8. That Hattie Respass is not the owner of a homestead in her own right.

9. That the said Fred. Respass was entitled to homestead exemption, but no homestead was allotted to him during his lifetime.

Upon the foregoing statement of facts the said Hattie Respass contends that she is entitled to a homestead out of the lands of the said Fred. Respass. The administrator contends that she is not entitled to a homestead.

On these facts the clerk adjudged that the widow was not entitled to a homestead in the lands of her deceased husband and directed that her dower be assigned, and subject thereto that the land be sold for assets. This judgment was affirmed by the court, and the widow, Hattie Respass, excepted and appealed.

It was contended for the claimant, Hattie Respass, that when the constitution conferred upon the widow the right to a homestead, in case there were "no children," these words should be construed to mean no children of the deceased and the widow making the claim; but, in our opinion, both the language of the constitution and authoritative interpretations of it are against defendant's position.

The sections of our constitution controlling the question (article 10, sections 2, 3, 5) provide as follows:

"Sec. 2. Every homestead and the dwellings and buildings used therewith, not exceeding in value one thousand dollars to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any resident of this state, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no

property shall be exempt from sale for taxes or for payment of obligations contracted for the purchase of said premises.

"Sec. 3. The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them."

"Sec. 5. If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

A perusal of these sections makes it clear, and the meaning is too plain for construction, that in speaking of children the instrument refers to children of the deceased owner, and that no special reference is made to them as children of his widow or any former wife. Thus, in section 3, "If the owner die, the homestead shall be exempt, etc., during the minority of his children or any one of them"; section 5, "If the owner die, leaving a widow and no children," etc.

It is urged for the defendant that the reason of the thing tends to sustain her position, as a widow should not be required to depend for support on the kindness and goodwill of adult children by a former wife. To this it may be answered that in case the owner die, leaving a widow and also children, minors or adults, that dower is the estate especially favored and designed by the law for the protection and support of the widow. In *Watts v. Leggett*, 66 N. C. 197, it has been held that the widow's dower is the superior right when both claims attach to the same property. The true answer, however, is that the constitution, in language too plain for construction, only confers the right of homestead on a widow in case the owner dies, leaving no children by the widow or any other lawful wife.

There are decisions of this court which bear upon this question and tend strongly to support this view of the case. Thus, in *Wharton v. Leggett*, 80 N. C. 169, approved in *Taylor v. Powell*, 90 N. C. 202, it was contended that by fair and reasonable interpretation the constitution should be construed to confer upon ^s the widow the right of homestead when the husband had died, leaving only adult children, and that the term "no children," in section 5, article 10, should be construed to mean "no minor children." But this view was rejected by the court, and *Ashe, J.*, delivering the opinion, said: "The plain and literal construction of these sections is that they were meant, first, to secure a homestead to every resident of the state who owned land and was in debt by exempting his land, not exceeding in value one thousand dollars, from sale for his debts; second, if he die in debt and in possession of a homestead, it should descend to his minor children until the youngest attain the age of twenty-one years;

and, third, if he die in debt and in possession of a homestead leaving a widow and no children, it would go to her." And again, on page 171, "But it is also insisted on the part of the widow defendant that the words in section 5, article 10, 'but no children,' should be construed to mean minor children but we do not concur in this construction. It cannot be made without discarding the plain and unequivocal language of the constitution—leaving a 'widow, but no children.' " And so we hold here. The constitution is speaking of the homestead throughout in special reference to the owner; and when it says if the owner of the homestead die, leaving a widow, but no children, the instrument means what it plainly says, and no other interpretation is permissible.

There is no error, and the judgment below is affirmed. See, also, *Wharton v. Taylor*, 88 N. C. 230, as to the correctness of the order entered.

Affirmed.

Homestead.—The Children of an Intestate, though the issue of a former marriage, are, as well as the widow, entitled to the benefit of a homestead exemption in the real and personal property of the decedent. Hence if the children are adults, a homestead in the decedent's land, as well as a homestead exemption in his personal property, may be set off to the widow and children, and be at once partitioned among them: *Ex parte Worley*, 54 S. C. 208, 71 Am. St. Rep. 783. A statute providing for the setting apart of a homestead for the "benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased," is for the benefit of legitimate children only, and cannot be invoked by an illegitimate widowed daughter remaining with the family: *Hayworth v. Williams*, 102 Tex. 308, 132 Am. St. Rep. 879.

GODETTE v. GASKILL.

[151 N. C. 52, 65 S. E. 612.]

WITNESS—Civil Liability for False Testimony.—A witness who swears falsely is not liable in damages to the plaintiff, who loses his suit in consequence thereof. (p. 965.)

W. D. McIver and R. A. Nunn, for the appellant.

No counsel contra.

53 CLARK, C. J. This is an action for damages against the defendant for willful and false testimony as witness in an action formerly tried, which had been brought by the plaintiff against one Bowen, alleging that by reason of such false testimony of the defendant the plaintiff had lost his suit against Bowen.

There is no precedent in this state, but an action on this ground has been brought in other jurisdictions, which have

uniformly held that such actions cannot be maintained. It was so held as far back as *Dampport v. Sympson*, Cro. Eliz. 220, and *Eyres v. Sedgewick*, Cro. Jac. 160. Subsequently a statute was enacted authorizing such action in certain cases, but even that statute, it seems, is now deemed obsolete in England.

It was held that such action does not lie: *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625; *Phelps v. Sterns*, 4 Gray, 105, 64 Am. Dec. 61; *Cunningham v. Brown*, 18 Vt. 126; *Bostwick v. Lewis*, 2 Day (Conn.), 447; *Smith v. Lewis*, 3 Johns. 157, 3 Am. Dec. 469; *Grove v. Brandenburg*, 7 Blackf. 234. And this is true of subornation of perjury: *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491; 1 Cyc. 687; 22 Am. & Eng. 698. *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279, holds that one not a party to the action in which the perjury was committed may maintain an action for tort against one who suborned witnesses to swear falsely in that action, whereby plaintiff's character was defamed.

The authorities above cited rest upon two grounds: 1. There was no precedent for such action, and, indeed, the precedents were against it: 2. It "would overhale," as Chancellor Kent says, in 3 Johns. 157, 3 Am. Dec. 469, the decision of the former case, to which the plaintiff in the new action had been a party. We think there is a third reason, in that it would multiply and extend litigation if the matter could be re-examined by a new action between a party to the action and a witness therein; and, more than that, witnesses would be intimidated if their testimony is given under liability of themselves being subjected to the expense and annoyance of being sued by any party to the action to whom their testimony might not be agreeable. It would give a great leverage to litigants to intimidate witnesses.

Witnesses who swear falsely are liable to indictment. It is not to be contemplated that grand juries shall willfully and oppressively find indictments; but if a civil action lay in such cases, a litigant smarting under the loss of his suit could subject witnesses to the annoyance and expense of litigation at will. Such action did not lie at common law, and we have no statute authorizing it.

The judgment of nonsuit is affirmed.

The Principal Case is Supported by *Cunningham v. Brown*, 18 Vt. 123, 46 Am. Dec. 140; *Dunlap v. Glidden*, 31 Me. 435, 52 Am. Dec. 625; *Parker v. Huntington*, 7 Gray, 36, 66 Am. Dec. 455; *Gusman v. Hearsey*, 28 La. Ann. 709, 26 Am. Rep. 104; *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231. But in *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279, it is affirmed that an action lies for suborning witnesses who falsely defame the plaintiff's character, in a suit to which neither the plaintiff nor the defendant was a party.

COX v. NEW BERN LIGHTING AND FUEL COMPANY.

[151 N. C. 62, 65 S. E. 648.]

FIXTURES.—The Mortgagee of Real Estate does not have a lien on subsequently annexed chattels superior to the rights of the conditional vendor or mortgagee of the chattels at or before the time of their annexation. (p. 969.)

FIXTURES.—Notice to the Mortgagee of the Real Estate of the annexation of chattels covered by a mortgage or conditional sale is not determinative of his superior right nor important in fixing the rights of the respective mortgagees. (p. 971.)

FIXTURES.—One Who Purchases Machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the chattels shall retain their character as personalty, regardless of the manner in which they may be annexed to the freehold. (p. 971.)

FIXTURES.—After Chattels have Become Fixed to real estate their character as part of the realty cannot be changed by a convention of the owner of the realty with a stranger so as to conclude the rights of prior mortgagees or creditors or subsequent purchasers for value. (p. 971.)

FIXTURES.—The Adjustment of the Rights of the Mortgagee of real estate and the mortgagee of chattels subsequently annexed to the realty, where it is contended that the enforcement of the chattel mortgage with consequent removal of the chattels will impair the security of the real estate mortgage, is determined by equitable principles, which in some cases may require the postponement of the chattel mortgage. (pp. 971, 972.)

FIXTURES.—The Delay in Recording a Mortgage of Machinery annexed to real estate upon which there is a prior mortgage does not affect the priority of liens as between the two mortgages. (p. 972.)

FIXTURES.—Notice to the Conditional Vendor or Mortgagee of chattels of the existence of a mortgage on the real estate to which they are to be annexed is not important in determining the rights of the respective mortgagees. (pp. 970, 971.)

MORTGAGE.—To What After-acquired Property Attaches.—A mortgage intended to cover after-acquired property can attach to such property only in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them although they may be junior to it in point of time. (pp. 972, 973.)

REGISTRY LAWS are Intended for the Protection of Subsequent, not prior, purchasers and creditors. (p. 973.)

W. W. Clark, for the appellant.

Simmons, Ward & Allen, for Smallwood.

MANNING, J. The plaintiff, being a stockholder of the New Bern Lighting and Fuel Company, hereinafter called the gas company, a corporation, instituted this action in behalf of himself and all creditors of the corporation, alleging the insolvency of the defendant corporation. Upon the demand of the plaintiff, a receiver was appointed.

wind up its affairs. The court directed the receiver to advertise for claims against the defendant, and authorized and directed said receiver to determine the priority of all claims which were contended to be encumbrances on the property of defendant. Whereupon S. W. Smallwood filed claim for \$60,000, evidenced by coupon bonds of the defendant and secured by a deed of trust or mortgage, duly authorized and duly executed on June 30, 1906, and recorded July 9, 1906, in the office of the register of deeds of Craven county, conveying two lots, therein described, all gasworks, pipes, etc., all property of every kind, and "also the rights, easements and additions to said plant, and equipment and rights that shall be made prior to the time the said bonds are paid off or discharged." The bonds were thirty-year bonds, bearing five per cent interest per annum, payable July 1st, and January 1st of each year. The defendant defaulted in the payment of taxes, in the interest on the bonds due July 1, 1908, and in other covenants specified in its deed.

On March 23, 1907, after the registration of the mortgage to secure its bonds, the defendant entered into a written agreement with the Empire Gas, Improvement and Construction Company, which we will designate as the Empire company, by which the Empire company agreed to furnish certain specifically described apparatus used for the manufacture of gas, and to erect the same in defendant's plant, for the sum of \$3,500, \$1,750 of which to be paid when materials were delivered and the remainder to be paid within six months after completion of the work, the note evidencing the deferred payment was executed September 1, 1907, at six months. It was stipulated in said contract as follows: "It is further understood and agreed by the parties hereto, ⁶⁴ anything to the contrary notwithstanding, that the apparatus mentioned in the annexed specifications is to remain the property of the party of the first part until all the amounts specified herein to be paid by the party of the second part are paid to the party of the first part. If such payment or payments are not made, as herein provided, by the party of the second part, the party of the first part shall have the right to enter the premises and plant of the party of the second part and remove the apparatus," etc. This conditional sale agreement was registered on January 9, 1908, in the office of the register of deeds of Craven county. The apparatus so purchased was installed between March 23d and September and was used thereafter by the gas company as a part of its plant. The receiver, under the order of the court, allowed the claim of Smallwood, holder of the bonds and interest thereon, and held that it was a first lien, subject only to unpaid taxes, upon all the property of the defendant, including the apparatus furnished by the Em-

pire company and included in its conditional sale agreement, finding in reference thereto the following facts:

Special lien claimed against the defendant corporation, Empire Gas, Improvement and Construction Company, of New York, claims title to the machinery sold by it to the defendant corporation until all payments due upon said machinery under a contract of sale shall have been fully paid. Your receiver has carefully examined this claim and finds that the contract of sale was executed March 23, 1907, and that the machinery was immediately shipped, delivered and installed in the defendant corporation's plant at New Bern, North Carolina, and that the last payment on it had fallen due and the defendant corporation had failed to make the payments. The said contract of sale under which claimant claims title to the machinery was not recorded in the office of the register of deeds of Craven county until about January 6 or 8, 1908. The parties to this contract sale acted without notice to the trustees of the deed of trust securing the bond, and without the consent of the said trustee, and the said deed of trust was recorded in the office of the register of deeds of Craven county on June 30, 1906, and has been on record for several months before the contract of sale referred to was made. The said deed of trust securing the bonds constitutes the first lien on all the property conveyed to the defendant company, and also a first lien on the rights, easements and additions to the said plant, and equipments and rights that shall be made prior to the time the said bonds are paid off and discharged. The two gas-making machines existed at the New Bern Gas Works at the time of the above conveyance, and they existed also at the time of the execution and recording of the deed of trust, and at the time the said contract of sale was executed by claimant company and the New Bern Lighting and Fuel Company. As a result of the purchase of the machinery above claimed, one of the two gas machines that were originally in the plant was taken out and dismantled, and its parts have been scattered about in various places; some of the parts have been sold, and it would now be impossible to again install them, except at a very large expense, while the other apparatus has been greatly damaged. The building in which the new machinery furnished under the said contract of sale has been installed has been so changed as to render it unfit for the purpose for which it was formerly used, and could not be again used for such purpose, except by the expenditure of a large sum of money. For these reasons your receiver is of the opinion that it would not be just or legal to allow the claim of the Empire Gas, Improvement and Construction Company, so as to retain title to the said machinery referred to in said contract, so as to defeat the lien of said bonds; and therefore disallows the claim.

to title, but recommends that it be allowed as a debt against the insolvent corporation.

The Empire company excepted to this finding. His honor heard the matter at November term, 1908, and filed his judgment January 11, 1909. It was agreed at the said term that his honor could take all the time he desired, and that all motions and exceptions should be made and the judgment should be entered as of November term. His honor, in his judgment, finds the facts affecting the claim of the empire company substantially as the receiver, and further finds the following sums due the Empire company under its contract: \$1,750, with interest from September 1, 1907, and \$154.47, with interest from October 1, 1907, and "that the gas manufacturing machine, the property furnished under said contract by the Empire Gas Company to the defendant is worth \$3,000 and the entire plant is worth \$26,688." The Empire company excepted to the findings of fact and the judgment of his honor, assigning as one of its grounds therefor "that there is no finding as to the amount of injury or damage, if any, caused the property of the defendant by the installation of the property furnished by the Empire Gas Company under the terms of its contract." The judgment adjudged the priority of the lien of Smallwood as holder of the bonds to the amount of \$60,000 over the claim of the Empire company, and further adjudged costs against the Empire company incurred in trying the exception filed by it. The Empire company appealed to this court.

²⁸ In our opinion, the judgment of his honor cannot be sustained upon the facts found by him. After a careful consideration of the authorities cited by the learned counsel appearing before us, and the consideration of other authorities our own researches have found, we think a very clear statement of the principle controlling one feature of this case is found in Jones on Chattel Mortgages, fifth edition, section 133a, as follows: "One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore, the title of a conditional vendor of such chattels, or of a mortgage of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor": 19 Cyc. 105; Campbell v. Roddy, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 267; Belvin v. Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; First Nat. Bank v. Elmore, 52 Iowa, 541, 3 N. W. 547; Edwards & Bradford Lumber Co. v. Rank, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; Anderson v. Creamery P. M. Co., 8 Idaho, 200, 101 Am. St. Rep. 188, 67 Pac. 493, 56 L. R. A.

554; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

The mortgagee (Smallwood), however, resists the contention of the Empire Company, the vendor, by conditional sale contract, upon the grounds (1) that the chattels, so annexed, are by the express terms of his mortgage embraced in it, under the words, "additions to said plant"; (2) that he had no notice of the claim of the Empire company or that its chattels were being annexed to the plant; (3) that the Empire company knew that the purpose of the gas company was to annex said chattels as permanent additions to said plant, and that the annexation could be done only by dismantling a part of the plant in its then condition; (4) that the Empire company had notice of the Smallwood mortgage by reason of its registration; (5) that the Empire company was guilty of laches in the registration of its conditional sale contract.

Conceding the correctness of his position on his first point of contention, it is not, under the authorities, conclusive of his superior right to claim the annexed chattels. Although embraced within the terms of the mortgage to secure Smallwood, the chattels were also probably so annexed as to become part of the freehold, though there is no definite finding by his honor as to the manner of the annexation. If the apparatus sold by the Empire company were neither additions to the plant nor annexed ⁶⁷ thereto as fixtures, Smallwood could not, in any view, have a lien upon them. It is only because of the express terms used in the mortgage, or because the chattels have been attached as fixtures, that Smallwood can assert any claim to them. In *Jones on Mortgages*, fourth edition, section 158, this author says: "The mortgage (speaking of an existent mortgage) attaches to the property in the condition in which it comes into the mortgagor's hands. If it be at that time already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time: *United States v. New Orleans R. R.*, 12 Wall. 362, 20 L. ed. 434. In *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537, the court said: "Another consideration makes it clear. I think, that in this case the absence of a concurrent intention on the part of the prior mortgagees is of no weight. . . . Hence I conclude that the agreement of the owner of the land with the plaintiff, as it did fully express their distinct purpose that the annexation of boiler and engines should not make them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees."

In *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 282, 63 S. E. 1045, 21 L. R. A., N. S., 843, Pou was the holder of

the first mortgage, containing an after-acquired property clause, executed by the Gay Lumber Company. His mortgage was recorded. Subsequently thereto the lumber company acquired lands and thereafter executed a mortgage to the Hickson Lumber Company, which company denied the priority of Pou's mortgage on these after-acquired lands. On this point Mr. Justice Brown, in his able opinion, said: "It is undoubtedly true that if the appellant had a lien on these lands at the date they were acquired by the Gay Lumber Company, which it could enforce against that corporation, it could enforce it against Pou, for the after-acquired property clause only attaches to such interest as the mortgagor acquires, and it would be immaterial whether Pou had notice of such lien or not." In no one of the many cases examined by us has notice to the prior mortgagee of the realty of the annexation of chattels covered by a chattel mortgage or conditional sale been considered as determinative of his superior right or as important in fixing the rights of the respective mortgagees. Upon the third point of the contention of Smallwood, to wit, the knowledge of the Empire company that its apparatus was to be annexed to the gas company's plant or to become additions thereto or as a substitution for other apparatus then in use: In the case of *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33, the court, in a well-considered opinion, upon this point said: "Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed ^{as} to or placed in a building, of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold: *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279." But it will not be understood that parties may, by their convention and at their will, convert chattels real into chattels personal. If at the time of the agreement the chattels personal have been annexed to and become affixed to the realty, their character as a part of the real estate cannot be subsequently changed by a convention of the owner of the real estate with a stranger, so as to conclude the rights of prior mortgagees or creditors or subsequent purchasers for value. The fourth point of contention has been considered in what has already been said.

The contention of Smallwood that his security will be diminished by permitting the Empire company to remove its chattels so as to enforce its lien remains to be considered. The proper adjustment of the rights of the respective

mortgagees can be secured by the application of sound and just equitable principles. "Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real estate mortgage as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminishing or impairing an existing mortgage thereon": *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Campbell v. Roddy*, 44 N. J. Eq. 244 6 Am. St. Rep. 889, 14 Atl. 279.

The facts found by his honor are not sufficient to enable us to adjust the interests of Smallwood and the Empire company in accordance with the equitable principles announced. While his honor finds the value of the plant at the date of the receiver's report, to be \$26,688, including the value of the apparatus and chattels sold by the Empire company, which he appraises at \$3,000, there can be no ascertainment of the value of the plant at the time the annexation of the chattels of the Empire company took place and the apparatus then used removed. Although his honor finds that some of the apparatus of the gas company was dismantled, scattered and its value perhaps totally destroyed by the installation of the apparatus acquired from the Empire company,⁶⁹ yet it would not necessarily follow that the value of the gas company's plant as an entirety was diminished or the security of Smallwood lessened. It may be that this substituted apparatus was more economically operated and more efficient in production.

Lastly, Smallwood complains that the Empire company delayed the registration of its conditional sale contract until January 9, 1908. Up to that time, and even for some time afterward, Smallwood seems to have had no cause for complaint. There was, up to then, no default by the mortgagor, the gas company, of which he complains. He parted with nothing of value to the gas company upon the faith of this security during this delay, and we do not see how he was prejudiced by it. He lost none of his rights by it, nor was he delayed in the enforcement of any of his rights under his mortgage deed, and no other parties are complaining of the delay.

In *United States v. New Orleans R. R.*, 12 Wall. 362, 12 L. ed. 434, the court said: "A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagee's

hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors." This, it seems to us, accords with our own decisions and rests upon the soundest principles of right and equity.

We therefore conclude there was error in his honor's judgment, and the same is reversed and this cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

As to Tests for Determining What is a Fixture, see *Hook v. Bolton*, 199 Mass. 244, 127 Am. St. Rep. 487, and cases cited in the cross-reference note thereto. As to when and against whom fixtures may, by agreement, retain the character of personal property, see the note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 877. If machinery is purchased and placed for use in a permanent building under a contract that it shall remain the property of the seller, or, after such machinery is placed in the building, a chattel mortgage is given by the purchaser to the seller on such machinery, a prior real estate mortgage on the building given by such purchaser is not a prior lien on such machinery so as to estop the chattel mortgagee from foreclosing his mortgage: *Anderson v. Creamery Package Mfg. Co.*, 8 Idaho, 200, 101 Am. St. Rep. 188. See, also, *Jennings v. Vahey*, 183 Mass. 47, 97 Am. St. Rep. 409. But according to *McCrillis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875, one who sells machinery to be put in a mill, with a stipulation that such machinery shall remain his until paid for, cannot, after permitting it to be made a part of the mill, without any inquiry as to ownership, remove it as against one whose rights are substantially those of a mortgagee of the mill. Where machinery has been so placed in a factory as to become prima facie a part of the realty, a secret condition in the contract under which the machinery was purchased that the title should remain in the seller until the payment of the purchase price is inoperative as against a subsequent mortgagee of the realty without notice: *Union Bank etc. Co. v. Fred W. Wolf Co.*, 114 Tenn. 255, 108 Am. St. Rep. 903.

NOBLE v. JOHN L. ROPER LUMBER COMPANY.

[151 N. C. 76, 65 S. E. 622.]

MASTER AND SERVANT—Safe Appliances.—The failure of an employer to furnish an appliance in a planing-mill to remove shivers when they obstruct a guide is not negligence if there is no such appliance in general use. (p. 975.)

MASTER AND SERVANT—Safe Method of Work.—It is the duty of an employer to furnish his employé a reasonably safe method, as far as practicable, for doing his work. (p. 975.)

MASTER AND SERVANT—Order to Use Dangerous Method. Where the only safe way for an employé in a planing-mill to remove a shiver is first to stop his machine, but the foreman forbids him to stop it and directs him to remove the shiver while the machine is running, which the employé does and is injured, the employer is liable. (p. 975.)

MASTER AND SERVANT—Order to Do Dangerous Work.—It is the duty of an employé to refuse to do something obviously dangerous which a reasonably prudent man under similar circumstances would not do. (pp. 975, 976.)

D. L. Ward and W. D. McIver, for the plaintiff.

Moore & Dunn, for the defendant.

BROWN, J. The uncontradicted evidence in this case tends to prove these facts: Plaintiff was injured in November, 1906, while feeding the planing-mill. He was working under one Chapman, who was the foreman of the machine. A shiver of wood became fastened under the guide. It was necessary to remove this. The grader, who was present called the plaintiff's attention to the fact that there was a streak on the board, caused by the shiver. Plaintiff shut the feed off and went to remove the shiver. The company did not furnish any appliance of any kind for removing such shivers of wood. It was customary to pick up a stick from the floor to remove them. The foreman had often done this in the presence of the plaintiff. Chapman, the foreman, had often told the plaintiff not to remove his belt and stop the machine when a shiver of wood got under the guide. At other times, when plaintiff would offer to stop the machine to remove the shivers and Chapman was not near enough to speak to him, on account of the noise made by the various machines, he would wave his hand to the plaintiff not to stop.

There are two allegations of negligence set out in the complaint, viz.: 1. Refusing to permit plaintiff to shift the belt and stop his machine long enough to remove the shiver, and directing him to remove it while running; 2. A failure to furnish a proper appliance with which to remove shivers.

There were the usual motions to nonsuit, which were overruled.

We find many exceptions in the record which, in the view we take of the case, it is unnecessary to discuss.

The principal exception is to the following charge: "The court instructs the jury that, in order to find the first issue in the affirmative, they must be satisfied by the greater weight of the testimony (1) that the foreman under whom he was placed to work directed him to remove the shiver without stopping the machine; (2) that the defendant failed to exercise reasonable care in furnishing to the plaintiff a reasonably safe appliance for removing the shiver while the machine was running."

We agree with the learned counsel for the defendant that there is nothing to support the second alleged ground of negligence, for the reason that there is no evidence that there is any kind of appliance in general use adapted for the safe removal of shivers when they obstruct the guide. The only appliance, so far as the evidence discloses, for the purpose, is an ordinary stick, which was used by the foreman as well as by plaintiff.

⁷⁸ And if the charge quoted had been in the disjunctive, we should be compelled to direct another trial, because we would be unable to determine upon which ground of negligence the jury acted. But if his honor put the burden on the plaintiff to prove both grounds of negligence in order to entitle him to a verdict, and therefore, if there is evidence to support either, it is sufficient to sustain the verdict.

It is elementary learning that it is the duty of the master to furnish his servant a reasonably safe method, as far as practicable, for doing his work. The only safe manner of removing the shiver was to disconnect the belt and momentarily stop the particular machine plaintiff was operating. When left to himself plaintiff did this, and of course escaped injury. To save time, the foreman forbade him to stop the machine and directed him to remove the shiver while running. The plaintiff did as he was ordered and was injured.

We think it was a false economy of time to forbid the plaintiff to do what ordinary care and prudence prompted him to do, and that the defendant is responsible for Chapman's negligence: *Tanner v. Hitch Lumber Co.*, 140 N. C. 475, 53 S. E. 287, and cases cited; *Shaw v. Highland Park Mfg. Co.*, 146 N. C. 235, 59 S. E. 676; *Avery v. West Lumber Co.*, 146 N. C. 592, 60 S. E. 646.

Chapman represented the defendant and had the right to give orders to plaintiff, and therefore if he failed in his duty the defendant is liable for his acts: *Tanner v. Hitch Lumber Co.*, 140 N. C. 475, 53 S. E. 287.

If Chapman had ordered plaintiff to do something obviously dangerous and which a reasonably prudent man, under similar conditions, would not do, then it would have

been plaintiff's plain duty to refuse. But it was not so obviously dangerous to undertake to remove the shiver with a stick. The plaintiff had seen the foreman do it, and was following his instructions when the foreman refused to allow him to shift the belt off the pulley and stop the machine.

The refusal was the direct cause of plaintiff's injury.

We have examined the exceptions discussed in the defendant's brief, and find no reversible error. The judgment is affirmed.

The Right of an Employé Who Obeys Orders Exposing Him to Unusual Risks to recover against his employer in the event of accident is considered in the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884.

The Liability of an Employer for Injuries from Defective Appliances which result to his employes is the subject of a note to Brazil Black Coal Co. v. Gibson, 98 Am. St. Rep. 289.

LAWRENCE v. HARDY.

[151 N. C. 123, 65 S. E. 622.]

PARTITION.—Publication of Summons Against Unknown Owners in partition, in the manner prescribed by statute, confers jurisdiction over them so far as their interest in the land is concerned, and they are bound by the decree in the cause and the deed pursuant thereto conveying title to the purchasers. (pp. 979, 981.)

PARTITION—Unknown Owners, Person to Represent.—The exercise of the court's discretion in not appointing a disinterested person to represent the interests of unknown owners in partition is not reviewable on appeal to the prejudice of an innocent purchaser. (p. 981.)

PARTITION—Unknown Owners, Investment to Protect.—The failure of the court to retain and invest funds sufficient to protect the interests of unknown owners in partition, as directed by statute, does not affect the title of purchasers. (pp. 981, 982.)

H. H. Phillips, for the appellant.

Gilliam & Clark, for the appellee.

¹²⁴ HOKE, J. On the hearing it appeared that in February, 1907, Lam Lawrence, an heir at law of James Lawrence, deceased, filed a petition against numerous other persons, cousins in different degrees, heirs at law of said James Lawrence, for sale of the lands of said James Lawrence situate in said county, and that all the heirs at law of James Lawrence who were known were made parties defendant by service and acceptance of process. In connection with the petition it was made to appear that, as plaintiff was informed and believed, there were other unknown

heirs at law of James Lawrence interested in the subject of the action who should be made parties, and that neither the names nor residences of such interested parties could, after diligence, be ascertained. On order, properly entered, publication was duly made for five successive weeks in the "Tarboro Southerner," stating the style and purpose of the action, etc., notifying "all the unknown heirs of James Lawrence, deceased, whatever may be their names and whatever may be their residence," to appear, etc. After the time of such publication had expired, decree was entered, sale had, and report made. The bid having been raised on May 4, 1907, a resale was ordered, and this having taken place and report duly made, the sale was confirmed, deed made to the purchaser, and, no unknown parties having appeared, nor their existence or placing disclosed, in July, 1907, distribution was ordered among the parties in interest who had appeared, and according to an amended petition filed, claiming for these parties the entire fund. The costs having been paid and the fund distributed, Elsie Lawrence, resident of Haywood county, Tennessee, claiming to be an heir at law and third cousin of James Lawrence, deceased, and that she had never known of the proceedings nor been served with process therein, applied to the court, on motion and later by formal petition, to have her portion of the property allotted to her, and to enforce her claim thereto on the land, etc. She was allowed to proceed in the cause in forma pauperis, and all the parties, including the purchaser, having been duly notified, the matter was heard, and the clerk found the facts directly relevant to the application of Elsie Lawrence and entered judgment as follows:

"This cause coming on for hearing before the clerk, and being heard upon the pleadings, as amended, and proof, the following conclusions of fact are found from records in case and proof:

"1. That Elsie Lawrence, at the time the original proceeding was instituted, was a nonresident of the state of North Carolina and had no actual notice of said proceeding until September 7, 1907.

125 "2. That at the time the original proceeding was instituted the said Elsie Lawrence was interested in the premises; that at that time her name was unknown to and could not, after due diligence, have been ascertained by the original petitioners.

"3. The facts recited in the second finding of fact were made to appear to the court by affidavit, and that thereupon the court duly ordered notice to be given to all such persons, whose names were then unknown, by publication in the newspaper published in the town of Tarboro, North Carolina.

"4. That the notice, a copy of which is attached to the answer, marked 'A,' was duly published in the 'Tarboro Southerner,' a weekly newspaper published in the town of Tarboro, once a week for five successive weeks immediately preceding the sale of the property for partition.

"5. That Elsie Lawrence was, at the time said original petition was filed, the owner of an undivided one-sixteenth interest in the property.

"6. That the property was duly sold at public auction; that said sale was a fair sale, for full value, and that at said sale T. M. Staton was the purchaser, and that he was a purchaser in good faith and for the full value of the property.

"7. That the court, in its discretion, did not deem it necessary to appoint any person to represent the unknown owners who had been served with notice of said original proceeding by publication.

"8. That Elsie Lawrence has not received any part of the purchase money, but that the whole thereof was paid to the known owners of the property sold in said proceeding, the names of the unknown owners not being known and their interest in said property at that time being also unknown to the court.

"9. That the petitioner, Elsie Lawrence, is satisfied with said sale, and seeks simply to recover her proportion of the purchase money.

"From the foregoing conclusions of fact the court finds the following conclusions of law:

"1. That the petitioner, Elsie Lawrence, was duly and regularly served with notice of the original proceeding by publication.

"2. That the title to said property has passed to T. M. Staton under the orders and decrees in said original proceeding; that said T. M. Staton was a purchaser in good faith, and that said sale cannot be set aside so as to affect the title of the said T. M. Staton.

"3. That it was not necessary for the court to appoint any person to represent the unknown owners in said original proceeding, ¹²⁶ unless the court, in its discretion, deemed such appointment necessary; and that as the court did not in its discretion deem such appointment necessary, the validity of said proceeding is not affected by the failure to make such appointment.

"4. That the petition of Elsie Lawrence sets up no defense to the decree for a sale for partition, made in the original proceeding, and no defense to the confirmation of said sale.

"5. That the petitioner, Elsie Lawrence, is entitled to receive from John Hardy, Jr., and Mary Eliza Harrell and James Hardy \$29.20 each, being her share of the purchase money, less the expenses of sale.

"6. That the order for a sale for partition and the order confirming said sale should not be set aside upon the petition of the said Elsie Lawrence.

"A. T. WALSTON, C. S. C.

"November 11, 1908, as of July 23, 1908.

"The petitioner excepts to the above judgment and appeals to the superior court. Notice waived.

"A. T. WALSTON, C. S. C."

The facts and the decree of sale further show that the publication was prior to said "decree." This judgment, as stated, was affirmed on appeal by his honor, Judge O. H. Allen, and the petitioner, Elsie Lawrence, excepted and appealed to this court.

It may be well to note that the petitioner, Elsie Lawrence, has recovered judgment against the other heirs at law of James Lawrence, deceased, for the ratable portion of her interest paid to each of the other heirs, and her appeal is from the refusal to make this recovery efficient by declaring same a lien on the property and ordering a resale of same, should this be necessary to accomplish the desired purpose. This being true, and the formal requirements of the law as to publication of notice for unknown parties having been properly complied with, we are of opinion that the petitioner has been regularly made a party to the proceedings, and that, so far as the purchaser is concerned, her claim to any interest in the property itself is barred by the decree in the cause and the sale and deed had and made pursuant to same.

Our statute on the subject (Revisal 1905, sec. 2490) clearly contemplates and provides that in proceedings for partition by sale, or otherwise, publication may be made "for persons interested in the premises whose names are unknown to and cannot, ¹²⁷ after due diligence, be ascertained by the petitioner." And while the hardship of some particular case has not infrequently provoked judges of ability and repute to strong expressions of condemnation, the decisions as to such legislation, and in proceedings of this character, i. e., in rem or quasi in rem, have generally upheld it, and always when the necessity for it was made to appear, and the notice provided was such as to render it reasonably probable that the parties concerned would be apprised of the proceeding and afforded an opportunity to appear and protect their interest: *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Pile v. McBratney*, 15 Ill. 314; *Nash v. Church*, 10 Wis. 303; *Foster v. Abbott*, 8 Met. 596; *Cook v. Allen*, 2 Mass. 462; *Foxcroft v. Barnes*, 29 Me. 128.

In *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773, it was held: "The legislature may by

statute authorize proceedings by action against unknown claimants, and bind them by constructive or substituted service or notice, in actions to determine adverse claims to real property. Such action is in the nature of a proceeding in rem; its object is an adjudication of the state of the title, and the judgment can go no further. The legislature may by statute provide for constructive or substituted service of process, in actions to determine adverse claims to land, as against unknown claimants, or in cases of necessity or where personal service is impracticable, in actions where the controversy relates to property within the jurisdiction of the court, and with a reasonable exercise of legislative discretion in such matters the courts will not interfere. Such statutes must be strictly construed and followed to preserve the distinction between known and unknown claimants." And, delivering the opinion, the court further said: "It is a case, then, where constructive or substituted service of notice upon adverse claimants may be made. Under the constitution, legal proceedings in the courts are under the direction of the legislature, subject of course, to the fundamental provisions of the bill of rights. But the guaranty of 'due process of law' does not necessarily require personal service of notice upon parties resident or nonresident. The legislature may in its discretion provide for substituted service in case of necessity or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere."

The writer does not recall a case in this jurisdiction where the validity of a decree has been questioned by reason of constructive service of process "on persons unknown." But the general power of our courts, following the provisions of the statute, to acquire ¹²⁸ jurisdiction and make decrees affecting the status and condition and ownership of real property situate within the state has been frequently recognized and declared (*Vick v. Flournoy*, 147 N. C. 25, 60 S. E. 978; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402); and, under the statute applicable we are of opinion, as stated, that jurisdiction has been properly acquired over the petitioner, so far as her interest in the land is concerned, and she is conclusively bound by the decree and the deed conveying the title to the purchaser.

A court dealing with the matter should always be particularly careful of the rights and interests of the parties who are only so by reason of constructive service. If such rights are questioned or assailed, the statute provides that some disinterested person may be appointed to represent

them and look after their interests, and this should in most instances be done. If these interests are known to exist, or there is good reason to believe that they do, a sufficient amount of the fund should be retained to satisfy such claims and be invested or settled so that it may be forthcoming when called for. This the statute expressly requires (Revisal, sec. 2516), and, if there is promise of success, further effort can and should be made to ascertain and notify the rightful owner; but the policy of the law is, and has always been, that our lands shall pass into the possession of home owners, and with assured and unencumbered title, and this wise and beneficial purpose should not be prevented or seriously hindered because in rare and exceptional instances a wrong may be possible.

In the case before us the deceased seems to have had no lineal descendants or near kinsmen, and his lands descended to numerous relatives, distant in degree, whose names and placing are not all known. So far as appears, if this claim is allowed, there is no assurance that the end is reached; and the facts present a case where a general notice by publication is the only feasible method by which the property can be sold for anything like its value and a true title assured. In his carefully prepared and learned argument the counsel for the petitioner further insisted that no one was appointed by the court to represent these unknown parties and no part of the fund has been retained or invested, as required by the law, and that, owing to these defects, the proceedings are void, at least to the extent necessary to secure the petitioner her interest in the property; but we do not think this position can be maintained. The statute (section 2490) expressly refers this matter of appointing some disinterested person to look after the absent owner's interest to the discretion of the court; and, conceding that we have the power to review the discretion of the lower court in this respect, we are ¹²⁹ not prepared to say that it should be done in this instance, and certainly not to the prejudice of an innocent purchaser. Our law is properly solicitous of the rights of such a purchaser; and, while they are affected by the existence of certain defects apparent in the record, numerous and well-considered decisions with us sustain the position that only those defects which are jurisdictional in their nature are available as against his title: *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763; *Harrison v. Hargrove*, 120 N. C. 96, 58 Am. St. Rep. 781, 26 S. E. 936; *Herbin v. Wagoner*, 118 N. C. 656, 24 S. E. 490; *England v. Garner*, 90 N. C. 197; *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455. Nor is the second defect one which should be allowed in any way to affect the purchaser, that no part of the fund has been retained and invested for

the rightful owner as the statute directs. This refers to the action of the court concerning the proceeds and to arise necessarily after the sale. It does not in any way relate or profess to relate to the jurisdiction of the court over the cause of the parties, and is a matter that the purchaser could in no way influence or control.

Under section 449, Revisal, a defendant, known or unknown, when there has been constructive service of process, is allowed, upon good cause shown, to defend after judgment rendered at any time within one year after notice and within five years from its rendition, and on such terms as may be just; and if the defense be successful and the judgment, or any part thereof, shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the court may direct. The section, however, contains this additional provision: "But title to property sold under this judgment to a purchaser in good faith shall not be thereby affected." Under the liberal provisions of the former portion of this section, the petitioner has been allowed to appear and to recover judgment against each of the heirs the amount of her interest which has been paid them, and under the last clause of the section, the title to the purchaser has been properly assured and confirmed.

There is no error in the judgment entered, and the same is affirmed.

Proceedings Against Unknown Owners in partition and other proceedings affecting the title to land is the subject of a note to *McClaymond v. Noble*, 87 Am. St. Rep. 358.

BRYANT TIMBER COMPANY v. WILSON.

[151 N. C. 154, 65 S. E. 932.]

OPTION—Withdrawal and Acceptance.—An option to sell standing timber, based on a nominal and not a valuable consideration, may be withdrawn at any time before an unconditional acceptance by the vendee, but upon such acceptance the contract becomes mutually binding. (p. 983.)

SPECIFIC PERFORMANCE—Sale of Standing Timber.—An option to sell standing timber, after being unconditionally accepted by the vendee, may be specifically enforced against the vendor. (pp. 984, 985.)

SPECIFIC PERFORMANCE—Purchaser Pending Suit.—Where in a suit for the specific performance of a contract to convey standing timber, the complaint fully describes the property and a pendens is filed, a purchaser pending the action takes subject to and is bound by the decree. (p. 984.)

SPECIFIC PERFORMANCE.—Where the Vendor is Unable to Convey the title called for by his contract, the purchasers may take what he can give and hold him answerable in damages as to the rest. (p. 985.)

SPECIFIC PERFORMANCE—Prayer for Damages.—The plaintiff in specific performance has a right to ask for damages, and they can be awarded in case the court refuses the principal relief. (p. 986.)

The following issues were submitted without objection: 1. "Did the plaintiff, within thirty days from the twelfth day of April, 1907, notify the defendant John E. Wilson of its intention to purchase the timber referred to in the complaint?" Answer: "Yes." 2. "If so, was the intention to purchase said timber coupled with the condition that the title was good?" Answer: "No." 3. "Has the plaintiff been at all times ready, able and willing to perform its contract on its part?" Answer: "Yes." 4. "Has the defendant John E. Wilson refused to perform his contract on his part?" Answer: "Yes." 5. "What damage, if any, is the plaintiff entitled to recover?" Answer: "One hundred dollars."

Upon the rendition of the verdict the plaintiff tendered the judgment set out in the record, decreeing specific performance of the contract. The court declined to sign and the plaintiff excepted. The court rendered judgment for damages only. The plaintiff excepted and appealed.

F. R. Cooper, Fowler & Crumpler and C. M. Faircloth, for the plaintiff.

Faison & Wright and George E. Butler, for the defendants.

¹⁵⁶ BROWN, J. On April 12, 1907, the defendants executed for a nominal consideration a contract, in writing, commonly called an option, whereby the defendants bound themselves to sell for a fixed price and for a definite period the timber growing and to be grown on certain lands described herein. Within the time required by the option the plaintiff gave due notice to defendant of its intention to purchase the timber and of its readiness to comply in all respects with the terms of purchase, thereby converting the written offer of the plaintiffs to sell into a valid and binding contract by an unconditional acceptance of and compliance with its terms.

It was the plaintiff's privilege to accept unconditionally and comply with the terms of the paper writing by paying the cash upon tender of the deed, and thus secure to itself the right to compel defendants to perform their contract: *Weaver v. Burr*, W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Hardy v. Ward*, 10 N. C. 385, 64 S. E. 171.

Upon the findings of the jury, is plaintiff entitled to have a decree compelling a specific performance of the contract, or is plaintiff remitted to an action for damages for its breach?

If the defendants had withdrawn this option or offer to sell before its unconditional acceptance, there being no valuable consideration for it, they would have exercised an unques-

tioned right; for without a valuable consideration to support it the agreement would be a mere nudum pactum, and might have been withdrawn at any time.

Until the proposal is accepted, there can be no contract, as there is nothing by which the proposer can be bound; and unless both are bound, so that an action can be maintained against the other for a breach, neither will be bound. But after unconditional acceptance there is a valuable consideration to support the contract; it then becomes mutual, and the voluntary proposal of one becomes the binding obligation of both: 1 Sugden on Vendors, 8th Am. ed., 195, 196; Bishop on Contracts, secs. 77-79, 325; Story on Contracts, 495; Benjamin on Sales, sec. 41.

¹⁵⁷ Contracts of this character, in respect to land, when unconditionally accepted, have been very generally enforced by courts of equity, and specific performance decreed, as will be seen by adverting to the numerous cases cited in the learned opinion of Mr. Justice Woods in *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

The defendant does not claim that there was any fraud, undue influence, oppression or other wrongful act on the part of the plaintiff in obtaining said contract; neither does he allege any mistake in reference to same.

But it is insisted that the defendants cannot specifically perform the contract, because they have conveyed the timber to the Tilghman Lumber Company. That would undoubtedly bar a decree for specific performance, although subjecting the defendants to damages, but for the fact that, according to the record, said company purchased, if at all, after the complaint was filed in this action, and, although it is not a party to the action, it is bound to the same extent as if it were: *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; *Todd v. Outlaw*, 79 N. C. 235; *Badger v. Daniel*, 77 N. C. 251.

Not only has a formal *lis pendens* been filed in this case, but the complaint contains a complete description of the property which is situated in the county where the action was commenced and is pending. This pleading refers to the registered option, as well as contains a full statement of the facts. It is itself notice to the world of the plaintiff's claim. The Tilghman company purchased after the filing of the complaint, and takes subject to any decree that may be made in this case: *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639; *Baird v. Baird*, 62 N. C. 317; *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455.

It is further contended that the defendants cannot make a good title to the timber, independent of the conveyance to the Tilghman company, and for that reason cannot be made to perform the contract.

This might avail the plaintiff if it was resisting the performance on its part, but it cannot avail these defendants, for it is well settled that, though the vendor is unable to convey the title called for by the contract, the purchaser may elect to take what the vendor can give him and hold the vendor answerable in damages as to the rest: *Kares v. Covell*, 180 Mass. 206, 91 Am. St. Rep. 271, 62 N. E. 244; *Corbett v. Shulte*, 119 Mich. 249, 77 N. W. 947; 29 Am. & Eng. Ency. of Law, 621, and cases cited. In this case the plaintiff has elected not only to take such title as the defendants can convey by their deed, but also to waive and discharge all claim for damages arising from a partial performance of the contract only.

¹⁵⁸ The next objection urged is that the subject matter is but growing timber and not the body of the land, and that equity will not require specific performance of that kind of contract, but will award damages in lieu thereof.

Some color is given to that position by the cases of *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464, and *Bomer v. Canady*, 79 Miss. 222, 89 Am. St. Rep. 593, 30 South. 638, 55 L. R. A. 328. But we find, upon a critical examination of the cases, that neither of them sustains the contention. The contract in the first cited case provided for the sale of merchantable ash, poplar and cherry trees, at the price of fifty cents and one dollar per tree, to be immediately removed. The refusal to decree specific performance is based upon the temporary character of the contract and because the breach is easily compensable in damages.

In the other case the contract required the defendant to saw up the timber into lumber and ship it to complainants. The court held that it would not specifically enforce a contract to cut trees from land and saw them into lumber, "if the contract be indefinite and uncertain as to the trees to be cut."

The contract we are asked to specifically enforce differs materially from those we have mentioned. The instrument defines with accuracy the land upon which the timber is growing—describes it as standing timber, ten inches in diameter, and such as may attain that size when cut, and gives ten years within which to cut and remove it. The price to be paid, as well as time of payment, is clearly stated.

The contract is definite and certain as to its subject matter, its stipulations, its purposes, its parties and the circumstances under which it was made. Its meaning is plain and its various provisions carefully and clearly stated.

There is a valuable consideration; the agreement is mutual. Specific performance is not only entirely practicable, but is necessary, in order to give the plaintiff the full benefit of the contract, and there is nothing inequitable in its enforcement.

In short, the contract has every requisite which is usually regarded as necessary to authorize a court of equity to compel

specific performance: Pomeroy's Equity Jurisprudence, §§ 1400-1505.

Then, again, the contract does not deal with personal property. It plainly savors of the realty.

Growing trees are often, especially in the older cases, regarded as a part of the land, and the sale thereof as a sale of an interest in land: 28 Am. & Eng. Ency. of Law, 537, and cases cited.

In this state growing trees have ever been regarded as part of the realty, and deeds and contracts concerning them are governed by the laws applicable to land: Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24; Hawkins v. Goldsboro Lumber Co., 139 N. C. 160, 51 S. E. 852; Mizell v. Burnett, 49 N. C. 249, 69 Am. Dec. 744.

¹⁵⁹ It is finally contended that the plaintiff, by his action, has elected to proceed for damages in lieu of specific performance.

The position is hardly tenable. The complaint sets forth a cause of action and asks for specific performance.

The plaintiff had a right to ask for damages, and they could have been awarded in this action in case the court refused to grant the principal relief.

As the plaintiff waives all damages, even for delay in performing the contract, the exceptions to the ruling of the court upon that issue need not be considered.

Upon a review of the record, we are of opinion that, upon the pleadings, proofs and responses to the issues, the plaintiff is entitled to the judgment tendered by its counsel.

The cause is remanded, with direction to enter judgment accordingly.

Reversed.

The Specific Performance of Options is the subject of a note to *Mir v. Hadden*, 118 Am. St. Rep. 592. It is only when the vendee has made his election and complied, or in good faith attempted to comply, with the terms of an option, that it becomes a contract enforceable by him in equity. Before specific performance can be enforced, the contract has ceased to be an option and has ripened into a mutually binding contract: *Rude v. Levy*, 43 Colo. 482, 127 Am. St. Rep. 123.

An Option to Purchase Land given without consideration may be withdrawn at any time before acceptance, but an option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired: *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881; *Tibbs v. Zirkle*, 55 W. Va. 49, 104 Am. St. Rep. 977. If an option to sell is not withdrawn prior to acceptance, it then becomes binding, notwithstanding it may have been based on an insufficient consideration: *Murphy, Thompson & Co. v. Reed*, 15 Ky. 585, 128 Am. St. Rep. 259.

Deeds to Timber and Their Effect are discussed in the note to *Wilson etc. Co. v. Alderman & Sons Co.*, 128 Am. St. Rep. 868. The sale of standing timber is ordinarily regarded as within the statute of frauds: *Polk v. Carney*, 21 S. D. 295, 130 Am. St. Rep. 719; *Turner v. Planters' Lumber Co.*, 92 Miss. 767, 131 Am. St. Rep. 552.

CAMPBELL v. HUFFINES.

[151 N. C. 262, 65 S. E. 1000.]

PARTNERSHIP—Authority of Partner to Bind Firm.—A mercantile instrument given in the partnership name binds all the partners, unless the person who takes it knows or has reason to believe that the partner making it is improperly using his authority for his own benefit to the prejudice of his associates. (p. 988.)

PARTNERSHIP—Estoppel to Deny.—One Who Executes a partnership contract in duplicate, and afterward agrees to annul the agreement, but leaves the duplicate copy in the hands of the other party, is liable to a third person thereafter induced by the other partner to loan money upon exhibition of such duplicate. (p. 988.)

ESTOPPEL—One Who Puts It Within the Apparent Power of another to commit a fraud should suffer the loss rather than a stranger who has innocently and in good faith acted upon the apparent power. (p. 988.)

W. H. Harp on May 23, 1903, applied to the plaintiff for a loan of five hundred dollars. He called the plaintiff into his place of business, and the latter at first declined to make the loan, there appearing to be some doubt about Harp's solvency. Harp then took from his safe a partnership agreement between himself and the defendant, dated June 5, 1902, which among other things provided that Harp should manage the business, do the buying, pay the bills, make all contracts, sign all checks, and have entire control of the business; that each partner was to own one-half; that the defendant had loaned Harp the money to buy a one-half interest in the business of C. A. Miller & Co.; that the business should be conducted under that name until July 1, 1902, after which it should be changed to such name as might be agreed upon; and that the partnership should continue until July 1, 1903.

The plaintiff testified that he knew the signature of D. R. Huffines, and, after seeing the partnership agreement, loaned the money and took a note signed "Harp & Huffines"; that Harp told him the money was needed to pay bills; that Huffines was out of town; that the money would shortly be repaid; and that two hundred dollars were repaid by Harp. The defendant admitted that he signed the partnership contract; that on the next day he decided to proceed no further; that he agreed with Harp to cancel the agreement; that he tore up his copy and Harp promised to destroy his copy; that he furnished Harp the money to buy a one-half interest in the C. A. Miller Co., and took his note for twelve hundred dollars, and Harp had paid him seven hundred dollars. The jury found that the defendant and Harp were partners at the time the plaintiff loaned the money, and that the defendant and Harp were both indebted to the plaintiff for the balance due. The defendant Huffines appealed from the judgment rendered on the verdict.

John A. Barringer, for the plaintiff.

A. L. Brooks and Thomas & Hoyle, for the defendant.

263 MANNING, J. We think the judgment of the court below is sustainable by the application of a few well-settled principles. The first headnote (which the opinion sustains, of *Cotton v. Evans*, 21 N. C. 284, declares: "A mercantile instrument, given in the partnership name, binds all the partners, unless the person who took it knew or had reason to believe that the partner who made it was improperly using his authority for his own benefit, to the prejudice, or in a way that might be to the prejudice, of his associates." Again, it is declared in that opinion: "In such a case there is a loss to fall on one of two innocent persons; and the question is, Which of them ought to bear it? Manifestly he who intrusted the power. It was susceptible of abuse, and he knew that when he conferred it. It is not, in point of form, exceeded; and if it has been employed for a different purpose than that for which it was created, that is a **264** risk that must have been seen and undertaken from the beginning." This case has been, at this term, cited with approval in *Powell v. Flowers*, 151 N. C. 140, 65 S. E. 817, in which other cases are cited sustaining the same principle. The defendant signed the articles of partnership; gave Harp, his copartner, a duplicate original; permitted him to keep it; Harp took it out of the iron safe in the place of business, showed it to plaintiff, and plaintiff, knowing the defendant's signature, loaned the money on the faith of it. The date of the loan was within the time stipulated for the duration of the partnership. The defendant put it in the power of his associate, Harp, to mislead the plaintiff and to defraud himself. The question simply is, Which should suffer the loss, the plaintiff or the defendant? It is well settled by many adjudications, here and elsewhere, that the party putting it within the apparent power of another to commit a fraud should suffer a loss, rather than a stranger who has innocently and in good faith acted upon this apparent power: *Ellison v. Sexton*, 105 N. C. 356, 18 Am. St. Rep. 907, 11 S. E. 180. By the written contract the defendant was an actual partner, not simply an apparent partner. What the partner, Harp, did was strictly within his power, under the written agreement and within the time stipulated for the duration of the partnership. "Where a man holds himself out as a partner, or allows others to do so, he is properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted": 22 Am. & Eng. Ency. of Law, 55; *Thompson v. First Nat. Bank*, 111 U. S. 529, 4 Sup. Ct. Rep. 689, 28 L. ed. 507. The defendant could easily have seen that the duplicate original held by Harp was destroyed, and the protection of himself from li-

bility would clearly seem to have demanded it. We have carefully examined the exceptions taken by the defendant at the trial, both in the taking of the evidence and to the charge of his honor, and the authorities cited in the able brief of his attorney, and we find no error. The judgment is therefore affirmed.

What Constitutes a Partnership is the subject of a note to Brotherton v. Gilchrist, 115 Am. St. Rep. 400.

One not in Fact a Partner cannot be made liable to third persons on the ground of having been held out as a partner, except when such holding out is done by him or by his consent, and was known to the person seeking to avail himself of it at the time that the contract was made. In such case, the liability rests on the principle of equitable estoppel: *Hahlo v. Mayer*, 102 Mo. 93, 22 Am. St. Rep. 753, and note. See, also, *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217; *Van Kleeck v. Hammell*, 87 Mich. 599, 24 Am. St. Rep. 182; *Morgan v. Farrel*, 58 Conn. 413, 18 Am. St. Rep. 282. A person knowing that he is held out as a partner is chargeable as one, unless he does all that a reasonable and honest man should do under similar circumstances to assert and manifest his refusal, and thereby prevent innocent parties from being misled, and whether or not he has done this is a question for the jury to determine: *Fletcher v. Pullen*, 70 Md. 205, 14 Am. St. Rep. 355.

BANK OF SAMPSON v. HATCHER.

[151 N. C. 359, 66 S. E. 308.]

BILLS AND NOTES.—That an Indorsement is "Without Recourse" does not affect the question of the indorsee's notice of an infirmity in the paper. (p. 992.)

BILLS AND NOTES.—Holder in Due Course.—The fact that an indorsee of a note knows that the paper arose out of an executory contract, of the terms of which he is cognizant, does not prevent his being a holder in due course nor permit a subsequent breach of warranty in such contract to be urged as a defense to his action on the note. (p. 992.)

BILLS AND NOTES.—Negotiability.—The Expression in a Note that it is given for the purchase price of property does not affect its negotiability. (p. 992.)

Faison & Wright and F. R. Cooper, for the plaintiff.

George E. Butler, for the defendant.

360 HOKE, J. Civil action, to recover the amount of a promissory note for one hundred and forty-four dollars. On the trial it appeared in evidence for plaintiff that on May 16, 1907, the defendant executed the note in question for one hundred and forty-four dollars to C. S. Lothrop & Co., payable on November 25, 1907, with interest at six per cent, for value received, and on May 22, 1907, the same was indorsed by said

payees "without recourse" to the plaintiff bank at a discount of ten per cent.

In the justice's court the defendant filed a written answer, admitting the execution of the note and its indorsement for value to plaintiff at the time stated, and alleged, by way of counterclaim, in effect, that the note was procured by false and fraudulent representations on the part of the payees of which the plaintiff bank was cognizant at the time of the indorsement. The defendants alleged, further, that the note was given in a transaction in which defendants had bought from payees the right to sell a "safety sash lock," and that there had been a breach of warranty as to the value and salability of such lock, causing damage, and that the damage incident to such breach was available against the plaintiff bank, who was associated in interest with the payees in the contract and had taken part therein.

In support of their counterclaim, the defendants offered testimony tending to show that C. S. Lothrop & Co., payees, held a contract with the Nickel Manufacturing Company, of Illinois, to manufacture the safety locks, and said company had given an accompanying guaranty that the locks would be manufactured "as per sample and be delivered in perfect working order," and to furnish same as they would be ordered by agents, at the contract price of two dollars per dozen. Said payees, holders of such contract, had joined in this stipulation, had sold to defendants the exclusive right to sell said locks in the county of Northampton, and, in connection with other agents, to sell the same in Sampson and other counties, and agreed that for every sixty dozen of locks ordered the defendants should have control of an additional county, etc.: that defendants executed the note sued on in pursuance of this contract, and some time thereafter, to wit, in June or July following, had ordered a quantity of the locks, and, having procured a number of agents, endeavored to sell same. One of defendants, testifying, said that the sample showed a good, well-made, workable lock, but the goods sent were made of inferior material, rough molded, not smooth, weak spring, would not work, bind, and would not hold the windows, and were worthless and unsalable, and all of them had to be filed before ³⁶¹ they would spring; that the agents had to stop, and the locks ordered were left on plaintiff's hands.

It was further agreed upon, as facts relevant to the inquiry, that said contract was delivered to the defendants at the time the note was executed, and as a part of one transaction; that plaintiff bank knew of this fact and of said contract at the time it took the note; that the transaction between defendants and a member of the firm of Lothrop & Co. took place in the law office of H. A. Grady, who was also vice-president of the bank. The said H. A. Grady and the cashier of the bank have

a similar contract with the payees, and they had both advised defendants that they thought it was a good thing; that the vice-president and cashier were on the discount committee of the bank, and had passed upon this note; that the note in question was written on a form of the bank, a number of which were in the office of H. A. Grady at the time, and was signed in the office of said H. A. Grady; that an arrangement had been made with plaintiff to discount at ten per cent all these notes by Lothrop & Co., and that these payees left the state on May 25, 1907, and had not since returned. There was also testimony to the effect that H. A. Grady and the cashier had made inquiry and received assurances to satisfy them of the standing and solvency of Lothrop & Co., and there was no evidence that this information was incorrect.

At the close of the testimony, and on the additional facts agreed upon, the court charged the jury, if they believed the evidence, they would render a verdict for plaintiff. Verdict for amount of the note and interest. Judgment on the verdict, and defendant excepted and appealed.

There was no evidence tending to establish any breach of contract at the time plaintiff became indorsee for value of the note sued on, the testimony showing that the locks were not ordered by defendant until June or July following, and the defects complained of were not disclosed until some time thereafter. Nor was there any testimony amounting to legal evidence to show that the plaintiff bank was interested with the payees in their transaction with defendants, otherwise than as indorsees of the notes, nor to show fraud on the part of the bank in connection with the matter, or any knowledge or notice of it. On the contrary, while the trade was made in the law office of H. A. Grady, Esq., who was at the time ³⁶² vice-president of the bank, it appears that said Grady and the cashier of the bank had made a contract with Lothrop & Co. similar to that of defendants, and had taken the precaution to inquire as to the business standing and solvency of the payees, and had received assurances that both were good, and there was nothing offered to show that these assurances were untrue.

There are several well-considered decisions of the court which support this view of the facts in evidence, among others, *Farthing v. Dark*, 111 N. C. 243, 16 S. E. 337; *Applegarth v. Tillery*, 105 N. C. 407, 11 S. E. 509; and our statute on the subject (Revisal, sec. 2205) is conclusive:

"2205. Actual Knowledge Necessary to Constitute Notice of Infirmary. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of

such facts, that his action in taking the instrument amounted to bad faith."

It has further been held with us (*Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847), that the form of the indorsement "without recourse," does not affect the question, and the defense indicated in the counterclaim can only be sustained if at all, on the ground that at the time of the indorsement the plaintiff bank was cognizant of the fact that defendant's obligation arose out of an executory contract and was aware of its terms, and when there was nothing in such contract restricting the negotiability of the notes nor to indicate fraud or imposition or an existent breach; and the correct doctrine is against the defense suggested, on the principle stated and upheld in *Mason v. A. E. Nelson Cotton Co.*, 148 N. C. 492, 128 Am. St. Rep. 635, 62 S. E. 625, 18 L. R. A., N. S., 1221. Even when such a notice appears on the face of the note, the authorities are against defendant's position: *Siegel v. Chicago T. & S. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 23 N. E. 417, 7 L. R. A. 537; *Ferris v. Tavel*, 87 Tenn. 386, 11 S. W. 93, 3 L. R. A. 414; *Bank of Commerce v. Barret*, 38 Ga. 126, 35 Am. Dec. 384.

The only decision we find which tends to support a contrary view is one in our own reports: *Howard v. Kimball*, 65 N. C. 175, 6 Am. Rep. 739. An examination into the facts of that case will disclose that the assignee of a note which expressed upon its face that it was given as purchase money of a certain tract of land not only had actual notice of the defect of title at the time he purchased, but he had taken a deed for such defective title from the original vendor, and held same to be conveyed to the vendee when the note was paid. The case, therefore, is undoubtedly well decided; but, in so far as the opinion gives countenance to the position that a defect of title is available against an indorsee for value of a note for the purchase money, from the fact, and from that ~~fact~~ alone, that the note on its face is expressed to be for the purchase money of land or a given tract of land, the case is not in accord with the better considered decisions. As an authority for such a position, it was in effect disapproved by a subsequent decision of this court, in *First Nat. Bank v. Michael*, 55 N. C. 53, 1 S. E. 855, in which a note of that kind was held to be "negotiable"; the term "negotiable" being used in the sense that an indorsee for value, without notice, *ultra*, became the owner of the note, unaffected by the equities and defenses existent between the original parties to the contract.

Our present statute on the subject would seem to put the matter at rest (Revisal 1905, c. 54, sec. 2153). This, being one of the sections defining what constitutes negotiability of notes, provides:

"2153. What Promise Unconditional. An unqualified order or promise to pay is unconditional, within the meaning of this chapter, though coupled with (1) an indication of a particular fund, out of which reimbursement is to be made or a particular account to be debited with the amount, or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional."

There was no error in the charge of the court or in the trial of the cause, and the judgment below is affirmed.

No error.

INDORSEMENT WITHOUT RECOURSE.

I. Form of Indorsement.

- a. Phraseology Employed, 993.
- b. Parol Evidence to Explain, 994.

II. Liability of Indorser.

- a. Liability as Indorser, 995.
- b. Liability as Vendor, 995.
- c. Liability on Warranty of Genuineness, 996.
- d. Liability on Warranty of Title, 996.
- e. Liability on Warranty of Validity, 996.

III. Transfer of Title to Instrument, 998.

IV. Negotiability and Bona Fide Ownership of Instrument, 998.

I. Form of Indorsement.

a. **Phraseology Employed.**—A restrictive or qualified form of indorsement of negotiable instruments, familiar to the commercial world and recognized by law, is indorsement "without recourse": *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321; *Chase v. Hathorn*, 61 Me. 505; *Ober v. Goodridge*, 27 Gratt. 878; *Welch v. Lindo*, 7 Cranch, 159, 3 L. ed. 301; *Davis v. Brown*, 94 U. S. 423, 24 L. ed. 204. These words are appropriate to an indorser only, not to an original promisor: *Childs v. Wyman*, 44 Me. 433, 69 Am. Dec. 111. They need not precede the signature of the party, but they may and often do follow his name; and where an indorser adds to his name the words "without recourse," at the time of his indorsement, parol evidence is admissible that such is the fact, although the paper is afterward indorsed by another person and the indorsee takes it without knowing that the limitation is applicable to the first indorser: *Fitchburg Bank v. Greenwood*, 2 Allen, 434; *Corbett v. Fetzer*, 47 Neb. 269, 66 N. W. 417. Where the payee of a note indorses his name at the right of and opposite the phrase "without recourse," the words are available to him only, and cannot be taken advantage of by subsequent indorsers: *Doom v. Sherwin*, 20 Colo. 234, 38 Pac. 56.

The usual form of this sort of qualified indorsement is "without recourse," or "without recourse to me," or "sans recours": *Brother-ton v. Street*, 124 Ind. 599, 24 N. E. 1068; *Southard v. Porter*, 43 N. H. 379; *Bisbing v. Graham*, 14 Pa. 14, 53 Am. Dec. 510; *Craft v. Fleming*, 46 Pa. 140; *Keyes v. Waters*, 18 Vt. 479; note to *Watson v. Cheshire*, 87 Am. Dec. 389; but any words clearly showing the same intention on the part of the indorser will be given like effect, such as "indorser not holden": *Ticonic Bank v. Smiley*, 27 Me. 225, 46

Am. Dec. 593; "I transfer all my right and title in the within note to be enjoyed in the same manner as may have been by me": *Haig v. Falconer*, 32 Ala. 536; "I hereby transfer and assign all my right, title, and interest in and to the within note": *Evans v. Freeman*, 12 N. C. 61, 54 S. E. 847. But whatever words are employed must clearly express the indorser's intention: *Fassin v. Hubbard*, 55 N. Y. 465. Indorsements of this kind, it is said, "ought to be made in strict compliance with the technical rules of the commercial law in this way: 'John Doe, without recourse'; or 'pay to Richard Roe, or order. John Doe, without recourse'; or in some other like form"; *Hart v. Barrett*, 34 Kan. 223, 8 Pac. 129. Perhaps a better form is this: "Pay to Richard Roe, or order, without recourse. John Doe": *Gehart v. Sorrels*, 9 Ohio St. 461. If this form is used, there can arise no question, in the event of several indorsements, as to which indorsement the phrase "without recourse" belongs; there will be no excuse for identifying it with an indorser other than the one who has employed it, as occurred in *Fitchburg Bank v. Greenwood*, 2 Allen, 434; *Corbett v. Fetzer*, 47 Neb. 269, 66 N. W. 417, referred to in the preceding paragraph. In *Hatch v. Barrett*, 34 Kan. 223, 8 Pac. 129, a writing in this form, "Said assignment is made without recourse on me, either in law or in equity," is held an assignment merely, not an indorsement in the commercial sense. And in *Gale v. Mayhew* (Mich.), 125 N. W. 781, an indorsement by the payee, "I hereby assign my interest in this note to G," is held not equivalent to an indorsement without recourse.

An instruction that, in order to exonerate an indorser, the words "without recourse" must be written in such a manner that they can be read by a man "of ordinary ability and understanding," is erroneous: *Hayden v. Strong*, 23 Hun, 527.

b. Parol Evidence to Explain.—Parol evidence is not admissible as against subsequent holders in due course, to show that an unqualified indorsement of negotiable paper was made with the understanding that it was made simply to transfer title and without recourse. To admit oral evidence in such a case would be to vary or contradict a contract in writing: *Notes to Drennan v. Bunn*, 7 Am. St. Rep. 356; *Watson v. Chesire*, 87 Am. Dec. 389. In *Kinsel v. Ballou*, 151 Cal. 754, 91 Pac. 620, the court refused to admit oral evidence to show that an indorsement "with recourse" was intended by the parties to be "without recourse." Yet one who takes a note indorsed "with recourse," with notice that the indorsement is intended to be "without recourse," cannot, although he acquires the note before maturity and for value, recover on the indorsement: *Johnson v. Williard*, 53 W. Va. 420, 53 N. W. 776. Neither is evidence admissible of a contemporaneous oral agreement that the indorser should be liable as a guarantor for the payment of a note which he has indorsed without recourse: *Youngberg v. Nelson*, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629.

On the other hand, it would seem that parol evidence is not admissible to convert an indorsement without recourse into an unqualified or unconditional indorsement: *Cross v. Hollister*, 47 Kan. 421, 15 Pac. 693. Yet, on the theory that an indorsement "without recourse" is not a contract in writing, but serves simply to transfer title, it has been held competent to show by parol evidence that the purchaser agreed to take the paper at his own risk, absolutely, and thereby to relieve the vendor of all liability, such as for an implied warranty

of genuineness, that ordinarily attends a sale and transfer by such methods: *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

The words "without recourse," following the name of the first indorser of a note and preceding the name of a second indorser, may be shown by parol to belong to the first indorser. Oral evidence in such a case has no tendency to vary or control the written contract, or to change the legal title of the instrument, but simply to prove what the contract really is: *Fitchburg Bank v. Greenwood*, 2 Allen, 434; *Corbett v. Fetzer*, 47 Neb. 269, 66 N. W. 417.

II. Liability of the Indorser.

a. **Liability as Indorser.**—One who indorses a note without recourse is not liable as an indorser. Obviously no action will lie on the indorsement, for by his written contract the indorser expressly declines to assume the liability of indorser. The indorsement effects a transfer of the title to the paper, without imposing the liability of an indorser: *Note to Donaldson v. Mississippi etc. B. B. Co.*, 87 Am. Dec. 390; *Cross v. Hollister*, 47 Kan. 652, 28 Pac. 693; *Waite v. Foster*, 33 Me. 424; *Richardson v. Lincoln*, 5 Met. 201; *Craft v. Fleming*, 46 Pa. 140; *Johnson v. Williard*, 83 Wis. 420, 53 N. W. 776. Other authorities that may be said to support this well-recognized rule are: *Stapler v. Burns*, 43 Ga. 382; *Collier v. Mahan*, 21 Ind. 110; *Bank of Kansas City v. Mills*, 24 Kan. 604; *Rayne v. Ditto*, 27 La. Ann. 622; *Templeton v. Hamilton*, 37 La. Ann. 754; *Hankerson v. Emery*, 37 Me. 16.

b. **Liability as Vendor.**—But it does not follow that one who exempts himself from liability as an indorser, by using the expression "without recourse," or its equivalent, stands free from all obligation in respect to the instrument. His undertaking, notwithstanding the restricted indorsement, may be a substantial one, for it seems clear that he divests himself of none of the liabilities of a vendor of the paper. In other words, an indorsement without recourse still leaves the indorser liable as vendor, not exempt from the liabilities arising from the sale and transfer by delivery, if the paper is susceptible of such transfer: *Bevan v. Fitzsimmons*, 40 Ill. App. 108; *Watson v. Cheshire*, 18 Iowa, 202, 87 Am. Dec. 382; *Dayton v. Tillorson*, 39 Iowa, 404; *Dumont v. Williamson*, 18 Ohio St. 515, 98 Am. Dec. 186. But his liability arises from the fact or contract of sale, not upon the paper: *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

A leading case on this question is *Dumont v. Williamson*, 18 Ohio St. 515, 98 Am. Dec. 186, where the court used this language: "The words 'without recourse' accompanying an indorsement clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity, upon due demand, or even if all the parties to the paper should prove to be wholly insolvent, we think they cannot be construed as importing more than this. At least, they do not divest such indorser of his character as a vendor of the note, nor exempt him from the liabilities arising from a sale and transfer by delivery, where the note is capable of being thus transferred. In such a case, then, is there no implied warranty on the part of the vendor that the note is not forged—that it is in fact what it purports on its face to be?" The court, after reviewing the authorities, takes the view that there is such a warranty. Another

leading decision on this point is *Challiss v. McCrum*, 22 Kan. 157, 21 Am. Rep. 181, where the court said that an indorsement without recourse "leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery: *Hannum v. Richardson*, 48 Vt. 506, 21 Am. Rep. 152. Independently, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: First, that there is an implied warranty of the genuineness of the signatures; and second, that there is no warranty of the solvency of the parties." "The liabilities of an ordinary or unqualified indorser," to quote from *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51, are upon the instrument indorsed, conditioned upon demand and notice; but where the transfer is by indorsement without recourse, or by delivery, the vendor's liabilities arise from the fact or contract of sale, and not upon the paper. The purpose of such an indorsement, like delivery without indorsement, is simply to carry title to the purchaser without alone importing a contract."

c. **Liability on Warranty of Genuineness.**—There appears to be no doubt that an indorser of a note without recourse impliedly warrants that the signatures of prior parties whose names appear thereon are genuine: *State v. Corning State Sav. Bank*, 139 Iowa, 338, 115 N. W. 937; *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Ware v. McCormack*, 96 Ky. 139, 28 S. W. 157, 959; *Dumont v. Williamson*, 18 Ohio St. 515, 98 Am. Dec. 186; *Hall v. J. T. Latimer & Son*, 81 S. C. 90, 61 S. E. 1057. He contracts and engages that the signatures borne by the paper as makers or prior indorsers are genuine signatures of the persons thereby represented, and further, it is said, that the note is a valid obligation: *Palmer v. Courtney*, 32 Neb. 773, 49 N. W. 754. Daniel has said, and his statement seems to be approved by the court in the last case cited, that the indorser "contracts that the bill or note is in every respect genuine, and neither forged, fictitious, nor altered. Undoubtedly and by universal admission this principle applies to the signatures of the drawer, acceptor, and maker of the bill or note, who are the original parties; and it is often expressed in language to the effect that the indorser warrants that it is a genuine instrument."

d. **Liability on Warranty of Title.**—An indorser without recourse also impliedly warrants that he has title to the paper which gives him the right to sell it, but he does not warrant the solvency of the maker: *Hecht v. Batcheller*, 147 Mass. 335, 9 Am. St. Rep. 703, 17 N. E. 651; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152. This rule that the words "without recourse" will not relieve an indorser from liability in case he is not the lawful holder of the instrument, or has no title thereto, is recognized in *Wolcott v. Timberman*, 28 Iowa, 454, but the facts in that case do not seem to bring it within the rule. Where a treasury note has been paid and canceled, but afterward stolen, the cancellation erased, and the instrument again put in circulation, one who subsequently indorses it without recourse is liable to his indorsee: *Frazer v. D'Invillien*, 2 Pa. 200, 44 Am. Dec. 190.

e. **Liability on Warranty of Validity.**—It is sometimes said that an indorsement of a note without recourse is an undertaking that the

instrument is valid and what it purports to be: *Palmer v. Courtney*, 32 Neb. 773, 49 N. W. 754; *Seeley v. Reed*, 28 Fed. 164. This clearly is true if the indorser knows when he transfers the instrument that it is worthless (*Dayton v. Tillotson*, 39 Iowa, 404), or invalid in its inception for want or illegality of consideration: *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181; *Blethen v. Lovering*, 58 Me. 437; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152.

It is also said that an indorser without recourse is liable on an implied warranty that the note is an obligation for the amount expressed on its face. And hence he can be held for any deficiency between the amount apparently due upon the face of the instrument and the amount legally collectible upon it, although the deficiency arises from a successful interposition of the defense of usury whereby the collection of interest is defeated. He does not own the amount forfeited by the usury, has no right to collect it, and therefore has no right to sell or transfer it to another: *Drennan v. Bunn*, 124 Ill. 175, 7 Am. St. Rep. 354, 16 N. E. 100; *Cressey v. Kimmel*, 78 Ill. App. 27; *M. Rumley Co. v. Dollarhide*, 86 Ill. App. 476. In *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181, the court, in holding liable as vendor an indorser without recourse of a usurious note, said: "The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof."

An indorsement by the payee in words "indorser not holden, D. S.," is not a bar to an action therefor, if payments have been made, or if setoffs can be claimed, when the note exhibits no indication of them, and the indorser leaves the indorsee ignorant of anything of the kind: *Ticonic Bank v. Smiley*, 27 Me. 225, 46 Am. Dec. 593.

But when one accepts a note assigned to him without recourse, which is annexed to a contract that the real amount due upon the note is to be determined by a third person, there is no implied warranty by the indorser that the sum stated in the note is actually due: *Freeman v. Guyer*, 13 Ill. 652.

Daniel has summed up the liability under an indorsement without recourse in this language: "When the indorsement is without recourse, the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse, but who is nevertheless liable if he draws upon a fictitious party, or one without funds. And therefore, the holder may recover against the indorser without recourse, if any of the prior signatures were not genuine; or if the note was invalid between the original parties, because of the want or illegality of the consideration; or if any prior party was incompetent; or the indorser was without title." This language is quoted, apparently with approval, in *Challiss v. McCrum*, 22 Kan. 157, 31 Am. Rep. 181. It is also supported by the statements of the court in *Watson v. Chesire*, 18 Iowa, 202, 87 Am. Dec. 382.

III. Transfer of Title to Instrument.

The title to a negotiable instrument may be transferred as effectually by indorsement without recourse as by an unqualified indorsement: *MacIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321; *Hudson v. Shepard*, 90 Ill. App. 626; *Brotherton v. Street*, 124 Ind. 599, 24 N. E. 1068; *Epler v. Funk*, 8 Pa. 468; *Seeley v. Reed*, 28 Fed. 164. The indorsement of a note without recourse transfers the whole interest therein: *Richardson v. Lincoln*, 5 Met. 201. The indorser impliedly warrants that he has title to the paper which gives him the right to sell it: *Hecht v. Batcheller*, 147 Mass. 335, 9 Am. St. Rep. 705, 17 N. E. 651; *Hannum v. Richardson*, 48 Vt. 508, 21 Am. Rep. 152. But an indorsement without recourse of a purchase money note, in which title to the property for which it was given is reserved in the payee, does not carry with it to the indorsee the title to such property: *Bradley v. Cassels*, 117 Ga. 517, 43 S. E. 857.

IV. Negotiability and Bona Fide Ownership of Instrument

It seems sometimes to have been considered that the phrase "without recourse" in an indorsement of a note, "with other circumstances tends to show that the note was not indorsed for value, and in the usual course of business, giving the indorsee absolute title, without setoff; or such other defense as the maker might have, if sued by the promisee": *Richardson v. Lincoln*, 5 Met. 201. But the general rule is well recognized that an indorsement without recourse does not affect the negotiability of instrument. Though relieving the indorser from liability as such, the indorsement is not out of the usual and due course of trade, and it cuts off the defenses and equities of the maker as effectually as does an unqualified indorsement. It does not charge the purchaser with notice of or put him upon inquiry as to such equities or defenses: *Thompson v. Love*, 61 Ark. 81, 32 S. W. 65; *Neely v. Black*, 80 Ark. 212, 96 S. W. 934; *Frost v. Fisher*, 13 Colo. App. 322, 58 Pac. 872; *Beach v. Bennett*, 13 Colo. App. 459, 66 Pac. 567; *Stevenson v. O'Neal*, 71 Ill. 314; *Hardy v. First Nat. Bank*, 56 Kan. 493, 43 Pac. 1125; *Maurin v. Chambers*, 16 La. 207; *Upham v. Prince*, 12 Mass. 14; *Goddard v. Lyman*, 14 Pick. 268; *Borden v. Clark*, 26 Mich. 410; *Mayes v. Robison*, 5 Mo. 114, 5 S. W. 611; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 91 N. W. 399, 96 N. W. 1021; *Epler v. Funk*, 8 Pa. 468; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1008; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Thorpe v. Mendenhall*, 123 Wis. 149, 107 Am. St. Rep. 1003, 101 N. W. 417, 68 L. & A. 146; *Hamilton v. Fowler*, 99 Fed. 18, 40 C. C. A. 47.

BOLLINGER v. RADER.

[151 N. C. 383, 66 S. E. 314.]

INSANE ASYLUM—Liability of Discharged Inmate.—Persons in charge of a state hospital for the insane, who discharge and release an inmate, are not answerable, even though the discharge is negligently made, for a homicide committed by him six months afterward. The discharge is not the proximate cause of the homicide. (p. 1000.)

Witherspoon & Witherspoon, A. A. Whitener and L. C. Caldwell, for the plaintiff.

W. D. Turner, W. A. Self and S. J. Ervin, for the defendants.

³⁸³ CLARK, J. The complaint alleges that the defendants—one of whom is the superintendent and the other three directors of the State Hospital for the Insane, located at Morganton, North Carolina—negligently discharged one Lonnie Rader, an insane patient committed to said hospital, from confinement therein, and ³⁸⁴ that six months later the said Rader, while insane, killed the plaintiff's intestate.

The defendants demurred, because the complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them, individually or collectively:

1. Because it appears from said complaint that defendant John McCampbell is superintendent of the State Hospital for the Insane, at Morganton, North Carolina, and the defendants Shuford, Davis and Armfield are members of the board of directors thereof; that said defendants, by virtue of their said offices, and acting within the scope and limits of authority conferred by law, discharged or released Lonnie W. Rader, a patient, from said hospital; that the said McCampbell and his codefendants are, by section 4560 of the Revisal of 1905, exempted from all personal liability for the alleged acts and omissions complained of in plaintiff's complaint.

2. That said John McCampbell and his codefendants, as appears from said complaint, were acting in their official capacity in the discharge of duty imposed by law and in the exercise of a legal discretion vested in them, and are not liable to plaintiff for discharging said Lonnie W. Rader, of which the plaintiff complains.

3. That said John McCampbell and his codefendants, in doing the acts complained of in the plaintiff's complaint, were in the discharge of judicial duties and functions imposed by law, and were acting within the limits of their authority, and are therefore not liable to the plaintiff in this action on account thereof.

4. That the allegations in said complaint, that said defendants, knowing that said Rader was dangerously insane and notwithstanding said knowledge, negligently caused the said Rader to be discharged from said hospital, do not state facts sufficient to constitute a cause of action against said defendants or either of them.

5. That there are not facts or alleged facts set forth in the complaint of plaintiff which could legally cause the damages claimed by him.

His honor sustained the demurrer, and the plaintiff appealed.

The defendants were public officers and were acting as such at the time that the said ~~was~~ Lonnie Rader was discharged by them from further confinement in the said State Hospital. The statute (Revisal, sec. 4596) provides: "Any three of the board of directors of any hospital . . . shall be a board to discharge or remove from their hospital any person admitted as insane, when such person has become or is found to be of sane mind, or when such person is incurable and, in the opinion of the superintendent, his being at large will not be injurious to himself or dangerous to the community; or said board may permit such person to go to the county of his settlement, on probation, when, in the opinion of the said superintendent, it will not be injurious to himself or dangerous to the community, and said board may discharge or remove such person upon other sufficient cause appearing to them."

The defendants discharged Lonnie Rader under and pursuant to the said statute, and this discharge of Lonnie Rader is complained of as a negligent act on their part.

We need not discuss the other grounds of demurrer, which were ably and interestingly argued before us by counsel for both sides, for the first ground of the demurrer is conclusive. The statute under which the hospital was created, organized and now exists provides that "No director or superintendent of any state hospital shall be personally liable for any act or thing done under or in pursuance of any of the provisions of this chapter": Revisal, sec. 4560. The discharge was made under and by virtue of the authority conferred by the above section (4596) of the Revisal.

But we will add that it does not seem to us that the discharge of Rader, on March 5th, even if negligently made, was the proximate cause of the death of the young girl, which occurred September 13th, following. The allegation is in the nature of "Post hoc, ergo propter hoc."

The defendants could not, by the exercise of ordinary care and caution, have anticipated, foreseen or expected that the death of the plaintiff's intestate would follow as the natural result of their act in discharging Rader from the hospital.

Their erroneous or mistaken opinion or judgment—that Lonnie Rader was sane, or insane—that his being at large would not be injurious to him or dangerous to the community, or that there were other sufficient reasons why he should be discharged—and their act in discharging him, did not cause her death. It may be that if they had kept Rader confined in the State Hospital he might not have killed her; but it is equally true that if ~~she~~ he had never been born or had never become insane he would not have killed her. The discharge of Rader, his absence from the hospital, his presence in Catawba county, and his presence at church on the day of the homicide, was a mere condition which accompanied, but did not cause, the injury. Like the presence of the freight in the depot at Lincolnton when the depot was accidentally destroyed by fire (*Extinguisher Co. v. Carolina & N. W. R. R.*, 137 N. C. 278, 49 S. E. 208), or the lumber on the right of way of the railroad at Elk Park when the hotel was destroyed by fire (*Bowers v. Atlantic Coast Line R. R.*, 144 N. C. 684, 57 S. E. 453, 12 L. R. A., N. S., 446), the absence of Lonnie Rader from the hospital was a mere condition which accompanied, but did not cause, the injury.

Counsel pertinently ask, is the absence of the policeman from his beat and this dereliction of duty on his part the cause of the burglary which happens in his absence and which his presence would have prevented? Is the act of the governor, who pardons a criminal, the cause of the homicide which such criminal subsequently commits? Is the conduct of the judge or justice in declining to remove a prisoner to another jail for safekeeping the cause of the death of the prisoner in the event he is hanged by a mob?

The judgment sustaining the demurrer is affirmed.

If the Persons in Charge of a Hospital, knowing the condition of a patient suffering from delirium tremens, leave him in an insecure apartment in charge of a woman powerless to restrain him, and he escapes from her control and assaults another patient, the jury may find a verdict of negligence: *University of Louisville v. Hammock*, 127 Ky. 564, 128 Am. St. Rep. 355.

The Doctrine of Proximate Cause is the subject of a note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807. Recent cases defining proximate cause are: *Seith v. Commonwealth Electric Co.*, 241 Ill. 252, 132 Am. St. Rep. 204; *Board of Trade Co. v. Cralle*, 109 Va. 246, 132 Am. St. Rep. 917; *Ford v. Tremont Lumber Co.*, 123 La. 742, 131 Am. St. Rep. 370; *Burger v. Omaha etc. Street Ry. Co.*, 139 Iowa, 645, 130 Am. St. Rep. 343; *Reynolds v. Galveston etc. Ry. Co.*, 101 Tex. 2, 130 Am. St. Rep. 799; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 129 Am. St. Rep. 659.

STATE v. PERRY.

[151 N. C. 661, 65 S. E. 915.]

MUNICIPAL CORPORATION—Regulating the Sale of Fish.—An ordinance forbidding the sale of fish outside the market-house, except fresh fish caught in the waters of the county, is a valid exercise of the police power of the city. (p. 1003.)

MUNICIPAL CORPORATION—Regulating the Sale of Fish.—An ordinance forbidding the sale of fish outside the market-house may be enforced by a criminal prosecution, regardless of the validity of the contract by the city for the building of the market. (p. 1004.)

MUNICIPAL CORPORATION—Contract to Build Market-house.—A city may properly contract with individuals to build and furnish it a public market-house, which is to remain under the control of the municipal authorities, and is to be rented to every dealer so far as its capacity will permit, and not exclusively to any particular ones, at reasonable rents. (p. 1004.)

Indictment for violating the following ordinance: "Sec. 13. No person shall sell any fresh fish within the incorporate limits of the city of Fayetteville, outside of said market house in said city: Provided, that fresh fish which are caught in the streams and waters in Cumberland county, when offered for sale in a fresh condition, shortly after they are caught, may be sold within the said city, at such places and points as may not be prohibited by law."

George L. Jones, attorney general, R. H. Dye and Cook & Davis, for the state.

Thomas H. Sutton and C. W. Broadfoot, for the defendant.

663 BROWN, J. The only questions presented by this appeal which we deem it necessary to discuss are the contentions of the defendant that the ordinance is *ultra vires* and also in conflict with article 1, section 31, of our state constitution, which forbids monopolies.

It appears to us that the passage of the ordinance in question was a valid exercise of the police power vested generally in municipal corporations.

The power of the public authorities to inspect and control the sale of articles of food intended for consumption is undoubted, the object being the preservation of the health of the community. **663** The power exists, therefore, in municipal authorities to establish and then regulate and control public markets or places at which all articles of food shall be offered for sale and sold, or to regulate and control markets established by private individuals and carried on as private enterprises. The health of the community, being one of the purposes of the organization of government, and the purity of food and drink having such an important effect upon the health, is universally held to be a ground for the exercise of

the power: 1 Abbott on Municipal Corporations, sec. 134; Smith's Modern Law of Municipal Corporations, sec. 593 et seq.; Dillon on Municipal Corporations, sec. 386.

This power to make by-laws relative to the public markets will not authorize corporations to prohibit the sale of fish and meats, etc., entirely within its limits, because that would be in restraint of trade, but it does empower them to prohibit the hawking about or vending by retail such articles of trade except at the public markets and within certain limits about them.

"The fixing the places and times at which markets shall be held and kept open," says the supreme court of New York, in *Bush v. Seabury*, 8 Johns. 418, "and the prohibition to sell at other places and times, are among the most ordinary regulations of a city or town police": Also, 1 Abbott on Municipal Corporations, sec. 135, and cases cited in notes.

The power of the municipal authorities to enact ordinances regulating the sale of perishable food stuff, and the supervision thereof by the city's health officer, is an exercise of its police power, which has been so uniformly sustained in all the courts of the land that it seems to be firmly established.

A collection of the cases will be found in note to *State v. Sarradat*, 24 L. R. A. 584; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; *City of Raleigh v. Sorrell*, 46 N. C. 49; *State v. Pendergrass*, 106 N. C. 664, 10 S. E. 1002.

But it is insisted that the ordinance was enacted in order to create a private monopoly, and conflicts with article 1, section 7, of our state constitution, which declares that "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed." The facts, briefly stated, are these: The city of Fayetteville, having no public market-house, and realizing the public necessity in the promotion of the health and comfort of its citizens for such a building, through its aldermen, entered into a contract with John Underwood and associates for the erection of this market-house, which the city was not able or did not care to undertake to build. The city provides for supervision by its own officials, has quarters for health officers, and enforces obedience to all regulations which may be from time to time enacted by the city. The contract also provides for the ⁶⁶⁴ purchase of the property by the city at stated periods, at its option. In fact, the entire market place is under the absolute control of the city; and it further provides that the rental for the stalls shall be reasonable, and, in order to establish what might be reasonable rent, it provides that it shall not be greater than that in other towns of similar size and under similar circumstances in North Carolina. And for all these benefits accruing to the public and furnishing the city quarters for its health officers, and other benefits accruing to the city, the city agrees to pay a rental equal to the amount of taxes imposed

thereon by the city until such time as the enterprise might be on a paying basis of six per cent. The books and records of the company are at all times open to the examination of the city officials.

We do not think this contract is obnoxious to any section of our constitution or violates any principle of public policy.

The contention that it is void because the property is exempted from municipal taxation is without basis upon the facts; but if it were true, this defendant could not raise the point under an indictment for violating a city ordinance, which in itself is a valid exercise of the police powers of the city and may be enforced, independent and regardless of the contract: *Lumberton Imp. Co. v. Commissioners*, 146 N. C. 353, 59 S. E. 1014.

To sustain the judgment it therefore becomes unnecessary to consider the contract; but as it was vigorously attacked by the learned counsel for defendant, and as it is to the interest of the city to set the question at rest, we will say that the right to enter into such a contract is clearly within the legitimate powers of the board of aldermen. The city has conferred no monopoly on Underwood and his associates. It is the city's market-house, to all intents and purposes, governed, controlled and regulated by its authorities. Every fish and meat dealer, as far as the capacity of the market-house will permit, is at liberty to rent stalls and do business there. Underwood and associates have no exclusive right to sell fish there themselves, nor to charge others their own price for space. Extortionate rents are carefully guarded against by the terms of the contract. The city had as much right to contract with Underwood to furnish it a public market-house as it had the right to build one of its own. The purpose of the contract is to benefit the community, and municipal legislation which has for its object the protection of the health, morals, etc., of the municipality is entitled to liberal construction, and the scope, if within constitutional limits, is very largely within the discretion of the authorities and not subject ⁶⁰⁵ to judicial interference: 2 *Smith's Modern Law of Municipal Corporations*, sec. 1322.

We think the contract is valid, and that similar conventions have been heretofore sustained: *State v. Sarradat*, 46 La. Ann. 700, 15 South. 87, 24 L. R. A. 584, and notes; *Palestine v. Barnes*, 50 Tex. 538; *State v. Natal*, 41 La. Ann. 887, 6 South. 722, and cases there cited; 1 *Smith's Modern Law of Municipal Corporations*, sec. 593.

The judgment of the superior court is affirmed.

The Power of Municipalities to Establish and Regulate Markets is considered in the notes to *Caldwell v. City of Alton*, 85 Am. Dec. 286; *City of Jacksonville v. Ledwith*, 23 Am. St. Rep. 581. The state has the right to regulate markets for the sale of produce, and may delegate that power to the municipalities in which such markets

are situated, and in such case ordinances adopted for that purpose are not ultra vires, and must be sustained when not unreasonable, discriminative, nor oppressive: *New Orleans v. Graffina*, 52 La. Ann. 1082, 78 Am. St. Rep. 387. See, also, *American Livestock etc. Co. v. Chicago Livestock Exchange*, 143 Ill. 210, 36 Am. St. Rep. 385. But the power to establish markets cannot be used to create a monopoly of the right to sell, and the right to sell at markets must be secured to all alike on the same condition: *City of Jacksonville v. Ledwith*, 26 Fla. 163, 23 Am. St. Rep. 558.

A Municipal Corporation has Power to Fix by Ordinance the places at which food commodities, in quantities adapted to the daily wants of the community, may be sold: *State v. Davidson*, 50 La. Ann. 1297, 69 Am. St. Rep. 478. An ordinance forbidding the sale of fruits, vegetables, and other articles of food within six squares of the public markets by peddlers is a valid exercise of the police power by a city: *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657.

STATE v. RAY.

[151 N. C. 710, 66 S. E. 204.]

BIGAMY—Extraterritorial Force of Statute.—A statute providing that "if any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere," every such offender shall be guilty of a felony, the expression "or elsewhere" is unconstitutional and of no effect. (p. 1006.)

BIGAMY—Marriage Contracted Without the State.—Parties coming back into the state after a bigamous marriage contracted without the state cannot be punished in this state under a statute providing that "if any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere," every such offender shall be guilty of a felony, for the expression "or elsewhere" is of no effect because contrary to the law of the land. (p. 1007.)

Indictment for bigamy. The evidence on the part of the state showed that the defendant married a woman in this state who is still living; that subsequently, having separated from her, he married another woman in Virginia who is still living, and returned with her to this state, where they lived together for nearly three years, when he left her. The evidence of the defendant tended to show that he removed to Indiana after separating from his first wife, and there obtained a divorce before contracting the second marriage. But in reply the state offered evidence tending to show that the decree of divorce was void. There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney general, for the state.

Parker & Parker, W. P. Bynum, Jr., and R. H. Hayes, for the defendant.

⁷¹² HOKE, J. We do not refer to many of the interesting questions presented in defendant's case on appeal, for the reason that the court is of opinion that in no aspect of the state's testimony can the defendant be convicted of the offense charged in the bill of indictment. The state does not contend or claim that such conviction can be upheld, except under our statute against bigamy (Revisal 1905, sec. 3361). On matters relevant to this inquiry, this section of our law provides as follows:

"3361. Bigamy.—If any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony and imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years; and any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended or be in custody, as if the offense had been actually committed in that county."

This has long been the law of this state controlling the matter, and appears in terms exactly similar in the code of 1883, as section 988. Construing this section, in *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130, Justice Avery, for the court, in a forcible and learned opinion, decides that this statute, in so far as it undertakes to punish a defendant for a bigamous marriage, occurring beyond the borders of the state, is unconstitutional, and that, in the language of the statute defining the offense, "If any person, being married, shall marry another person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, etc., shall be guilty of a felony," the expression "or elsewhere" is void and of no effect. An examination of *Cutshall's* case will further disclose that it was there directly and necessarily held that the parties to a bigamous marriage, occurring without the state, could not be indicted and punished under the provisions of this statute, by reason of having thereafter returned to the state and lived together as husband and wife.

The case in question was determined on appeal by the state from an order quashing a bill of indictment for bigamy. The bill contained three counts: The first charged, in substance, a ⁷¹³ bigamous marriage, occurring in the state of South Carolina. A second charged that, after such bigamous marriage in South Carolina, the parties came back to North Carolina and lived together as husband and wife. There was a third count in the bill, on which a nolle prosequi was entered in the lower court, and the contents are therefore immaterial.

The supreme court, as stated, held that no offense was charged in the first count, because our state law could not be given extraterritorial effect, and that none was charged in the second count, because the statute contained no such provision. Justice Avery, speaking to this last question, said: "The additional count, in which it was charged that the defendant, after the bigamous marriage in South Carolina, came into North Carolina and cohabited with the person to whom he was married, cannot be sustained, because the offense is not covered by the statute." And a perusal of the law gives clear indication that the court has correctly construed it in Cutshall's case. The only offense created and defined by this section of the statute is the "second marriage, while a former husband or wife is still living." This is declared to be felony, and it is the only act made criminal by the law, for it is perfectly plain that the subsequent words of the statute, "and any such offense shall be dealt with, tried, determined and punished in the county where the offender shall be apprehended or be in custody," refers only to the venue of the crime defined in the first clause, "such offense" being, as stated, "the second marriage, the former husband and wife still living." Coming back into the state after a bigamous marriage elsewhere, and a living together by the parties as husband and wife, might and ordinarily would constitute the crime of fornication and adultery: *State v. Cutshall*, 109 N. C. 764, 26 Am. St. Rep. 599, 14 S. E. 107. But there is nothing in this statute which makes such conduct a felony, or which deals or attempts to deal with it one way or another; and the expression, "or elsewhere"—that is, a bigamous marriage beyond the borders of the state—having been declared of no effect by the courts, because contrary to the law of the land, there is nothing in the statute which applies to the conduct of the defendant, and he is entitled to go, quit of any further molestation by reason of any indictment predicated and necessarily dependent upon it.

There are decisions in many of the states, and by courts of recognized authority, sustaining convictions by reason of conduct similar to that imputable to defendant on this evidence, or upholding statutes condemning it: *Brewer v. State*, 59 Ala. 101; *Commonwealth v. Thompson*, 2 Cush. 551; *State v. Fitzgerald*, 714 75 Mo. 571; *State v. Palmer*, 18 Vt. 570. But in the cases cited, and all others of like import, so far as we have examined, the statutes, in express terms, made the "cohabiting together within the state, after a bigamous marriage elsewhere," a specific criminal offense. Thus, in the Missouri statute (*State v. Fitzgerald*, 75 Mo. 571), the language is, "Every person having a husband or wife living, who shall marry another person without this state, in any case where such marriage would be punishable if contracted or solemnized

in this state, and shall thereafter cohabit with such other person within this state, shall be adjudged guilty of bigamy," etc.

As now advised, and speaking for himself, the writer sees no reason why a state could not declare the coming into the state and cohabiting together here by the parties after a bigamous marriage in another state, a felony, and punish it as such; but the question is not presented, for the court is clearly of opinion that our statute contains no such provision, and the prosecution of the defendant, therefore, for the offense charged, on the evidence as it now appears, cannot be sustained.

The court is not inadvertent to the case of *State v. Long*, 143 N. C. 670, 57 S. E. 349, which upholds the contrary view, but, after a careful consideration, we are of opinion that, on authority and for the reasons stated, the case referred to is not well decided; and, on the facts presented, the defendant was entitled to the instruction prayed for by him, that if the jury believed the evidence they would render a verdict of not guilty.

For the error indicated, there will be a new trial, and it is so ordered.

New trial.

Clark, C. J., Dissenting. "The supreme court of the United States has held that no court should assume to declare a statute unconstitutional unless it was clearly so 'beyond all reasonable doubt': *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606. This court so held in *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968, *State v. Lytle*, 117 N. C. 738, 51 S. E. 66, *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992, 3 L. R. A., N. S., 997, and in other cases. *Cooley's Constitutional Limitations*, seventh edition, 254, states this as the accepted doctrine, and cites numerous authorities. Certainly we would not hold that a co-ordinate department had either ignorantly or intentionally violated the constitution, which they had sworn to observe, unless it was clear to us beyond a reasonable doubt. Inasmuch as this court, in a recent and unanimous opinion (*State v. Long*, 143 N. C. 670, 57 S. E. 349), upheld this statute, we at least cannot think there is no reasonable doubt about it.

"Nor should a court hold an act unconstitutional unless it can point to the provision of the constitution which the legislature has violated. This cannot be done in this case.

"Neither should a court put a meaning on the statute, which meaning the court may deem will make it unconstitutional, when there is a just and reasonable construction which renders it constitutional. This construction we put upon this statute in *State v. Long*, 143 N. C. 670, 57 N. E. 349, when we held that the legislature had power to provide what should constitute bigamy (which was unknown to common law), and that in this section the legislature had made the crime of bigamy consist, not in the second marriage, but in the living together in this state as a man and wife under color of such second ceremony. Without that ceremony, it would be fornication and ad-

tery. With such fraudulent ceremony, wherever it took place, such living together here is bigamy.

"In *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130, Avery, J., speaking for the majority, conceded that if this construction was the meaning of the act, it was valid. Merrimon, C. J., contended that this was the true construction. He said (page 553): 'This enactment is not very aptly, precisely or clearly expressed, and hence its validity is seriously questioned. But it must receive such reasonable interpretation as will render it intelligible, operative and effectual, if this can be done consistent with the constitution. It does not necessarily imply or intend that the offender shall be indictable and convicted in this state for the offense of bigamy in another state; such is not its meaning. It intends that whoever shall be in this state, being married to two living wives or two living husbands, as the case may be (except in the cases excepted in the proviso to the statute), shall be guilty of felony, and that without regard to whether the second marriage took place in this state or elsewhere.' Further, he says (page 554): 'It makes the bigamist here answerable, because he is so living here, an offense to and an offender against this state and society here. The fact of bigamy—having two living wives or two living husbands—and the presence of the offender (living in second marriage) in this state constitute the offense. . . . The statute does not treat the second marriage as the offense, nor the offense as committed elsewhere than in the state.'

"Again, on page 557 (110 N. C.), Chief Justice Merrimon says: 'The statute does not make the second marriage the offense; it simply treats this as a fact to be taken in connection with others, all constituting the offense in this state. The offense is wholly statutory in its nature, and must be so treated.' This view must be correct, else society in this state is powerless to protect itself, if the bigamist, living here, has taken the trouble to have the ceremony of the second marriage performed in another state. We need not discuss the reference to indictment for fornication and adultery, except to say that if that is an adequate remedy, why have any statute against bigamy at all?

"In *State v. Long*, 143 N. C. 670, 57 S. E. 349, this court took Judge Merrimon's construction of the statute, which is identical with that in Bouvier's Law Dictionary, as the one intended by the legislature—as it doubtless was—and applied Judge Avery's concession, that if this were its meaning the statute was valid. This effectuated the intent of the legislature, avoided holding their action violative of the constitution, protected society and convicted a guilty man. Why disturb this result? For whose benefit? No innocent man can suffer by letting the law stand as we held it to be in *State v. Long*."

The Crime of Bigamy is the subject of a note to *People v. Spoor*, 126 Am. St. Rep. 201.

The Venue of a Crime, or the Place Where It is Committed, is the subject of a note to *Simpson v. State*, 44 Am. St. Rep. 79. Generally a crime can be prosecuted and punished only in the state and county of its commission: *State v. McAllister*, 65 W. Va. 97, 131 Am. St. Rep. 955. A statute providing that when goods obtained by burglary are taken into another county, the prosecution for burglary may be in the latter county, violates the constitutional provision that one accused of crime has the right to be tried in the county in which the offense is alleged to have been committed: *State v. Carroll*, 55 Wash. 588, 133 Am. St. Rep. 1047.

CASES

IN THE

SUPREME COURT

OF

PENNSYLVANIA.

HISTORICAL SOCIETY v. KELKER.

[226 Pa. 16, 74 Atl. 619.]

WILL—Witness, Whether must Know Contents.—A witness to a will containing a charitable gift, who at the time of attestation does not know that the instrument is a will, is nevertheless a credible witness, that is, one not disqualified to testify by mental incapacity, crime or other cause. (pp. 1010, 1011.)

WILL—Witness.—The Time of Qualification of a Witness to a will, by reason of noninterest, must be referred to the time of the execution of the instrument. A witness to a will containing a charitable gift need not be without interest at the time of probate as well as at the time of attestation. (p. 1012.)

Robert Snodgrass, of Snodgrass & Snodgrass, and E. E. Beidleman, for the appellant.

James M. Lamberton and Nead & Nead, for the appellee.

18 STEWART, J. Two questions are sought to be raised by this appeal, both of which have been so conclusively adjudicated that we need only to state them and refer to the authorities which govern. First, is an attesting witness to a will containing a charitable devise or bequest, who at the time of signing was without knowledge that the instrument that he was attesting was a will, a credible witness under the requirements of the act of April 26, 1855 (Pub. Laws, 325)? Second, must such witness be without interest at the time probate is asked for, as well as at the time of attestation? A credible witness is one who is not disqualified to testify by mental incapacity, crime or other cause: *Combs' Appeal*, 135 Pa. 155. An attesting witness under the act means a subscribing witness: *Paxson's Estate*, 221 Pa. 98, 70 Atl. 280. The chief purpose in subscribing is to identify the instrument; not necessarily as a will, since the paper must speak for itself, but as the particular instrument which the subscribers saw the maker execute. "Therefore, it is not essential in any case to the probate of a will to prove more by the

witnesses who were present at its execution than the identity of the instrument, that they saw the testator subscribe or make his mark, and at the time of doing thereof he was of sound, disposing mind, memory and understanding": Combs' Appeal, 105 Pa. 155. "If it be that a bequest for a charitable use is void unless the witnesses ¹⁹ subscribe the will, the statute does not require that the testator shall declare to the witnesses that the instrument is his will, or that he communicate to them its contents": Combs' Appeal, 105 Pa. 55. In the present case it is admitted that the subscribing witnesses were credible—except as disqualified by interest, a subject for consideration in the answer to the second question—that they sufficiently identify the instrument, and that they were requested by the testator to attest his execution of it. This meets every requirement of the statute except that which makes it essential that the witnesses be disinterested.

The argument in support of the proposition that the witnesses must be disinterested as well at the time of the probate as at the time of the execution of the instrument, proceeds on a clear misapprehension of what was said in Paxson's Appeal, 221 Pa. 98, 70 Atl. 280. We quote from the opinion in that case: "Nothing is easier than to antedate a writing, whether a deed or will, and the statute guarded against that danger by the requirement that it should be not merely proved, but 'attested' by two witnesses, and those two must be 'at the time disinterested.' At what time? Certainly not merely at the time of probate, for that was the general rule under the act of 1833, and did not need any re-enactment. Those whose memory goes further back than the evidence act of 1887 will recall the amount of time and argument spent over questions of the interest of witnesses, and whether the interest had been or could be released. The act closed all controversy on this point by the requirement that the witnesses should be disinterested 'at the time.' At what time? Clearly at the time the instrument was executed in the manner required by the statute." The words, "certainly not merely at the time of the probate, for that was the general rule under the act of 1883, and did not need any re-enactment," as they here occur, are seized upon as giving rise to an implication that the witness must, in order to be qualified, be disinterested both when the instrument is executed and when probated. No such meaning was intended, and it requires ingenuity to extract any such implication. The reference is to conditions ²⁰ existing when the act of 1855 was passed. Prior to the act of 1855 a subscribing witness to a will who was a beneficiary thereunder was incompetent to testify in connection with the probate, not, however, because of anything in any statute relating to wills, but by reason of a general rule of evidence which excluded from the stand any-

one having pecuniary interest in the matter in controversy. The act of 1855 had no effect whatever upon this rule; it remained operative after the act as before. The disqualification under the rule had relation to the time when the person was called to testify. No matter how much he had been interested before, if he had in fact divested himself of that interest when called to testify, he was competent. The act imposed another and wholly distinct disability, not in any way affecting the disability under the general rule, namely, a disability in consequence of having an interest at the time of execution of the instrument. So that after the passage of the act, where a subscribing witness having an interest under the will was called to prove the will, even though that interest had been divested, he remained disqualified notwithstanding. The language of the act is "at the time disinterested." Was any other time meant by this than that contemplated in the general rule? This was the question put in the opinion, and the answer was—certainly another time was meant; the purpose of the act could not have been merely to give legislative sanction to the general rule; it clearly defined a disability reaching further back than the time when the party was called to testify. Giving to the expression "not merely" the significance for which the appellant contends, that it is the equivalent of "not only," it expresses exactly the thought intended to be conveyed, and the law as it stood at the time of the passage of the act of 1855. The general rule which excluded a witness on ground of interest was deemed inadequate in view of the purpose of the act, and a certain positive disqualification was defined which would operate to exclude in cases where by reason of divestiture of interest, before the party was called to testify, the general rule would fail to operate. The opinion is clear of all possible obscurity, and the decision is directly to the ²¹ point that the time of qualification of the witnesses must be referred to the time of the execution of the will.

It is conceded that when this will was executed and attested the subscribing witnesses were wholly without interest. Five months after its execution the testator added a codicil, unattested, in which he gave legacies to the witnesses who had previously attested the will. By the act of 1887, disqualification on account of interest in such cases had been removed. These parties therefore stood clear of all disqualification by reason of interest, except as the act of 1855 interfered. But under that act the disqualification by reason of interest must arise in connection with the factum, otherwise it does not exist. When the will which they attested was executed they were without any interest in or under that will, and were therefore competent.

Judgment affirmed.

That a Witness to a Will Should Know Its Contents is not essential to the validity of the testament: See the note to *Lane v. Lane*, 114 Am. St. Rep. 231.

The Competency of Attesting Witnesses to a Will is to be determined upon the state of facts existing at the time of the attestation, rather than upon the facts existing at the time of probate: See the note to *Stevens v. Leonard*, 77 Am. St. Rep. 459.

PATCHIN v. SEWARD COAL COMPANY.

[226 Pa. 159, 75 Atl. 250.]

GUARDIAN'S SALE.—**The Existence of Jurisdictional Facts**, in proceedings by the committee of a lunatic to sell his land by order of court must be determined by an inspection of the record. The facts set out in the petition determine the jurisdiction of the court. (p. 1014.)

GUARDIAN'S SALE—Notice—Land in Another County.—Where an order of court gives the committee of a lunatic authority to sell land within the county, and also authority to apply to the court in another county for an order to sell land therein, notice to the next of kin should be given in both courts, not merely in the latter one. (p. 1015.)

GUARDIAN'S SALE—Jurisdiction—Parol to Impair Record.—Where the record shows no lack of notice or other jurisdictional facts, in proceedings by the committee of a lunatic to sell his land by order of court, parol evidence is not admissible in ejectment by his heirs to impair the effect of the record. (p. 1016.)

GUARDIAN'S SALE—Irregularities in the Sale of a Lunatic's Land by order of court should be corrected in the case in which they occurred. They cannot be considered in a collateral proceeding. (p. 1016.)

John E. Kunkle, A. L. Cole and Edward E. Robbins, for the appellants.

Wm. Williams, Jas. S. Moorhead, Robt. W. Smith and W. David Lloyd, for the appellees.

¹⁶² **POTTER, J.** This was an action of ejectment for the recovery of one hundred and six acres of land in St. Clair township, Westmoreland county, brought by Edwin Patchin and others, who were heirs at law of George Patchin, deceased, against the Seward Coal Company. Upon the trial a verdict for the defendants was directed, and afterward a motion for judgment non obstante veredicto was refused, and judgment was entered upon the verdict.

It appears that on November 26, 1897, George Patchin, a resident of Clearfield county, was declared a lunatic by an inquest ¹⁶³ held in that county. His son, Edwin Patchin, was appointed his committee, but subsequently resigned, and on January 5, 1900, A. D. Bates was appointed committee in his

place. The lunatic owned real estate in Clearfield, Indiana and Westmoreland counties, the latter being the land which is the subject of the present suit in ejectment.

On February 23, 1900, A. D. Bates, committee of the lunatic, presented a petition to the court of common pleas of Clearfield county, praying for an order to sell the real estate of the lunatic in Indiana and Westmoreland counties for the payment of his debts and the maintenance and support of himself and his family. An order was made, authorizing and directing the committee to make application to the court of common pleas of Westmoreland county for the sale of the real estate located in its jurisdiction. On March 1, 1900, the committee presented a petition to the Westmoreland county court, setting forth the proceedings in Clearfield county, and praying for an order to sell the real estate of the lunatic in Westmoreland county. The order was granted and the real estate, being the same land the title to which is in question in the present suit, was sold by the committee, and the sale was duly confirmed and deed made to the purchaser. The title of the purchaser has, by subsequent conveyances, now become vested in the Seward Coal Company, the defendant and appellee.

On October 19, 1904, George Patchin died intestate, and the present suit was brought by his heirs at law, to recover possession of the land thus sold and conveyed by his committee. The plaintiffs alleged that the proceedings in Clearfield county were defective and not in compliance with the requirements of the statute. That the court was without jurisdiction because the next of kin were not all notified; that the record did not show the appointment of a guardian ad litem for certain minors. And further, that if the court of Clearfield county did not have jurisdiction to make its order, the court of Westmoreland county acquired no jurisdiction. Plaintiffs maintained that these defects were fatal to the validity of the sale, and that no title passed thereby, and that George Patchin at the time of his death was still the owner of the land.

¹⁶⁴ The crucial point in this case, as contended by counsel for appellants, is whether the court of common pleas of Clearfield county had jurisdiction to make the order authorizing the committee of the lunatic to raise the sum of money required. The existence of the jurisdictional facts must be determined by an inspection of the record. "It is settled law that the facts set out in the petition determine the jurisdiction of the court": *Bennett v. Hayden*, 145 Pa. 586, 23 Atl. 255. The petition to the Clearfield county court stated that the lunatic had a wife, Agnes Patchin, and nine children, four of whom were minors, and that these were all of the next of kin of said lunatic capable of inheriting his estate. It further set forth as a fact that by the acceptance of service and joinder in the said petition of the wife, and all of the children

of said George Patchin except one, they had due notice of the application. It again called attention to the fact that four of the children were minors, and had no guardian, and prayed that a guardian ad litem be appointed at once by the court for these minor children. To this petition was also attached what purported to be the actual acceptance of service by the wife and all the children except the oldest son of notice of the application to be made by the committee for the sale of real estate of the said George Patchin. There was also a return that notice of the application had been served on Edwin Patchin, the oldest son of the lunatic, by leaving a true and attested copy thereof with his wife. It further appeared from the petition that this son, Edwin Patchin, had in the first instance been appointed a committee of the person and estate of the said lunatic, but had done nothing to protect the interests of the estate, and thereafter had been superseded as committee by the appointment of the petitioner, A. D. Bates. From this and from other averments appearing in the petition, it is very apparent that the said Edwin Patchin must have been, from the circumstances of the case, and aside from the actual notice given, fully aware of the necessity for the application by the committee for leave to make sale of the said real estate, and of the proceedings in connection therewith. It appears also from the record that in the Westmoreland county petition it was averred "that ten ¹⁶⁵ days' notice of this application was given to Agnes Patchin, wife of said lunatic, and to all of his children who were next of kin." There was an affidavit of the committee to the same effect, which averred in addition that the notice was given to the next of kin "personally." In this petition it was also averred that Allison O. Smith had been appointed by the Clearfield county court guardian ad litem of the minor children of George Patchin. From all this we are abundantly satisfied that it does appear that due notice of the intended application for the sale of the real estate was given to the wife and next of kin of the lunatic, capable of inheriting the estate, and that the contention upon the part of the appellants cannot be sustained, that the Clearfield county court was without jurisdiction by reason of the lack of this essential notice. The record does disclose certain irregularities in the proceedings which should have been corrected, or which would have justified the court in setting them aside, had they been brought to its attention in that case, but such defects cannot be raised here in this collateral proceeding. We do not go to the extent of holding, as the trial judge apparently did, that without regard to the proceedings in Clearfield county, it was sufficient if it appeared that in some way the wife and next of kin had due notice of the application for the final order of sale made in the Westmoreland county court. We think that under the provisions

of the statute the fact that due notice of the intended application had been given to the wife and the next of kin should appear to the court of common pleas having jurisdiction of the accounts of the committee, before it can be called upon to act. Certainly this is true where the real estate is in the same county; and where it is in another county, the same court is to be satisfied of the expediency of a sale or mortgage of the real estate not within its jurisdiction before it can lawfully authorize the committee to raise the money. Doubtless it is good practice to see that due notice to the wife and next of kin, as required by section 24 of the act of June 13, 1836 (Pub. Laws, 589), is given of the intended application in both courts. As an examination of the record shows no lack of jurisdictional facts, it follows that parol evidence could not properly have been admitted to impair the effect of the record. The truth of the record, as to matters within the jurisdiction of the court, cannot properly be questioned here. Whatever irregularities existed should have been corrected in the case itself in which they occurred; they are not to be taken up or considered at this time, in a collateral proceeding. We see no merit in any of the assignments of error, and they are therefore dismissed, and the judgment is affirmed.

Notice of the Application as Affecting the Validity of a Guardian's Sale is the subject of a note to Mortgage Trust Co. v. Redd, 129 Am. St. Rep. 148. Where a notice of a guardian's sale is given in one of the two methods provided by statute, as when it is given by publication but not by posting, there is a substantial compliance with the statutory provisions, and the sale is not voidable after confirmation. Harper v. Smith, 89 Ark. 284, 131 Am. St. Rep. 93. And according to some authorities the giving by a guardian of the required statutory notice by publication of his petition to sell his ward's estate is not essential to the jurisdiction of the court, and its omission is not fatal to the judgment, nor does it render it open to collateral attack: Mortgage Trust Co. v. Redd, 38 Colo. 458, 120 Am. St. Rep. 132.

GREENHALGH COMPANY v. FARMERS' NATIONAL BANK.

[226 Pa. 184, 75 Atl. 260.]

BANKING—Deposits or Loans to Cashier.—Where a depositor claims that three items of deposit were in the usual course of banking, while the bank claims that they were private loans to the cashier, and the evidence on the issue is conflicting, the question is for the jury. (p. 1018.)

BANKING—Deposits or Loans to Cashier.—Where, in an action by a depositor to recover an alleged balance of deposit, he contends that the deposits were in the usual course of banking, while the bank claims that they were private loans to the cashier, it is

proper to refuse an instruction to the jury that if they find that the general manager and treasurer of the plaintiff company and the cashier of the defendant bank made an arrangement by which the amount of money represented by the disputed deposits was intended as an individual loan to the cashier and was received by him as such, there can be no recovery. (p. 1018.)

BANKING.—A Balance Struck in a Pass-book is in effect an account stated between the bank and its depositor. (p. 1018.)

BANKING.—A Balance Struck in a Pass-book may be impeached for fraud or error, but in the absence of such impeachment the bank is estopped from denying its liability as shown by the account as stated. (p. 1018.)

BANKING.—Balance Struck in Pass-book.—Whether or not a bank is estopped from denying its liability for a balance struck in a pass-book by reason of fraud or error depends upon the facts, which are for the jury. (p. 1018.)

BANKING.—Balance Struck in Pass-book.—The Presumption is that a balance struck in a pass-book is correct, and the burden is on the bank to show the contrary, when it attempts to evade responsibility. (p. 1019.)

Assumpsit to recover an alleged balance due the plaintiff as a depositor. It appears that the plaintiff deposited on June 6, 1906, and October 5, 1906, two checks for three thousand dollars each to the order of W. C. McKee, cashier, and on November 23, 1906, one for fifteen hundred dollars to the order of W. C. McKee, individually. The plaintiff contended that these checks were payments to the bank in the nature of deposits, but the defendant contended that they were individual loans by the plaintiff to the cashier of the bank. The evidence on this issue was conflicting. Verdict and judgment for the plaintiff. Defendant appealed.

J. S. Carmichael and W. J. Breene, for the appellant.

George E. Reynolds and F. A. Sayers, for the appellee.

¹⁸⁶ **ELKIN, J.** This was a case for the jury, and after a careful consideration ¹⁸⁷ of the record here presented, including the charge of the court and the questions raised by the assignments, we have not been convinced that any reversible error was committed in its submission. The appellee is a trading corporation and the appellant is a national bank, with authority to receive moneys on deposit and do a general banking business. The appellee opened an account with the appellant bank and made deposits from time to time in the ordinary course of banking—at least, such is the contention of appellee. The first three items of credit claimed by the plaintiff company are denied by the defendant bank as a liability against it. The defense is that these items were not received by the bank as deposits, but were intended as private loans to the cashier of the bank and in fact were so used. The case proceeded to trial upon the controverted questions of fact material to this issue. A large amount of evidence was intro-

duced bearing directly or incidentally upon the question at issue, with the result that a verdict was returned in favor of the plaintiff.

The appellant contends that the judgment should be reversed for several reasons, the most important of which may be set forth as follows: First, under the pleadings and evidence the contract sued on was special, not made in the ordinary course of banking business nor within the scope of the cashier's authority, and that by reason thereof judgment should have been directed for defendant. This position is clearly not tenable. Whether the controverted items were deposited in the usual and ordinary course of banking and intended as a credit to the account of the plaintiff company or were private loans to the cashier were the important questions involved in the issue and they were for the jury. It would have been clear error for the court under the evidence to have held as a matter of law that no liability attached to defendant. Second, that the court erred in refusing to affirm defendant's ninth point, which requested the trial judge to instruct the jury if they found that the general manager and treasurer of the plaintiff company and the cashier of the defendant bank made an arrangement by which the amount of money represented by the three disputed checks was intended as an individual ¹⁸⁸ loan to the cashier and was received by him as such, there could be no recovery. The learned court was clearly right in refusing to affirm this point as submitted. All of the facts set forth in the point might be true without affecting either the rights of the plaintiff company or the liability of the defendant bank. The rights of the one company and the liability of the other did not necessarily depend upon what the respective officers did, or attempted to do, because they may have acted outside of the scope of their authority by undertaking to do what they had no right or power to do. The jury either did not believe any such arrangement had been made or found that these officers had no authority to make it if attempted. To have affirmed the point as submitted would have been misleading, and would not have correctly stated the law applicable to the facts of the case. Third, that the court erred in introducing the doctrine of estoppel based upon the entry by the cashier of the items of credit claimed in the bank-book of the appellee and upon the balances therein stated. We do not agree with this position under the facts of the present case. A balance struck in a pass-book is in effect an account stated between a bank and its depositor, which it is true may be impeached for fraud or error, but unless so impeached, the bank is estopped from denying its liability as shown by the account so stated by it. This doctrine is of universal application. Whether a bank is or is not estopped from denying its liability for a balance stated by reason of fraud or error depends upon the facts.

which are for the jury. In such a case the burden is on the bank attempting to evade responsibility, because the presumption is that the balance stated by its own officers is correct, and truly represents the account between the parties. The learned court below very carefully explained the doctrine of estoppel as applied to the facts of the case, and we find no error in the charge in this respect. Fourth, it is complained that the charge was confusing and contained extraneous matters, and that there was not an adequate and judicial presentation of the defendant's case in its submission to the jury. Before passing upon the merits of the assignments which raise these questions we have carefully examined the testimony as ¹⁸⁹ well as the charge of the trial judge for the purpose of ascertaining whether any injustice was done appellant by the alleged errors complained of, and as a result have concluded not only that these assignments are without merit, but that the learned court fully, fairly and intelligently explained the law applicable to the case, and that the manner of its submission is free from just criticism.

Assignments of error overruled and judgment affirmed.

THE EFFECT OF BALANCES STRUCK IN PASS-BOOKS.

I. The Popular Conception, 1019.

II. The Legal Conception, 1020.

III. Definitions.

- a. "Balance," 1021.
- b. "Pass-book," 1021.
- c. "Accounts Stated," 1021.

IV. The Effect of the Entry on the Pass-book, 1022.

V. Acquiescence.

- a. Application of the Doctrine, 1024.
- b. Summary of the Law on the Subject, 1026.

I. The Popular Conception.

Like most simply phrased propositions the title to this note covers the consideration of many topics, and the subject is like to be met with an offhand dismissal as being too well known for further discussion. Experience will remind the reader, but more especially the practitioner, that greater difficulty is found in furnishing authorities for simple and familiar legal dicta than in discovering many opinions on some unusual propositions. Familiarity with the subject has bred a lofty disregard for its source, and the old illustration is not inapt. In the day's walk one passes hundreds of people of the nature of whose clothing no information could be given because they are customarily attired, but if one of them reflected the seven colors of the rainbow in any part of the raiment, the attention would immediately be riveted on that one, while the simply dressed occasioned no food at all for thought. Those who have bank accounts are all used to the expression "balance struck in the pass-book"—business men generally speak of balances as though they knew what balances are—and pass-book is perhaps within the appre-

hension of everyone over thirteen years of age—"accounts stated" is mouthed perhaps only by lawyers, but is known to people generally—and here we have the elements and suggestions for the question. What is the effect of a balance struck in a pass-book? Consider as we must consider it here, colloquial definitions cease to have value and the seeker for information needs that his terms should bear a judicial interpretation. Before giving them, however, let us see what, according to the law of business men, the "man-in-the-street's" conception of the phrase is. Knowing of the existence of banking institutions, he is aware that he may go to one of them and if he so desires deposit his money there either for a given term on interest, or if he has business transactions with others, that he may use the money as he wants it. This he accomplishes by drawing checks or bills on the bank up to the amount originally deposited, and if there is not sufficient there to pay the checks he desires to draw, he makes a further deposit, and so on. It is, of course, necessary that the bank should keep a correct entry in its books, and in some parts of the world bankers make a small annual charge therefor. In addition, it is necessary that the depositor, whom we shall now call the customer, shall also keep an account of his dealings with his bank. To that end he must make entries somewhere, and for the customers' convenience the banks furnish small books, suitably ruled in which are entered the sums received by the bank, initialed by the receiving officer, and in some cases also the checks or bills paid by the bank on the customer's order, and when this book is so inscribed it is what is called "made up," and a balance struck showing what sum is still available for the customer, or if by arrangement with the bank he has used some of their money, in what sum he is then indebted to them. This balance is noted on the page containing the last entry, and it is the effect of that balance on both banker and customer we are called upon to consider.

II. The Legal Conception.

Let us now, having given the popular conception, turn to the legal one, and, as is usual, it will be found that good law and common sense are hand in hand. We will quote from Mr. Justice Harlan's opinion in *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811: "While it is true that the relation of a bank and its depositor is one simply of debtor and creditor (*Phoenix Bank v. Risley*, 111 U. S. 125, 4 Sup. Ct. Rep. 228 L. ed. 374), and that the depositor is not chargeable with any payments except such as are made in conformity with his orders, it is within common knowledge that the object of a pass-book is to inform the depositor from time to time of the condition of his account as it appears upon the books of the bank. It not only enables him to discover errors to his prejudice, but supplies evidence in his favor in the event of litigation or dispute with the bank. In this way it operates to protect him against the carelessness or fraud of the bank. The sending of his pass-book to be written up and returned with the vouchers is, therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book with the vouchers is the answer to that demand, and in effect imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate

it. . . . The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it or have it made within a reasonable time after opportunity given for that purpose is inconsistent with the object for which he obtains and uses a pass-book." This view has been confirmed in *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. 380. Another object is also attained by the prompt receipt of the pass-book or some other form of receipt from the officer of the bank who takes for his principal money of the customer on deposit to either an operative or a deposit account. It is a check against mistake and fraud. For if the customer merely makes out what is known as the "pay in" slip or blank, and hands it and the money to the receiving teller of the bank, there is nothing to prevent the officer destroying the slip or blank so filled in and appropriating the money with a simple denial that the customer had paid money to his credit. The duplicate form initialed by the officer when given is some evidence, but the proper and safe mode is the production of the book, its signature or initialing by the officer and the perfection of that balance, with the effect of which we are dealing.

III. Definitions.

a. "Balance."—First, what is a balance? It has in law no technical signification, but only a popular one. In its literal import it is perhaps applicable only to weights, but it is more often figuratively applied to other things. Etymologically it means two dishes such as are used for weighing, but we speak of the balance of an account, and then it implies that something has been deducted from something else, for convenience called a debtor and creditor adjustment, and balance signifies that which is left after the deduction, irrespective of amount: *Taylor v. Taylor*, 3 A. K. Marsh. 18. It has received the same interpretation in a Mississippi decision: *Brown v. Mullins*, 24 Miss. 204.

b. "Pass-book."—Next, what is a pass-book? A pass-book is the book of the buyer (corresponding with our term "customer"), or usually debtor party, in which he allows the other party (corresponding with our term "banker") to enter their mutual transactions, and thus these entries become in a great degree the written admissions of both parties. Whatever is entered there by one party is entered with the other's consent, and therefore it is presumed to be right, whatever may be the subject matter of the entries; for the parties may make their pass-books evidence of other transactions as well. A pass-book is not, like shop-books, limited as evidence to entries of goods sold and work done: *Ruch v. Fricke*, 28 Pa. 241. The book having been inscribed by the banker is "passed" back to the customer; hence the construction of the compound word "pass-book." From the entries thus made by the banker writing in the balance referred to, the customer is apprised of the state of his account, and on that then state of account the question turns. The state of the account becomes in legal parlance an account stated, and the reader is entitled to a judicial interpretation of the phrase.

c. "Accounts Stated."—Blackstone tells us in book III, page 162: "Assumpsit on account stated.—Likewise, fifthly, upon a stated account between two merchants, or other persons, the law implies that

he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *in simul computassent* (which gives name to this species of assumpsit, and that the defendant engaged to pay the plaintiff the balance he has since neglected to do it."

The modern definition of an account stated is that it is an agreement between persons, who have had previous transactions, fixing the amount due in respect to such transactions, and promising payment. *Zacarino v. Pallotti*, 49 Conn. 36; *McDowell v. North*, 24 Ind. App. 435, 55 N. E. 789; *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587; *Gerding v. Funk*, 48 App. Div. 603, 64 N. Y. Supp. 42. "In general terms, where an account is rendered by one person to another, showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the person against whom the balance appears, or where parties having previous transactions agree upon a definite balance as due from one to the other, this will constitute an account stated": 1 Cyc. 364. We need multiply authorities for these definitions without number, but for practical purposes these are sufficient and correct.

IV. The Effect of the Entry in the Pass-book.

In *Greenhalgh Co. v. Farmers' Nat. Bank*, 226 Pa. 184, ante, p. 174 75 Atl. 260, there appears in the clear opinion of Elkins, J., this statement: "A balance struck in a pass-book is in effect an account stated between the bank and its depositor, which, it is true, may be impeached for fraud or error, but, unless so impeached, the bank is estopped from denying its liability as shown by the account so struck by it."

No clearer proposition on the subject could have been penned in a few words, and though the learned judge saw no occasion to appeal to authority for his statement, no difficulty need be experienced in following it. With the foundation laid by the definitions, with their application to the proposition of the learned judge which we have unhesitatingly adopted as the true rendition of the principle, little trouble will be met in adopting the decided cases. Entries in a depositor's pass-book striking a balance coupled with the delivery of the book to him, without objection on his part, constitute an account stated. *Clark v. Mechanics' Nat. Bank*, 11 Daly, 239; *August v. New York Fourth Nat. Bank*, 1 N. Y. Supp. 139; *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 111. And the proposition stands even on a firmer base, if, as is often the case, the bank has returned to the customer his checks with the account of the balance. If no objection has been made within a reasonable time thereafter, the balance struck will be presumed to be correct. *McLaughlin v. First Nat. Bank*, 71 Ill. App. 329; *Benton County Bank v. Walker*, 85 Iowa, 728, 51 N. W. 241; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Kenneth Inv. Co. v. National Bank of Republic of Mo.*, App. 125, 70 S. W. 173; *Farry v. Farmers' & Mechanics' Bank* (N. J. Ch.), 58 Atl. 305; *Nodine v. First Nat. Bank*, 41 Or. 38, 8 Pac. 1149. The mere fact that the account contains interest charges for which, of course, no checks have been drawn, does not affect the status of the account: *Schoonover v. Osborne*, 106 Iowa, 421.

N. W. 263. Where there has been but a short interval between the delivery of the pass-book and the discovery of a mistake the balance will not be regarded as an account stated: *Schneider v. Irving Bank*, 1 Daly, 530. In the California case of *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790, the customer gave checks for certain drafts and received his pass-book showing his balance after deducting the checks. The bank failed and the drafts were dishonored in consequence, and a subsequent statement by the manager of the bank was admitted to show the alteration which the allowance for the checks used to purchase the drafts would make and thus alter the balance appearing in the book. In *Wasson v. Lamb*, 120 Ind. 514, 16 Am. St. Rep. 342, 22 N. E. 729, 6 L. R. A. 191, the principle was slightly broadened. The court in that case said that the rule which governs in keeping accounts between banker and customer is, that as money is paid in and drawn out or other debts and credits are entered by the consent of both parties in the general account, a balance may be considered as struck at the date of each payment or entry on either side of the account, and this view is supported by *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368, and *Lamb v. Morris*, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111.

We think the rule sound because it is a corollary to that other salutary rule, that when a deposit is made and the amount and date entered by the bank's officer in the depositor's pass-book, the entries bind the bank as admissions. In some cases, we learn from the opinion last cited, it has been held that they become conclusive upon the bank, like an account stated when the pass-book is balanced: *Morse on Banks and Banking*, 3d ed., sec. 291. But judging from late cases, that does not seem warranted. In *Rettig v. Southern Illinois Nat. Bank*, 147 Ill. App. 193, Mr. Justice Creighton said the rule is, "Where a depositor fails to examine his pass-book within a reasonable time after the same has been balanced by the bank and returned to him, he will not be estopped from showing error in his account, but his neglect will place the burden on him to show that the balance as returned is not correct." In the case referred to the bank-book was balanced to June 28, 1907, again on the 4th of September, 1907, and in November, 1907, the depositor claimed that an error had been made in that part of the account which preceded the 28th of June, 1907. In *Lucas v. Northwestern Savings Bank* (Mo. App.), 128 S. W. 19, it was held that where the banker discovered an error in the pass-book and there and then canceled the entry, it could not be regarded as an admission by the bank. In that case there appeared in the plaintiff's pass-book an entry of a sum deposited on May 14, 1906, which sum he had not deposited. One Vossmeier had deposited the sum on the 14th of May, 1906, and in error the bank officer had entered it in plaintiff's book instead of some much smaller sum the plaintiff had deposited, but in respect of which there was no evidence; and an instruction that the entries made by the bank in the plaintiff's pass-book were admissions that the plaintiff had deposited the amounts represented by them was held to be erroneous on the ground that the bank had on first discovering the error canceled the entry and had offered a mass of testimony tending to prove it was erroneous.

And here it may not be amiss to give the rule as to the conclusiveness of an account stated. "The balance ascertained from a statement of accounts was formerly held to be the result of so deliberate

an act by the parties as to preclude an examination into the items for the purpose of correcting errors or mistakes; but this rule has been so far relaxed that while the promise to pay the ascertained balance is in effect a new promise, the settlement being regarded as the consideration for it, the settlement does not create an estoppel, but furnishes a strong prima facie presumption that the result is correct: *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 83, 98 Pac. 33. This view is supported by *Langdon v. Roane's Admr.*, 6 Ala. 513, 41 Am. Dec. 60; *Ware v. Manning*, 86 Ala. 238, 5 South. 682; *Heady v. March*, 75 Cal. 566, 17 Pac. 702; *Naylor v. Lewiston & S. E. Electric Co.*, 14 Idaho, 789, 96 Pac. 573; *Butphen v. Cushman*, 35 Ill. 116; *State Life Ins. Co. v. Postal*, 43 Ind. App. 144, 84 N. E. 156, 109; *Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427; *Gillett v. Chavez*, 12 N. M. 353, 78 Pac. 68; *Townsend v. Meyers*, 134 App. Div. 540, 119 N. Y. Supp. 478; *Holmes v. De Camp*, 1 Johns. 34, 3 Am. Dec. 231; *Harman & Crockett v. Maddy Bros.*, 57 W. Va. 66, 49 S. E. 110; *McGraw v. Traders' Nat. Bank*, 64 W. Va. 509, 63 S. E. 393. The result is nevertheless a contract, and the onus rests on the party seeking to reopen the account to establish by clear and satisfactory evidence the error, fraud or mistake and, unless he accepts and sustains the burden, the settlement is conclusive: *Cross v. Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 94; *Anzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; *Conlin v. Carter*, 93 Ill. 536; *Linville v. State*, 130 Ind. 214, 9 N. E. 1129; *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 83, 98 Pac. 883; *Rehill v. McTague*, 114 Pa. 82, 60 Am. Rep. 341, 7 Atl. 23; *Klauber v. Wright*, 52 Wis. 303, 8 N. W. 893; *Chappelaine v. Dechenaux*, 4 Cranch, 306, 2 L. ed. 629; *Murphy v. United States*, 14 U. S. 464, 26 L. ed. 833.

V. Acquiescence.

a. Application of the Doctrine.—The doctrine of acquiescence founded on the maxim that equity comes to the vigilant and not to the sluggard plays a most important part in regulating the liability of both banker and customer on balances struck in pass-books. If the customer receives his account with or without his checks, and remains silent for an unreasonable time, he is estopped from opening the account stated by the balance. The presumption of correctness is difficult to dislodge, and can be dislodged only for fraud or mistake, but it can be dislodged if it is shown, for instance, that the fraud or error was not discoverable except by unusual scrutiny. In *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, a confidential clerk having charge of his employer's check-book and bank-book, and whose duty it was to enter all checks on one side of the bank-book, the bank entering all deposits on the other, forged fourteen checks of his employer at different times, the bank paid them and he entered them in the bank-book. The bank returned the checks with the book, striking the balances after the payment of the first five, and again after the payment of the other nine. The employer did not discover the fraud until after the payment of all the forged checks. In an action by him against the bank to recover the amount paid on the forged checks, he was not absolutely estopped by apparent acquiescence in the account thus stated by the bank book, and was held entitled to recover unless he had been guilty of negligence in discovering the fraud, and unless the bank, in paying the later forged checks, had relied on his apparent acquiescence.

the payment of the earlier ones. In *Hutchinson v. Market Bank*, 48 Barb. 302, a customer was held not entitled to reopen his account after the lapse of six years. In *American Nat. Bank v. Bushey*, 45 Mich. 135, 7 N. W. 725, nonreference for two years was regarded as acquiescence on the part of the customer, and in *Kenneth Inv. Co. v. National Bank of the Republic*, 103 Mo. App. 613, 77 S. W. 1002, ten days was held to be an insufficient time for the customer to check his account, except both banker and customer resided in the same town or city. The court followed *McKeen v. Boatmen's Bank*, 74 Mo. App. 281, and added that such ten days, however, should not be arbitrarily fixed. And thus the law stands to-day very much as it stood after the case of *Weisser's Admr. v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, which has settled the principles which govern these cases. In that case it was claimed that the account between the bank and the depositor became a stated account by the entries in the bank-book and striking a balance, and the return of the vouchers with the book, and also that the depositor by neglecting to examine the checks and account on the return of the bank-book, adopted certain forged checks as his own. The court held that the account became, by the omission of the depositor to examine the bank-book and vouchers, an account stated, but also that it might be impeached by evidence of fraud or mistake. In respect to the negligence it was held that a depositor owes no duty to a bank which requires him to examine his pass-book or vouchers with a view to detecting forgeries of his name. The customer has a right to assume the bank will do its duty to itself, and was not bound to look for charges to his account made without his order. In *Kenneth Inv. Co. v. National Bank of the Republic*, 96 Mo. App. 125, 70 S. W. 173, the law on the subject was well reviewed, and the court thus summarized its views: "The legal relation between the bank and its general depositor is that of debtor and creditor, and notwithstanding that the depositor has presumptively acquiesced in his account, as rendered by the bank, by retaining it without objection, yet when he is able to point out specifically error, mistake, or forgeries in the account, he ought to be allowed restitution, unless the error, mistake, or forgery was induced by his negligence, and to make the restitution would work a special damage to the bank." In the course of the opinion the court discussed the merits of *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72, and *Myers v. Southwestern Nat. Bank*, 193 Pa. 1, 74 Am. St. Rep. 672, 44 Atl. 280, and indorsed the former of the two as supported by the better reason and more consonant with sound equity. The excerpt quoted by the court is so direct in its bearing on the subject that we reproduce it. After reviewing the authorities the court said: "Where a customer of a banker receives his book from his banker balanced, with his checks returned canceled, as vouchers to the entries made by the banker, and there are circumstances within his knowledge at the time from which, by the exercise of reasonable care and inquiry, he would have been able to ascertain that some of the checks so returned were altered or forged, and he fails to exercise such reasonable care and inquiry, and the bank thereby suffers loss, or is placed in a worse position than it would have occupied if such inquiry had been made, and the facts ascertained and communicated to it, within a reasonable time, the customer has lost his recourse against the bank. Indeed, we regard the case, where there

are facts within the knowledge of the customer sufficient to put him on inquiry, provided he proceeds as a reasonably careful, prudent and honest man, and where the inquiry, if made, would disclose the fact as tantamount to a case where the person has actual knowledge; and we understand this to be a general principle in the law." The acquiescence is not to be applied only to conduct of the customer. The doctrine is intended as well a weapon against the banker. In *Hick v. Eleventh Ward Bank*, 7 Daly, 476, the customer received his account in which was credited a draft which was subsequently dishonored. The bank sought to charge him with the amount, but he objected by reason of their delay in notifying him of the receipt of their attempted collection and his accounts were rendered to him for two years without the objectionable item being charged. The court held that the account stated was after that period conclusive against the bank.

b. *Summary of the Law on the Subject.*—In *Brown v. Lyndberg Nat. Bank*, 109 Va. 530, 64 S. E. 950, the court exhaustively reviewed the authorities, paying special regard to the opinion of Mr. Justice Harlan in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 5 Sup. Ct. Rep. 657, 29 L. ed. 811, referred to ante, subdivision II. and concisely sums up the law in two propositions, namely: 1. That it is the duty of the customer within a reasonable time and with business-like care to examine his pass-book and lose no time in bringing any error to the notice of the bank; and 2. That it is equally the duty of the bank to keep accurate accounts with the customer and prevent any fraud being practiced either by forged checks or otherwise. These propositions are further supported by *Bank of Richmond v. Richmond Electric Co.*, 106 Va. 347, 117 Am. St. Rep. 1014, 56 S. E. 152.

The foregoing synopsis of the law on the subject is consonant with practically all the authorities. Here and there, it is true, are to be found a broadening or narrowing of the rule, but such extensions or compressions are very elastic, and the rule springs back to first principles. They are, in short, that good faith must exist between the banker and the customer, that that good faith must be exhibited in the keeping of the accounts, that when they are reduced to writing the *littera scripta* shall prevail even though they contain error, if by the perpetuation of that error the innocent party is prejudiced and has not himself warped the opportunity for correction, if he has acquired knowledge of the mistake, and finally that disregarding all errors and mistakes, all principles of accounts stated, all doctrines of acquiescence, the suggestion of fraud on the one side and innocence on the other will always be followed until the searchlight of the courts can be projected upon it, always assuming that that innocence is legal innocence of any circumstance which the party complaining should have brought under the notice of the other. In short, the duty of the banker is to keep the account correctly, and to correctly strike the balance in the pass-book; the duty of the customer to examine that balance carefully; the duty of both to communicate each to the other aught that savors of irregularity, error, mistake or fraud.

COMMONWEALTH v. FISHER.

[226 Pa. 189, 75 Atl. 204.]

JURY—Duty to Exclude from Outsiders.—It is the duty of the court, in a homicide case, to see that the jury, after they are charged with the prisoner, are not exposed to contact or do not communicate with outsiders, either during the progress of the trial or after they have returned to their room to deliberate and make up their verdict. (pp. 1027, 1028.)

JURY—Duty to Exclude from Outsiders.—From the time the jury in a homicide case is sworn until they have returned their verdict to the court, they must be kept entirely aloof and free from contact or communication with other parties than the bailiffs who have them in keeping. (p. 1028.)

JURY—Use of Intoxicating Liquors.—The law requires jurors to be sober, intelligent and judicious persons. Hence courts will not permit a jury, charged with passing upon the life of a prisoner, to receive and use intoxicating liquors while they have the prisoner in charge. (p. 1028.)

JURY—Drinking, Separating and Mingling With Outsiders.—A verdict of conviction in a homicide case will be set aside where the jurors were permitted to pass through crowds in the courtroom and mingle with people in the corridors of the hotel where they stayed, and were permitted separately with tipstaves to visit saloons, drug-stores and barber-shops, where they came in contact with outsiders; and were also permitted to drink intoxicating liquors at the saloons and in their rooms at the hotel. (pp. 1031, 1032.)

CRIMINAL LAW.—The Right to a Discharge Under the "Two-term Rule" is essentially a habeas corpus proceeding under section 54 of the act of March 31, 1860. The proceeding is separate from the trial of the cause, and is not reviewable on an appeal from a conviction therein. (p. 1032.)

J. A. Welsh, John I. Welsh and C. K. Morganroth, for the appellant.

D. W. Shipman, A. K. Deibler, district attorney, and H. W. Cummings, for the appellee.

¹⁹⁰ MESTREZAT, J. More than half a century ago Chief Justice Gibson, speaking for this court in *Peiffer v. Commonwealth*, 15 Pa. 486, 53 Am. Dec. 605, said (page 470): "Even the forms and usages of the law conduce to justice; but the common law, which forbids the separation of a jury in a capital case before they have been discharged of the prisoner, touches not matter of form, but matter of substance. It is not too much to say that if it were abolished, few influential culprits would be convicted, and that few friendless ones, pursued by powerful prosecutors, would escape conviction. Jurors are as open to prejudice from persuasion as other men, and neither convenience nor economy ought to be consulted, ¹⁹¹ in order to guard them against it. Let them have every comfort compatible with their duties; but let them not be exposed to the converse of those who might pervert their judgment."

In *Commonwealth v. Roby*, 12 Pick. 496, the learned Chief Justice Shaw, speaking for the supreme judicial court of Massachusetts on the same subject, said (page 519): "The rule of the authorities is, that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshment has been furnished by a party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves, or have had communications not authorized, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly, and may have been corruptly, done; or where the irregularity consists in doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, there it would be proper to set aside the verdict, because no reliance can be placed upon its purity and correctness."

These cardinal rules should control courts in dealing with the conduct of jurors, and especially in cases where a defendant is on trial for his life. He has the right to be tried by a jury of his countrymen who are free from bias and prejudice and who are permitted to hear and deliberate upon his case from the evidence which is produced on the trial, without any communication or interference by outside parties. It is upon such evidence that the guilt or the innocence of the defendant should be determined, and he has the right to demand of the court that no other evidence shall be heard or considered by the jury. It is also the duty of the court to see that the jury, after they are charged with the prisoner, are not exposed to contact or do not communicate with outsiders either during the progress of the trial, or after they have returned to their room to deliberate and make up their verdict. In other words, from the time the jury is sworn until they have returned their verdict to the court, they must be kept entirely aloof and free ¹⁹² from contact or communication with other parties than the bailiffs who have them in keeping during the trial. This is absolutely necessary if the case is to be tried by an impartial and unbiased jury, and the constitutional rights of the defendant are to be protected.

While the jury are to be kept free from outside influences during the trial, it is equally important that the jurors be what the law requires them to be, "sober, intelligent and judicious persons," and that they continue to be such until the verdict has been rendered and the guilt or innocence of the defendant has been determined. It is for this reason that courts of justice will not permit a jury, charged with passing upon the life of a prisoner, to receive and use intoxicating liquors while they have the prisoner in charge. The twelve men who have been summoned and sworn to pass upon his

guilt or innocence should be free from the effects of intoxicants which, in the language of Chief Justice Shaw, disqualify them for a "proper deliberation and exercise of their reason and judgment."

Henry Fisher, the defendant, was indicted in the court of oyer and terminer of Northumberland county and was convicted of murder of the first degree. Upon appeal to this court, the judgment was reversed and a new trial was ordered. Fisher was again tried, convicted of murder of the first degree, and has taken this appeal. Among his other complaints, he alleges serious and grave misconduct on the part of the jury, which, he contends, has deprived him of his constitutional rights. We agree with him, and are compelled to reverse the judgment on that ground.

The learned court below was asked to correct the misconduct of the jury by granting a new trial, and we think it evident from the opinion of the learned judge refusing the new trial, as well as the concessions made by the counsel for the commonwealth in his argument to this court, that a new trial should have been granted. We will not go over in detail the testimony disclosing the misconduct of the jurors during the trial and after they had retired to deliberate upon the verdict; we will refer to it briefly.

¹⁹³ It is apparent that Northumberland county does not have proper and suitable accommodations for jurors impaneled in homicide cases. This is conceded by counsel on both sides of the case, and is made further apparent by the fact that this court has reviewed two capital cases from the county and in both cases we were required to pass upon the misconduct of the jurors. In the present case the jury was sworn at 7:30 P. M. on Wednesday and returned a verdict the following Saturday about 2:30 P. M. The jury were put in charge of two tipstaves, one of whom, it is manifest, is a man whose many years unfit him for the position. The usual oath was administered to these tipstaves, in which they swore that they would not permit any person to speak to the jurors, nor speak to them themselves, nor would they speak to them in relation to the trial except to ask if they had agreed upon their verdict or to return to the courtroom, or concerning their health, comfort and necessities while in their custody. During the trial, while the jury was not in court, they were kept at a hotel in the busiest part of the town, which, for the reasons shown by the depositions, was an improper and unfit place. When they left the jury-box they were required to pass through the crowd in the courtroom and in a hall, and they entered the hotel through the corridor, where they came in contact with the guests of the house. It seems that the sessions of the court were extended into the night. A short time after the jury had been sworn one of the jurors left his fellows and went with a tipstaff to a saloon, and there both

he and the tipstaff obtained beer and cigars. The juror testified that while he was in the saloon he did not use the telephone, but in this he was positively contradicted by the tipstaff, who testified that the juror did talk on the telephone with some unknown person. Of course what was said to him over the telephone could be known only by himself and the person with whom he conversed. The tipstaff in the first part of his examination testified that he heard the conversation, but finally admitted that he did not know what was said by the party talking with the juror. It appears from the testimony that this juror was absent from the other jurors without their knowledge.

194 On Thursday night, about midnight, after the jurors had returned to their room in the hotel, two of their number left the room and the hotel with a tipstaff, and went across the street to a saloon, some distance away. There were other persons in the saloon who were discussing the topics of the day. It may well be assumed that one of the topics under discussion was the Fisher homicide trial, which then seemed to be exciting much attention in that community. While in the saloon, one of the jurors and the tipstaff drank at the bar, the other juror during the time was some distance apart from them, near the wall. The latter was questioned in regard to the Fisher case until the tipstaff interfered. To the extent of this conversation does not clearly appear from the testimony. While the tipstaff testified that there was no conversation with the juror, yet his recollection is clearly at fault if other testimony on the subject is credible.

The jurors were frequently in the corridor of the hotel where the other guests assembled and conversed. They were thereby thrown into close contact with outsiders and could hear their conversation. It was testified by a disinterested witness that on one of these occasions one of the jurors was spoken to. This the tipstaff denied. During the time the jurors were walking or lounging in the lobby they were necessarily separated, and what they heard and with whom they conversed cannot positively be known. It is apparent, however, that there was an opportunity for them to be approached upon the subject of the trial. On one occasion it appears that three of the jurors were in a toilet-room with another party and with the tipstaff on the outside, and not in a position to know what was taking place between the jurors and the other party. On another occasion, while the court was in session, certain jurors left the box, passed through the audience in the courtroom and the crowd in the hall to the toilet-room, unaccompanied by any officer. On another occasion a tipstaff took two or three of the jurors to a barber-shop. Again, one of the jurors left his colleagues and went to a drug-store so frequently that the tipstaff who accompanied

him complained of it. On these occasions the juror got "stomach medicine" and cigarettes.

¹⁹⁵ In addition to this conduct of some of the members of the jury in separating themselves from their colleagues and going to a drug-store, to a saloon outside of the hotel where they were stopping, and to barber-shops, it appears from the testimony, and it is conceded, that on several occasions they had both beer and whisky in their room at the hotel. The quantity of each is not known, nor is it known who furnished the greater part of it. On some occasions the tipstaves would bring it to the jury, on others it would be brought by the bell-boys at the hotel. One juror said he had a pint of whisky, another said that he ordered whatever whisky he needed and got it, and another spoke of the quantity of beer used. The beer was taken to the room in bottles and a lard can. One juror testified that he told the tipstaff what liquor he wanted and he got it, and another, that the jurors themselves brought liquor to the room. During the drinking it appears that the tipstaves and the jurors "were talking backward and forward." It seems from the testimony that the tipstaves also participated in the drinking. One of the tipstaves testified that the bell-boys brought the whisky to them, but he did not know who ordered it. n

We will not go further into the testimony showing the misconduct of the jurors who were impaneled to determine the guilt or innocence of the defendant. What has been stated was amply sufficient to require and compel the learned judge below to set aside the verdict and grant the defendant a new trial. In the recent civil case of *Mix v. North American Co.*, 209 Pa. 636, 59 Atl. 272, where the trial judge, with a knowledge of the misconduct of the jury, declined to set aside the verdict, our Brother Brown, in speaking for the court and reversing the judgment against the defendant for such misconduct, said (page 645): "Here the deviation was gross; officers were utterly regardless of their oath in allowing the jury to separate, and the jurors themselves were heedless of their duty in doing so; and taking their separation into consideration in connection with their communication with outside parties after they had retired to their room and with the gambling that was continued only after money had been sent for and received from ¹⁹⁶ the outside, their misconduct cannot escape judicial condemnation." This language may well be applied to the case in hand. There was apparently no effort to seclude this jury from contact with the public. They were permitted to pass through the crowds in the courtroom, in the hall, and in the corridor of the hotel. They were permitted to go to saloons, a drug-store, and barber-shops, where they came in contact with outsiders. They spoke with other parties, and if the tipstaff is to be believed, one of the jurors who did communicate with an outsider testified falsely to the

fact. In a recent appeal from this same court, we declared it to be a reprehensible practice to permit jurors during a murder trial to separate so far as to go to a barber-shop although under the charge of an officer; and we further emphatically said: "To permit them to separate and some of them to go to a public room where they might be brought in contact and communication with others was a palpable violation of an unbroken practice of the courts of over and terminer, especially in capital cases, and meets with our condemnation": *Commonwealth v. Gearhardt*, 205 Pa. 357, 393, 54 Atl. 1029. In the same case we also said (page 393): "We unhesitatingly condemn such indifference to their duty on the part of the officers and such heedlessness of duty on the part of the jurors, for they doubtless heard the oath administered to the tipstaves." If we add to the separation of the jury and its attending circumstances, the fact that both whisky and beer in unknown quantities were taken to the jury-room at the hotel and were consumed by the jurors in the manner shown by the evidence, there can be no question that the learned trial judge abused his discretion when he refused to set aside the verdict. It is seldom, we are pleased to say, that this court is called upon to review a case where the trial court has permitted a verdict of murder of the first degree to stand which was obtained under such circumstances. Verdicts obtained under circumstances of this character cannot receive the approval of a judge or court which has proper respect for and enforces the constitutional rights of the citizen. The defendant had a right to be tried by a jury who were free from the contamination and influence of outsiders and were above ¹⁹⁷ suspicion of being intoxicated while in the discharge of their duties. For such gross misconduct of the jury as appears from the evidence in this case, we are compelled to sustain the assignment of error and set the verdict aside.

We do not deem it necessary to consider the other assignments of error. We may suggest, however, that the right of the defendant to be discharged under the "two-term rule" is essentially a habeas corpus proceeding under section 54 of the act of March 31, 1860 (Pub. Laws, 427), which is an enactment of the act of February 18, 1785 (2 Sm. Laws, 27, section 3). This proceeding is separate and distinct from the trial of the cause, and is not reviewable on this appeal: *Cox v. Commonwealth*, 29 Pa. 129. If, however, the assignment is considered, it must be overruled, because the continuance was caused by the condition or conduct of the defendant himself. He is therefore not in a position to take advantage of the statute.

While it is unnecessary to pass upon the assignments alleging error in overruling the defendant's challenge for cause to certain jurors, we may suggest, as the case must be re-

tried, that the rule which the court should observe is well stated in *Staup v. Commonwealth*, 74 Pa. 458, *O'Mara v. Commonwealth*, 75 Pa. 424, and *Allison v. Commonwealth*, 99 Pa. 17. The next will be at least the third trial of the defendant for this offense, and as the people of Northumberland county generally are familiar with the case, the learned trial court may have occasion to apply the rule applicable to challenges of jurors who have heard or read the testimony given on a former trial.

The judgment is reversed, and a venire facias de novo is awarded.

**MISCONDUCT OF JURORS, OTHER THAN THEIR SEPARATION,
FOR WHICH A VERDICT MAY BE SET ASIDE.***

I. Misconduct of Jury in Criminal Cases—In General, 1033.

II. Particular Acts of Misconduct.

a. Use of Intoxicating Liquors.

1. In General, 1034.
2. During Progress of the Trial, 1037.
3. After Case is Submitted, 1039.
4. Burden of Showing Effect of Using Liquors, 1040.

b. Communications or Conversations With or in the Presence of the Jury.

1. In General, 1040.
2. Conversing With Witnesses, 1045.
3. Conversing With Counsel, 1046.
4. Communications With the Judge, 1046.
5. Communication Between Jurymen and Court Officers, 1047.

c. Receiving Evidence Out of Court.

1. In General, 1050.
2. Unauthorized View or Inspection, 1051.
3. Taking Out or Consulting Records or Documents, 1051.
4. Demonstrative Evidence, 1052.
5. Statements by Jurors.
 - A. General Rule, 1053.
 - B. Presumptions, 1054.
 - C. Statements Made After Verdict has been Agreed upon, 1055.

6. Access to or Reading Newspapers, 1056.

7. Receiving Mail, 1057.

8. Access to or Reading Law Books, 1058.

III. Deliberation and Manner of Arriving at Verdict.

- a. Jury Should Deliberate as a Body, 1059.
- b. Discussions and Arguments, 1059.
- c. Experiments, 1060.
- d. Manner of Arriving at Verdict, 1061.

I. Misconduct of Jury in Criminal Cases—In General.

The discussion in this note is confined to the point raised in the principal case, namely, What is such misconduct of the jury in a criminal case, other than their separation, as will vitiate their verdict? Misconduct of a jury by separation, and their misconduct generally

*REFERENCES TO MONOGRAPHIC NOTES.

Misconduct of juror as ground for new trial: 35 Am. Dec. 254.

Effect of the separation of a jury: 103 Am. St. Rep. 155.

as ground for new trial in civil cases, will be found treated in the notes of this series referred to on page 1033.

It can hardly be denied that any misconduct of the jury in a criminal case which is prejudicial to the accused would deprive him of that most salutary constitutional right of being accorded an absolutely fair and impartial trial, and therefore invalidate a verdict of guilty.

The courts have ever been alive to the fact that it is of the utmost importance to the administration of justice that the purity of trial by jury should be preserved—that a verdict upon which doubt may be cast cannot be good—and consequently there has been perfect harmony of judicial opinion, as we shall presently see, upon the general proposition that whenever the jury in a criminal case has been guilty of misconduct which has been prejudicial to the defendant, a verdict of conviction must be set aside. Moreover, the jury being composed of twelve individuals, the misconduct of any juror, actual or imputed, “by which a fair and due consideration of the case may have been prevented,” is misconduct of the jury, because the jury can only act as a unit, and the misconduct of one of the members cannot be eliminated, and therefore in such cases the action of the jury as a whole is invalid: *State v. Morgan*, 23 Utah, 212, 64 Pac. 356; and to same effect is *State v. Ned*, 105 La. 696, 30 South. 126, 54 L. R. A. 933.

But what kind of misconduct on the part of the jury shall be sufficient to vitiate their verdict is a question upon which the course of judicial decision has been far from uniform.

Every irregularity of which the jury may be guilty will not vitiate their verdict, but only such as amounts to misconduct which is shown as a fact or presumed as a matter of law to be prejudicial to the defendant: *Welchel v. State*, 23 Ind. 89; *Medler v. State*, 26 Ind. 171; *Woods v. State*, 43 Miss. 364; *Riley v. State*, 9 Humph. 646; *Jack v. State*, 26 Tex. 1. This doctrine seems also to have been recognized in the principal case (ante, p. 1027), and from the succeeding subdivisions of our topic, in which we discuss particular acts of misconduct, it is shown to have been very generally approved by the courts.

II. Particular Acts of Misconduct.

a. Use of Intoxicating Liquors.

1. *In General.*—Whilst the courts all unite in condemning the drinking of spirituous liquors by jurors while in the discharge of their duties, there is great diversity of opinion as to how far drinking by a juror, at his own expense, without permission of the court, or the consent of the party, is such misconduct that the verdict should be set aside and a new trial granted. In some jurisdictions it has been held that if any liquor is drunk while the juror is in discharge of his duties, the verdict cannot stand.

This stringent rule was strongly announced by the supreme court of New York in *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332, where a conviction for murder was set aside because some of the jurors drank liquor during the progress of the trial. Said the court: “This should not be tolerated in any shape, in the jury, during the progress of the trial. . . . It will not do to weigh and examine the quantity which may have been taken by the jury, nor the effect produced. In this case, it is not at all probable that either of these jurors was, at the least, under the influence of strong drink; but being doubtful

whether they may not have drunk something, we ought not, especially in a case of life and death, to sustain the verdict"; and the doctrine stated in this case was followed by some of the earlier decisions in other states: *State v. Baldy*, 17 Iowa, 39; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *State v. Bullard*, 16 N. H. 139; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

In *State v. Baldy*, 17 Iowa, 39, and in *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550, it was held that the single fact of the jury drinking ardent spirits was, per se, sufficient ground for setting aside the verdict. In the former of these two cases the court said that: "The use in any degree of that which stimulates the passions and has a tendency to lessen the soundness of judgment is itself conclusive evidence that the party who has the right to the exercise of that dispassionate judgment has been prejudiced in not having it as perfect as it existed in the juror when accepted, applied to the determination of the cause"; and in the latter case the supreme court of Texas said: "Every day's experience must satisfy us that it is impossible to lay down a rule as to how much can be drunk without impairing the qualification of a juror for discharging the trust confided in him. . . . It is but too true that it will make a man bold and reckless, not only of consequences, personally, but also of the rights of those whose life and most valuable interests, property and reputation, are at stake; and its effect is so very different on different men that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined whether a juror had drunk too much or not, and the only safe rule is to exclude it entirely." Though there is much force in the argument presented in these opinions in favor of the doctrine they sustained, the courts in other jurisdictions have not sanctioned so stringent an interpretation, and the rule has been virtually overruled by later cases.

According to the overwhelming weight of modern authority, the use of intoxicating liquors by the jurors at their own expense while in the discharge of their duty is not ground for setting aside the verdict unless injurious consequences resulted therefrom: *McLendon v. State*, 36 Ark. 646, 51 S. W. 1062; *Payne v. State*, 66 Ark. 545, 52 S. W. 276; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *State v. Harrigan*, 9 Houst. (Del.) 369, 11 Atl. 1052; *Westmoreland v. State*, 45 Ga. 225; *Davis v. People*, 19 Ill. 74; *Pratt v. State*, 56 Ind. 179; *State v. Bruce*, 48 Iowa, 530, 30 Am. Rep. 403; *State v. Tatlow*, 34 Kan. 80, 8 Pac. 267; *State v. Dorsey*, 40 La. Ann. 739, 5 South. 26; *State v. Bellow*, 42 La. Ann. 86, 7 South. 782; *Russell v. State*, 53 Miss. 367; *Green v. State*, 59 Miss. 501; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Taber*, 74 Mo. 292, 41 Am. Rep. 314; *State v. Washburn*, 91 Mo. 571, S. W. 274; *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55; *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718; *Territory v. Burgess*, 8 Mont. 57, 9 Pac. 558, 1 L. R. A. 808; *State v. Jones*, 7 Nev. 688; *State v. Luciel*, 31 N. J. L. 249; *State v. Bailey*, 100 N. C. 528, 6 S. E. 372; *Commonwealth v. Cleary*, 148 Pa. 26, 23 Atl. 1110; *Stone v. State*, 4 Humph. 27; *Rowe v. State*, 11 Humph. 491; *Allen v. State*, 17 Tex. pp. 637; *Rider v. State*, 26 Tex. App. 334, 9 S. W. 688; *Brown v. Tate*, 45 Tex. Cr. App. 139, 75 S. W. 33; *Roman v. State*, 41 Wis. 12; *United States v. Gilbert*, 2 Sum. 19, Fed. Cas. No. 15,204.

The grounds upon which all of these courts place their ruling was well expressed by the supreme court of Colorado in *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526. Said the court: "Whether the use of intoxicating liquor by any one or more of a jury is sufficient cause for setting aside a verdict rendered by such jury has given rise to a contrariety of opinion by the courts. This difference seems to rest much upon differences of time in judicial history, and somewhat upon differences in local prevailing sentiment. Under the English common law in early times juries were treated with a rigor which is unknown in modern practice, and would not be tolerated if attempted. Jurors were confined in rooms like prisoners, there to be kept without meat, drink, fire, or candle, unless by permission of the judge, until they were all unanimously agreed: Blackstone's Commentaries, book II, 375. And if the jurors did not agree before the judges were ready to leave the town and go to another, the jurors were not discharged, but were 'carried around the circuit, from town to town, in a cart. The time when the discomfort, if not torture, of jurors was considered essential to securing just and speedy verdicts has long gone by. As to the use of liquors, the English authorities seem to hold that if the drink is not at the expense of the prevailing party litigant in the case, the verdict is not necessarily vitiated." The court then referred to the cases of *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332 and *State v. Baldy*, 17 Iowa, 39, as holding that spirituous drink in any degree is in itself conclusive evidence that the party on trial has been prejudiced, and continued: "It must be borne in mind that the question we are to deal with has nothing to do with the moral or social question involved in the use of intoxicating liquors. If a verdict is to be set aside for misconduct of the jury, it must be for legal reasons alone. If by such misconduct a party litigant, or, in a criminal case, a party on trial, has been prejudiced, the verdict should be set aside for the law requires a fair and impartial verdict. If the justice, soundness or fairness of the verdict has been impaired, or in any way vitiated, by the use of liquors by the jury, such verdict should be set aside. But if no such consequences be shown, or are fairly inferable, if no juror was intoxicated, or in any manner or degree affected in his deliberations or judgment, for what reason in such case is the verdict to be set aside? How has the party on trial in such case been prejudiced or injured by the conduct or misconduct of the jury? The real question in the case is, Has the party to be affected by the verdict been prejudiced by the conduct or misconduct of the jury? The general rule, as stated by Mr. Wharton in his work on Criminal Law, section 3111, is that 'The verdict will not be set aside on account of misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect their impartiality or disqualify them from the proper exercise of their functions.'"

The court then said that in the present case the testimony clearly contradicted even a presumption that the judgment of the jury had been affected by the use of liquor, and added: "But it is said, on the other hand, that the only safety lies in the rigid rule of setting aside the verdict in every case where intoxicating liquors are used by the jury, regardless of whether the jury were affected by such use or not. We cannot assent to this proposition. Would such a rule prevent a repetition of like misconduct by future juries? We say, No. And instead of safety, there is manifest danger in the rule, for it would hold out an obvious temptation, and furnish an almost certain opportunity

tunity to secure a new trial in every case, by the surreptitious introduction of liquor into a jury-room, and would tend to lessen the certainty of conviction in every criminal case." This language of the Colorado court was quoted in full and approved by the supreme court of Arkansas in *Dolan v. State*, 40 Ark. 454.

In some of the cases we have cited as sustaining the doctrine that the mere drinking of spirituous liquors by the jury at their own expense while discharging their duty will not be sufficient per se to vitiate the verdict, the drinking was done during the hearing of the case and in others after the jury had retired and were deliberating upon their verdict, no distinction seeming to have been made in applying the rule in the one case more than in the other. In some jurisdictions, however, this distinction has been clearly made, and we will give a few instances showing how the rule has been applied under these different circumstances.

2. *During Progress of Trial.*—In *Payne v. State*, 66 Ark. 545, 52 S. W. 276, where the defendant was convicted of murder in the second degree, the court refused to set aside the verdict, because, after the opening statements had been made, the jury, together with the deputy sheriff who had them in charge, drank intoxicating liquor, it not appearing that the defendant was prejudiced thereby, and the verdict being justified by the evidence.

In *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538, during the trial of defendant for murder, one of the jurors invited another juror to take a drink while in a hotel; whereupon the sheriff in charge of the jury asked all of the jurors to take a drink, and some of them took about two tablespoons of whisky, others taking cigars and mineral water. It appeared that none of them were affected by the liquor they drank. The court refused to set aside a verdict of guilty on the ground of misconduct of the jury, saying: "To set aside a verdict on account of these facts would be preposterous."

In *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122, a prosecution for homicide, one of the jurors, during the hearing of the case, used intoxicating liquors combined with other curative agents without medical advice or prescription. It did not appear that its effects were intoxicating or that it was used without the knowledge of the prisoner or his counsel. It was held that there was no such misconduct of the jury as to vitiate a verdict of guilty.

In *State v. Tatlow*, 34 Kan. 80, 8 Pac. 267, it was held that the mere fact that a juror has drunk intoxicating liquor during the progress of the trial, unless furnished to him by the prevailing party, is not of itself sufficient to vitiate the verdict; and it was further held in this case that the fact that the juror was under the influence of intoxicating liquor during the recess of the court, but had recovered therefrom before the trial was resumed, while it is improper conduct, to be severely condemned, would not vitiate the verdict unless harm had resulted to the defendant.

But in *State v. Demarest*, 41 La. Ann. 413, 6 South. 654, a trial for murder, liquors were furnished to the jury during the hearing of the case, and while going to the hotel at which they were stopping they became so boisterous as to attract the attention of the police. At the hotel they sang songs, used bad language and acted in a noisy and rowdy manner. The officers in charge of the jury were positive in their declarations that no member of the jury was intoxicated, but it was held that the conduct of the jury was such as to leave the im-

pression in the minds of others that, if they were not actually drunk they were unduly excited by the use of liquor, and the verdict of guilty was set aside.

In *State v. Salverson*, 87 Minn. 40, 91 N. W. 1, it was held that the use of intoxicants by a juror while engaged in the trial of an action, to such an extent as to render him incapable of appreciating and comprehending the proceedings in court, and unfit for an intelligent, fair and impartial performance of his duties, when not participated in, assented to, or waived by the parties, vitiates the verdict unless no prejudice is clearly shown. But the court in this case refused to set aside a verdict of conviction for grand larceny, though admitting that one of the jurors was intoxicated during the hearing of the case and was somewhat drowsy from the effects of liquor during the argument of counsel. This decision was based, however, upon the ground that defendant's counsel did not call the attention of the trial judge to the fact that the juror was intoxicated, it not appearing that they were ignorant of his condition, and also upon the ground that it satisfactorily appeared that no prejudice in fact resulted from the juror's intoxicated condition.

This case seems to go further than any of the other cases we have found which do not recognize that the mere fact of drinking by a juror does not per se vitiate the verdict, and is in strong contrast with the ruling of the supreme court of Louisiana in *State v. Demarest*, 41 La. Ann. 413, 6 South. 654, where the verdict was set aside because the boisterous actions of the jurors were such as to create the impression that they were under the influence of liquor though the officers in charge of the jury declared positively that they were not. That the court considered this a close case, and that its ruling might be misunderstood, is apparent from the concluding remarks made by Brown, J., in delivering the opinion of the court in *State v. Salverson*, 87 Minn. 40, 91 N. W. 1: "We do not wish to be understood as approving in the slightest degree conduct of this character on the part of jurors. It is highly reprehensible, and calls for the prompt and effective action of the trial court when attention is called to it. When a person is placed upon his trial for a crime which may, if he be found guilty, require his imprisonment, he is entitled to an orderly, dignified trial, conducted by a court and jury possessing their faculties, and having due regard for the grave responsibility resting upon them; and where jurors, by an indulgence in intoxicating liquors, so impair their faculties as to unfit themselves for intelligent service, it is the duty of the trial court to set their verdict aside, guarded in the performance of that duty by the rules and principles we have adverted to in this opinion."

In *People v. Hull*, 86 Mich. 449, 49 N. W. 288, after the evidence had closed in the case but before the jury were charged, the court directed that the jury should view the premises where the homicide was committed. While in the hotel viewing the premises one of the jurors took a drink of liquor at the bar of the principal witness for the prosecution, and this was held sufficient misconduct to necessitate setting aside a verdict of conviction. The decision here, however, is not based on the mere fact that the juror drank the intoxicating liquor, but upon the fact that he procured it at the house of the principal witness for the prosecution, and that it might have been furnished him by such witness.

In the late case of *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55, the court refused to disturb a conviction for murder in the first degree, because the deputy sheriff lawfully in charge of the jury brought a bottle of whisky to the jury-room from which the jurors took a drink before retiring.

3. After Case is Submitted.—The doctrine that the mere drinking of ardent spirits by a juror, at his own expense, while in the discharge of his duty, is not of itself such misconduct as will require setting aside the verdict, has been held in most jurisdictions to apply when the drinking was done while the jury were deliberating upon their verdict, as well as when it was done before the case was submitted.

Thus, in *Kee v. State*, 28 Ark. 155, the jury, while deliberating upon their verdict in a murder case, visited a saloon in company with the sheriff and most of them took a drink of spirituous liquor, the sheriff paying for the drinks. The court said this conduct was very reprehensible on the part of the jurymen, and they should have been severely punished by the court, but since it did not appear that in consequence of it the prisoner did not receive a "fair and impartial trial," it furnished no valid reason for a new trial.

And in the later case of *McLendon v. State*, 66 Ark. 646, 51 S. W. 1062, where spirituous liquor was taken in small quantities to the jury-room, not oftener than twice a day, while the jury were deliberating upon their verdict in a homicide case, and was drunk by the jury, it was held not such misconduct as would vitiate the verdict, when the court was convinced that the verdict was correct, and that none of the jurors were affected by the liquor they drank.

In *Creek v. State*, 24 Ind. 151, a homicide case, it was held that though the correctness of the verdict is doubtful, and it is shown that jurors drank intoxicating liquors during their deliberations, yet, if the state shows that no injury resulted, a new trial will not be granted; and to same effect is *Pope v. State*, 36 Miss. 121.

But in California, where it has been repeatedly held that the mere drinking of ardent spirits by a juror during the trial is not per se ground for setting aside a verdict of conviction, this rule is not applied, at least in capital cases, when the drinking is done after the jury have retired to deliberate upon their verdict. Thus, in *People v. Lee Chuck*, 78 Cal. 317, 20 Pac. 719, a conviction for murder was set aside because the jury, after the case was submitted, were taken to a restaurant for dinner and partook of wine and drank brandy in their coffee. The court said: "It is infinitely more important that the channels of justice be kept pure and untainted than that the verdict against this defendant shall be maintained." Moreover, the court said this presented a very different question from that where the drinking was done during the trial. "Here the trial had closed," said Works, J. "The life of the defendant was in the hands of the jury. They were deliberating upon a question of the gravest consequence to the defendant, to society and to themselves. . . . We are of opinion that when the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict in a capital case, a verdict of conviction should not be allowed to stand." Chief Justice Beatty expressed strong dissent to the opinion entertained by the majority on this question, saying: "Unless we are warranted in holding, as mere matter of law, that any drinking of wine by a jury, after retiring for deliberation,

however moderate, and whether sanctioned by the trial court or not, is misconduct per se, or unless we can find as matter of fact that men who use wine and brandy in the manner and to the extent these jurors did, and as thousands of men do every day without impairment of their sobriety or decorum, are thereby necessarily deprived of their ordinary judgment and discretion, we cannot say that the jury was guilty of misconduct or the defendant prejudiced in this particular."

And in *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549, a murder trial lasting eleven days, when large quantities of beer, wine and whisky were ordered by the jury at their own expense, and some of it consumed after submission of the case, but most of it during the trial, and without permission of the court or knowledge of defendant, a verdict of guilty was set aside on account of such misconduct of the jury, although it did not appear that any juror was intoxicated.

But whatever difference of opinion may exist upon the question whether the mere drinking of ardent spirits by a juror, either before or after submission, is per se such misconduct as to vitiate the verdict, where a juror has drunk so much as to unfit him for the proper discharge of his duty, the verdict cannot stand: *People v. Gray*, 61 Cal. 164, 144 Am. Rep. 549; *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *State v. Jones*, 7 Nev. 408; *State v. Jenkins*, 116 N. C. 972, 2 S. E. 1021; *March v. State*, 44 Tex. 64; and this principle is fast running through all the cases.

4. **Burden of Showing Effect of Using Liquors.**—If the correctness of the verdict is doubtful, and it is shown that jurors drank intoxicating liquors during their deliberations, the state must show that no injury resulted: *Creek v. State*, 24 Ind. 151; *State v. Greer*, 22 W. Va. 800.

b. Communications or Conversations With or in the Presence of the Jury.

1. **In General.**—To secure to every person accused of crime an absolutely fair and impartial trial, it has ever been the policy of the law to keep the jury in a criminal case entirely separated from the world, and permit no communication with them from the beginning of the trial until the verdict is rendered. The law "contemplates that no outside influences shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their mind in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try": *Shaw v. State*, 83 Ga. 92, 9 S. E. 268.

The language quoted from this case correctly states the law on this question; and the authorities are uniform that, if the jurors in a criminal case are allowed to communicate or converse with outsiders without permission of the court, or to be or remain where they may hear the remarks of outsiders, and defendant is thereby prejudiced, the verdict must be set aside. "The reason why juries should not be allowed to have intercourse with others than themselves," said the supreme court in *Madden v. State*, 1 Kan. 340, "has been clearly and forcibly stated thus: 'The law has, with great pains, endeavored to procure for triers men above exception, who stood indifferent as they stood unsworn, and, with yet more jealous care, provided that they should hear no evidence but what was relevant to the precise matter in controversy, and fit to bring their understanding and ear

sciences to a proper conclusion thereon. If, after all these precautionary means, it permitted the triers to mix with those around them, to catch the partialities and prejudices of the friends and enemies to the parties, and to open their ears to all that might be said in relation to the matter under trial, the precautions were nugatory, and there was no security for an impartial verdict founded upon the evidence. This part of the rule, as it admitted of no dispensation, so it permitted no exception, unless such was produced by imperative necessity, and even then this was not allowed without great hesitation, and against the opinion of many sages of the law: 1 Dev. & B. 500."

This principle was clearly stated in *Collier v. State*, 20 Ark. 36, and among the numerous cases supporting it are: *People v. Boggs*, 20 Cal. 432; *People v. Symonds*, 22 Cal. 348; *People v. Kelley*, 46 Cal. 355; *Chestnut v. People*, 21 Colo. 512, 42 Pac. 556; *State v. Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1052; *Surles v. State*, 89 Ga. 167, 15 S. E. 38; *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *State v. Allen*, 89 Iowa, 49, 56 N. W. 261; *Baskett v. Commonwealth*, 19 Ky. Law Rep. 1995, 44 S. W. 970; *State v. Dorsey*, 40 La. Ann. 739, 5 South. 26; *State v. Gordon*, 116 La. 388, 40 South. 771; *Taylor v. State* (Miss.), 30 South. 667; *State v. Igo*, 21 Mo. 459; *State v. Howell*, 117 Mo. 307, 23 S. W. 263; *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895; *People v. Flack*, 24 Abb. N. C. 444, 9 N. Y. Supp. 279; *State v. Danils*, 134 N. C. 671, 46 S. E. 991; *Commonwealth v. Lombardi*, 221 Pa. 31, 70 Atl. 122; *State v. Way*, 38 S. C. 333, 17 S. E. 39; *State v. Church*, 6 S. D. 89, 60 N. W. 143; *Riley v. State*, 9 Humph. 646; *Rowe v. State*, 11 Humph. 491; *March v. State*, 44 Tex. 64; *Nance v. State*, 21 Tex. App. 457, 1 S. W. 448; *Pickens v. State*, 31 Tex. Cr. App. 554, 21 S. W. 362; *Stiles v. State* (Tex. Cr. App.), 75 S. W. 511; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176; *United States v. Daubner*, 17 Fed. 793.

Some cases hold that when there is an irregularity which may affect the impartiality of the proceedings, as when the jury have improperly had communications with others not authorized, the defendant is entitled to the presumption that the irregularity has been prejudicial to him, and a verdict of guilty will be set aside, unless the state shows that no injury could have occurred by reason of the irregularity: *Butler v. State*, 72 Atl. 179; *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588; *Madden v. State*, 1 Kan. 340; *Commonwealth v. Shields*, 2 Bush, 81; *Boles v. State*, 13 Smedes & M. 398; *Carter v. State*, 78 Miss. 348, 29 South. 148; *Farrar v. State*, 2 Ohio St. 54; *State v. Morgan*, 23 Utah, 212, 64 Pac. 356; *Commonwealth v. Wormley*, 8 Gratt. 712, 56 Am. Dec. 162; *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176. Thus, in *Vaughn v. State*, 57 Ark. 1, 20 S. W. 588, a conviction of murder was set aside because after submission some of the jurors were allowed to stand on the courthouse porch where they could hear citizens discussing the merits of the case, the court saying that this made a prima facie case that the jury had been exposed to improper influence, and cast upon the prosecution the burden of showing that the exposure was of a character which could not, or did not, influence them.

In *Boles v. State*, 13 Smedes & M. 398, the prisoner was convicted of murder. When the case was submitted, the jury, with the consent of the prisoner, was taken to a hotel, where they could get refresh-

ments, and remain till they could agree. At the hotel they were taken to the public table, where they ate with the boarders, being seated at an end of the table, with the officers between them and the guests. Rooms were provided for them at the hotel, and at their request a barber was sent for to shave some of them and cut their hair. The barber was in the room for more than an hour, and while there another deputy sheriff called the officer having charge of the jury out of the room; he left it, closing the door behind him, and conversed with the other deputy. There was no evidence of tampering either by the barber or by the guests at table; on the contrary, the officer stated that he heard no one speak to them on the subject of trial, though the barber might have done so by whispering, or he might have conveyed written communications to them.

On this state of facts, it was agreed that the verdict should stand, unless tampering or improper influences were shown, but in overruling this contention and setting aside the verdict the court said: "This would be a very unsafe rule. The prisoner who is in confinement would not be able, one time in a hundred, to show that a verdict had been procured by improper means, although such may have been the case." The court then referred to the common-law rule that when the jurors depart from the bar they must not be allowed to speak with any outsider, and continued: "This is a plain, practical and safe rule. It cannot be mistaken, and is easily followed. Any departure from it is a violation, and leads to confusion and difficulty in which there is no rule of law to guide us. Each departure may make a new case for the discretion of the court, for where there has been a departure from the given rule, the verdict must depend upon the discretion of the court. Can the court say it is no harm for one person to be with the jury? The law does not say so, and if one may be, then, perhaps, in the opinion of the court, two would do no mischief. Then again, if a stranger may be with the jury a few minutes or an hour, the court must settle a question of time—how long may he be with them without vitiating the verdict? There is no rule of law by which these things can be determined. If the common-law rule be followed, there is certainty, but if not, there is uncertainty. And if a prisoner must show that the verdict is vitiated it is needless to pretend to hold to the forms of law; it may be made up in the street or in the courtyard, and it is good."

The case of *State v. Andrews*, 29 Conn. 100, 76 Am. Dec. 593, seems also to support the doctrine that prejudice to the prisoner will be presumed where the jury has had unauthorized conversation with others than themselves.

In *State v. Cartright*, 20 W. Va. 32, while the jury were deliberating upon their verdict, in a case of assault with intent to kill, a man who had borne a prominent part in the fight during which the alleged assault occurred was admitted to the juryroom, upon the invitation of the jury, to fiddle for them, and remained there with the jury and the officer who had them in charge for half an hour, fiddling for the jury. The jury and the officer denied by affidavit that any conversation or communication had been had between the jury and the fiddler, and the jurors made affidavit that his presence or conduct had no influence on their verdict, but the affidavit of the fiddler was not taken. It was held that the prisoner was entitled to the benefit of the presumption that the irregularity had been prejudicial to him, and a verdict of guilty was set aside. Said the court: "Although there might be, and perhaps was, no tampering with the jury in the

case, yet in a free country it is better that the inconvenience of a new trial should be incurred than that just principles should be disregarded, and a suspicion remain that a citizen has been convicted without a fair and impartial trial. The law . . . casts the burden of removing all suspicion of unfairness upon the state, and we are unable to say in this case that that suspicion has been removed to our entire satisfaction or beyond a reasonable doubt."

The fact that a person outside the jury-room spoke to one of the jurors during their deliberations, and that some of the jurors spoke to other persons outside, is not ground for new trial where it does not appear that anything was said referring to the trial: *People v. Boggs*, 20 Cal. 432.

And where, during the progress of a murder trial, one of the jurors approached two persons who were conversing about the case, and one of the parties called the attention of the other to the fact of the juror's approach, to which the juror replied "that they might go ahead; it wouldn't make any difference to him," this did not show any disposition on the part of the juror to act improperly or require that the verdict of guilty be set aside: *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

A new trial will not be granted because the bailiff allowed the jury to go with him to the postoffice, and permitted one of the jurors to ask for his mail, it not appearing that the juror got any mail: *Chestnut v. People*, 21 Colo. 512, 42 Pac. 656.

And the fact that a juror, while charged with the case, communicated with outsiders on unimportant matters in no way relating to the case, and that the bailiff having charge of the jury brought him newspapers, at his request, late in the evening, and but a short time before the verdict was found, nothing being shown to have occurred tending in any way to damage defendant, was not sufficient ground for a new trial: *Flanagan v. State*, 64 Ga. 52.

That, pending the trial, a bystander remarked to one of the jurors "that he looked warm," was a matter of no moment, where the jury had not been permitted to separate: *State v. Goodson*, 116 La. 388, 40 South. 771.

And where one of the jury, during a trial for murder, called to a person in the street, from a window of the courthouse, and asked him to tell his (the juror's) wife to send him his supper, to which the person addressed replied, "Well," and afterward delivered the message, and the supper was sent, and the officer in charge of the jury received it from the hands of the persons who brought it and sent them to the opposite side of the room from the jury, at a distance of about sixty feet, and it was proved that there was no communication with the jury except as above stated, it was held that there was no improper tampering with, or sinister influence brought to bear upon, the jury: *Ned v. State*, 33 Miss. 364.

So, also, the fact that a venireman, on being peremptorily challenged and about to leave the box, whispered something not concerning the case to a juror who had been accepted, was not prejudicial to the accused: *Sayler v. State* (Miss.), 30 South. 657.

Likewise, where it appears that jurors have left the jury-room in charge of an officer, have communicated with persons outside the jury-room, and received notes during their deliberations, but there is no evidence of actual undue influence exerted on them, this was not such misconduct as to vitiate the verdict: *State v. Tilghman*, 33 N. C.

513. The court said in this case, however: "Perhaps it would have been well had his honor in his discretion set aside the verdict and given a new trial, as a rebuke to the jury and an assertion of the principle that trials must not only be fair, but above suspicion."

The fact that pending a trial for murder, while the jury were in the street, in charge of an officer, the father of the deceased bowed to one of the jurors and shook hands with him, when no conversation was had between the parties, though improper and calculated to shake confidence in the integrity of the verdict, was no ground for a reversal: *State v. Daniels*, 134 N. C. 671, 46 S. E. 991.

In the late case of *Commonwealth v. Lombardi*, 221 Pa. 31, 70 Ad. 122, it was held that where a jury, on a trial for murder, were permitted to take their meals in the common dining-room of a hotel, and to sit on the veranda and to talk with outsiders at the windows of the jury-room, it was not ground for the reversal of a conviction where it appeared that the jury were always accompanied by two tip-staves, and had a separate table for their meals, and did not converse with anyone as to the case during the trial. The court said: "Such situations are to be treated with common sense, and while the investigation should be full and searching, yet a trial really fair and proper should not be set aside for the mere suspicion or appearance of irregularity shown to have done no actual injury."

In *Rowe v. State*, 11 Humph. 491, it was held that the fact that one of the jurors in a trial for a capital felony spoke to an outsider upon a subject not relating to the trial was not such misconduct as required granting a new trial.

But in *Love v. State*, 6 Baxt. 154, it was held that the fact that after the evidence in a trial for murder was closed, the officer in charge of the jury allowed one of them to be talked to by a drunken man on the street while the jurors were separated in small squads is ground for granting a new trial, although the juror so accosted made affidavit that the case was not mentioned.

In *March v. State*, 44 Tex. 64, after the jury had retired and were deliberating upon their verdict, in a case for assault with attempt to murder, someone from the outside spoke to one of the jurors sitting in the window of the jury-room, and asked him how long the jury would be out. The juror replied, "During the year 1873, unless he got his verdict, which was for seven years' imprisonment in the penitentiary." It was held that this was not such a conversation under *Paschal's Digest*, article 3137, as required a new trial to be granted, the court saying the conversation must be such as is calculated to impress the case under consideration upon the mind of the juror in a different aspect from the one made upon the mind by hearing the evidence in the courtroom, or of such a nature as calculated to result in harm to the party on trial"; and to same effect are *Nance v. State*, 21 Tex. App. 457, 1 S. W. 448, *Pickens v. State*, 31 Tex. Cr. App. 554, 21 S. W. 362, and *Stiles v. State* (Tex. Cr. App.), 75 S. W. 511.

And in *United States v. Daubner*, 17 Fed. 790, it was held that the fact that two of the jurors during the progress of a criminal trial spoke to an outsider of the trial and the length of time consumed therein, and that one of them exhibited a memorandum-book in which the names of the witnesses were written, will not be ground for setting aside the verdict, when it does not appear that anything as to the merits of the case was discussed in the conversation.

2. **Conversing With Witnesses.**—The same general principles which prevail with reference to communication or conversation between a juror and outsiders apply to communications or conversations between a juror and a witness.

Thus in *Bryan v. Commonwealth*, 17 Ky. Law Rep. 965, 33 S. W. 95, where defendant was convicted of assault with intent to murder, the court refused to set the verdict aside, because a witness for the prosecution had "eagerly, excitedly and warmly" shaken the hands of several of the jurors trying the case, and spoken to them in an "earnest and excited" manner, it not appearing that the witness was talking to the jurors about the case, or that defendant was injured thereby.

In *State v. Crane*, 110 N. C. 530, 15 S. E. 231, it was held that a verdict need not be set aside because a juror has been spoken to by a witness, where the trial court finds that the juror had not been thereby influenced. "Certainly," said the court, "it cannot be maintained that as a matter of law the verdict must be set aside because a juror is spoken to, when it is found as a fact that the verdict was not affected thereby. . . . Such a principle would place every verdict at sea whenever the losing party might be anticipatory and adroit enough to procure a witness of the winning side to address an improper remark to one of the jurors. When it appears only that there was opportunity whereby to influence the jury, but not that the jury was influenced—merely 'opportunity and chance for it—a new trial is in the discretion of the presiding judge'; and to same effect is *State v. Way*, 38 S. C. 333, 17 S. E. 39.

In *State v. Allen*, 89 Iowa, 49, 56 N. W. 261, it was held that a conviction for forgery would not be set aside because one of the jurors, during a recess of the court, was engaged in conversation by certain witnesses for the state, who commended the prosecuting witnesses and condemned the defendant, the juror not having invited the conversation and having endeavored to turn it to some other topic, and the prosecution not being responsible for the conduct of the witness.

And so, too, in *State v. Ayer*, 23 N. H. 301, it was held that a verdict for the state will not be set aside merely because a juror heard a witness for the prosecution, in a barroom, use harsh language against the prisoner; the witness not attempting or being employed to influence the juror.

These two cases seem to go further than any others we have noticed, in holding that such misconduct would not be sufficient to authorize a presumption that the defendant had been prejudiced.

In *Cook v. State*, 85 Miss. 738, 38 South. 110, on a trial for homicide, a witness for the prosecution, who was also the father in law of the deceased, sat familiarly in conversation with the jury in the courtroom, though some of the court officers were present. The court said: "We are not sure but that we could reverse this case and order another trial for this only, if it were the only error to be found in the record." And in *Odle v. State*, 6 Baxt. 159, it was held that the fact that, while a trial for murder was in progress, part of the jurors were allowed to sit at their meals with three of the witnesses for the state, in a distinct room from that where sat the officer in charge and the other jurors, vitiates the verdict.

And in *State v. Cartright*, 20 W. Va. 32, it was held that the presence of a witness in the jury-room during the jury's deliberations

was sufficient to raise a presumption of prejudice, which the state should disprove, though the jurors made affidavit that they had no conversation with such witness.

3. **Conversing With Counsel.**—The general rule which forbids jurors from conversing with others than themselves while discharging their duty in a criminal case applies equally to conversations with counsel. Thus, when in a criminal case, after the jury were instructed and while on their way to their room, the deputy prosecuting attorney spoke to one of the jurymen, asking if he had any message to send to his family, to which the juror replied, "If the folks are at home, tell them to feed your horse, and give you your supper and keep you overnight," a new trial was granted, though no wrong was intended by either the attorney or the juror: *Hutchens v. State*, 14 Ind. 78, 39 N. E. 243.

On the other hand, however, in *State v. Fruge*, 28 La. Ann. 637, it was held that the fact that a juror during the trial whispered with the district attorney is not, if prejudice is not shown, a ground for setting aside a conviction.

4. **Communications With the Judge.**—In an early Massachusetts case, Parker, C. J., said: "We are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury, after the cause has been committed to them by the charge of the judge, unless in open court, and, when practicable, in the presence of the counsel in the case": *Sargent v. Roberts*, 1 Pick. 337, 11 Am. Dec. 185.

Following the rule thus laid down in a civil case, it has been held that any communication between the judge and jury in a criminal case, after the latter have retired to make up their verdict, will be such an irregularity as will, if prejudice by the defendant has been suffered, vitiate the verdict.

Thus, where, after a jury has retired to deliberate, the court adjourns and the judge goes home, he carries no judicial powers with him, and for him to send a message of instruction to the jury from his residence is an irregularity which will vitiate a verdict of guilty unless the court can see that the message could not by possibility have prejudiced the case of the accused: *Rafferty v. People*, 72 Ill. 37.

And in *State v. Alexander*, 66 Mo. 148, a murder trial, it was held that a written answer from the judge to an inquiry in a note from one of the jurors, after retirement of the jury, was misconduct which vitiated a verdict of guilty.

But when a juror in a criminal case expressed the desire, after the jury had retired, to ask the state's attorney a question, on being refused, asked the court, in the presence of the entire jury, if less than twelve of their number could make a verdict, and was told "No"; and afterward, in reply to a question whether the jury could agree, replied that he would hang the jury for a thousand years, but was stopped before finishing the sentence, it was held that this was not such misconduct of the jury as to require setting aside the verdict: *Crawford v. Commonwealth (Ky.)*, 35 S. W. 114.

Also, in *State v. George*, 8 Rob. (La.) 535, where, on a trial for a capital offense, the judge remained with the jury, after they had retired, to read the testimony which he had reduced to writing, it was held illegible that the jury could not decipher it, but afterward withdrew and subsequently returned, at their request, and wrote out their ver-

dict, it was held that these acts, though irregular, did not vitiate the verdict, it not appearing that the judge participated in the proceedings.

And in *State v. Connelly*, 7 Mo. App. 40, the fact that the judge in a criminal trial, after the jury had retired, directed the marshal in open court to see whether the jury wanted further instructions, and the marshal reported that they did not, but would be through in a few minutes, and the jury shortly returned a verdict, did not warrant the granting of a new trial.

So, also, in *People v. Kelly*, 94 N. Y. 526, it was held that the fact that, after the jury had retired for consultation in a felony case, a juror sent a written communication to the judge which was answered, is not ground for a new trial in the absence of a showing as to the contents of the writing.

The only case we have discovered where misconduct of the jury was alleged because of conversations between the judge and jury while the trial was in progress is that of *State v. Rowell*, 75 S. C. 494, 56 S. E. 23. This was a murder trial, and on two occasions during the trial one of the jurors left the jury-box, went up to the judge's bench, and in the presence of the other jurors and of the attorneys for each side spoke to the judge in a whisper about the case. The judge at once repeated aloud what the juror had said to him privately, and gave his reply publicly in the presence of all concerned. In holding that this did not show misconduct prejudicial to the defendant's case, the court said: "There is no doubt that the greatest care in a circuit judge is required, so that no possible doubt could exist as to what passes between him and a juror. It is far better that the juror should be required by the judge to declare openly what information he would seek from him, and thus avoid any possible misconstruction. But the judge in this case endeavored at once to impart the utmost publicity to what the juror said to him privately, by himself stating what had been asked. There was no hesitation and no delay by Judge Klugh in making known what the juror had asked him, for he gave his reply openly in the presence of all concerned. Under these circumstances, we feel that there had been no interference with the cause of justice in this matter."

5. Communication Between Jurymen and Court Officers.—The common-law rule which prohibited jurors from speaking to the officers having them in charge except to communicate as to their necessities, or in answer to a question whether they had agreed upon a verdict, has been relaxed in modern times to the extent that a verdict will not be set aside because of communications between the jurors and the officer unless the communications were of such a character as to prejudice the accused. Thus, in *McFalls v. State*, 66 Ark. 16, 48 S. W. 492, a murder trial, after the case was submitted, a juror retired from the jury-room in the night to answer a call of nature, with the officer in charge of the jury. The only conversation which took place between them was that the officer asked how the jury "was running," and the juror replied, "Pretty well; I think we will get through in two or three hours." The officer then said, "If you do, I will get the judge to come over, and then we may get some rest to-night." This was held not sufficient to require granting a new trial.

In *People v. Quimby*, 6 Cal. App. 482, 92 Pac. 493, it was held that proof that a juror in a homicide case inquired of the deputy sheriff who had them in charge what punishment the law prescribed for man-

slaughter; that the officer replied that he did not know; that the juror stated that he thought it was from one to ten years; and that the officer replied that might be so, but that he did not know—was not proof of misconduct warranting setting aside a verdict of guilty.

In *Jones v. State*, 68 Ga. 760, the sheriff in charge of the jury in a prosecution for rape occupied the bed with one of them during the trial of the case. It was held that though a grave irregularity, a verdict of guilty would not be set aside where it was apparent that no harm resulted; and to same effect is *Doyal v. State*, 70 Ga. 134 and *Kirk v. State*, 73 Ga. 620.

Likewise the fact that the bailiff attending the jury in a burglary case remained all night in the room occupied by the jury at the hotel where they were lodged under instructions from the court would not vitiate the verdict, unless it appeared that the jury were there for the purpose of deliberating, or that something was said or done there touching the case, more especially when it strongly appears that the room was occupied by the jury merely as a place of repose for the night, and that the case was not under discussion or immediate consideration at any time the officer was present or during that night: *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

And in a trial for larceny where a question arose while the jury were deliberating as to what a witness had testified, the fact that they requested the officer in charge of them to bring in the minutes of the witnesses' testimony, which the officer refused to do, was held no ground for a new trial: *State v. Griffin*, 71 Iowa, 372, 32 N. W. 445; and to same effect is *State v. Barker*, 43 Kan. 262, 23 Pac. 513.

So, too, a verdict will not be set aside because the jury, while deliberating, conversed with a deputy sheriff who sat at the table with them at supper, where they were kept together during the adjournment of court, and the conversation did not relate to the trial and could not have affected their decision: *State v. Summers*, 4 La. Ann. 26.

Nor will the act of the sheriff in telling the jury on Saturday evening that the judge was about to depart to another place, but if there was any probability of their coming to a decision he would wait, and unless they decided soon they might have to be locked up until Monday morning, while highly reprehensible, justify reversal of a conviction for manslaughter: *Alexander v. State* (Miss.), 22 South. 871.

And the fact that a juror asked the officer in charge of the jury whether they could find a verdict and the court fix the punishment, and the officer made no reply, but communicated the inquiry to the prosecuting attorney, it was held no ground for a new trial, it appearing that defendant was not prejudiced by the alleged misconduct: *State v. Stark*, 72 Mo. 37.

Likewise, where, on trial of a prosecution for stopping a railroad train with intent to rob, one of the jurors remarked to the officer in charge of the jury that he would like to go out to the "kiss-shaped track," and the officer withdrew a little from the jury, but still in plain sight of them, these occurrences were not sufficient to invalidate the verdict of the jury: *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337.

And in a prosecution for murder, the act of a deputy sheriff in relating to some of the jurors in his charge a difficulty between a witness for the state and a witness for the defense, in which the

former arrested the latter, took from him a pistol, and in making the arrest struck him on the head, was not ground for reversal, where the witness for the defense was not controverted as to material portions of his testimony: *Adams v. State*, 48 Tex. Cr. App. 452, 93 S. W. 116. But where the communications between the jury and the officer are prejudicial or reasonably calculated to injure the accused, the verdict will be set aside. Thus, it was held in *Cooper v. State*, 103 Ga. 63, 39 S. E. 439, that after a jury had retired to make up their verdict in a murder case, and had evidently differed among themselves as to the verdict which should be rendered, the delivery to them by the bailiff of a copy or abstract of a written paper prepared by the sheriff, and containing extracts from the code relating to the law of homicide, and the examination of this paper by the jurors, is cause for a new trial, notwithstanding the verdict finally rendered may have been agreed upon by all the jury before this paper was received or read by them; it also appearing that "some of the jurors wanted the information therein contained solely for their own satisfaction."

And in *State v. Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277, 14 South. 181, it was held that the fact that the officer who had charge of the jury during its deliberations said to one of the jurors who had not agreed to the verdict which had been agreed upon by the other eleven jurors that it was "a plain case" vitiated the verdict.

A statement by the officer to the jury that the accused had been in the penitentiary was sufficient to require a verdict of guilty to be set aside: *State v. Dallas*, 35 La. Ann. 899; or that public opinion was against the defendant: *Nelms v. State*, 13 Smedes & M. 500, 53 Am. Dec. 94; or commenting to the jury upon the weight and credibility of the evidence: *State v. Weisman*, 68 N. C. 203; or a statement that the jury should send the defendant to the penitentiary: *Dansby v. State*, 34 Tex. 392.

In *Brown v. State*, 69 Miss. 398, 10 South. 579, a prosecution for murder, the jury had been instructed that if they should find the defendant guilty, they might fix his punishment at imprisonment for life instead of capital punishment. After the jury had been considering their verdict the bailiff in charge of them pointed out this instruction to the jury, stating that it was his desire that they should not delay their decision, as he did not wish to wait longer, and they found a verdict of guilty, fixing the punishment at life imprisonment. It was held that the bailiff's interference was ground for reversal.

So, also, where defendant was indicted for burglary and grand larceny, and the jury had deliberated for an hour and a half, one of them asked the bailiff the difference between burglary and petit larceny, and the bailiff replied that one would send the prisoner to the penitentiary and the other to the county farm, and the jury immediately returned a verdict of guilty of the latter offense, the verdict will be set aside: *Wilkerson v. State*, 78 Miss. 356, 29 South. 170.

Likewise, where, while a jury was considering a case, the sheriff called to the bailiff having them in charge that the judge would leave for his home in a few minutes, and unless they returned a verdict at once, they would be held until another day, the action of

the sheriff would be presumed to be prejudicial and ground for reversal: *Shaw v. State*, 79 Miss. 577, 31 South. 209.

In *People v. Hartung*, 17 How. Pr. 85, 4 Park. C. Rep. 256, it was held the fact that a jury in a murder trial, after retiring to deliberate on their verdict, took the opinion of the officer in attendance as to whether they could bring in a verdict of manslaughter would vitiate a verdict of guilty, unless it appears beyond all reasonable doubt that no injury resulted to the prisoner therefrom.

c. Receiving Evidence Out of Court.

1. In General.—Since any evidence outside of that produced at the trial would not be given under the sanction of an oath, and would also be received without the knowledge of the defendant, thereby depriving him of the right to repel it, the courts have uniformly condemned as improper the reception of any evidence by the jury in a criminal case outside of that produced at the trial, and whenever there is sufficient ground to suspect that the defendant has been prejudiced by the reception of such evidence, the verdict will be vitiated. This general principle is found running through all the books, and many instances in which it has been sustained by the courts will appear in later subdivisions of this note.

But the presumption is that jurors perform their duty, and hence a verdict will not be set aside on the ground that the jury received evidence out of court unless positive evidence of such misconduct is introduced: *People v. Williams*, 24 Cal. 31.

Hence, where defendant was on trial for forging a receipt, and the receipt together with the writing with which it had been compared by experts on the trial, and a magnifying-glass, were left in an unlocked drawer in the jury-room, but there was no evidence that they were seen by the jury, it was held there was no such misconduct of the jury as would vitiate the verdict: *State v. Bailey*, 11 N. C. 528, 6 S. E. 372. And if misconduct of the jury in suffering outside rumor to influence their verdict be assigned as error, it must appear that the rumor was known to the jury at the time their verdict was agreed upon: *Rowland v. State*, 14 Ind. 575.

And where no prejudice has resulted to the accused from the fact that the jury had obtained information not disclosed by the evidence at the trial, the verdict will not be set aside. Thus, in *State v. Bensley*, 84 Iowa, 83, 50 N. W. 570, a forged note which defendant was alleged to have passed was payable to a third person. One of the jurors on being taken by an officer to a hotel for dinner examined the register at the time the note was passed, and found the name of the payee. The juror testified that the finding of the name was not considered by him in arriving at a verdict, and that the circumstance was not referred to or discussed in the deliberation of the jury. Another juror testified that he saw the aforesaid juror examine the register, and that the latter remarked to him at the time that the name there could have no bearing on the case. It was held that while such conduct was not to be approved, no prejudice resulted, and a motion for new trial was properly overruled.

In *Testard v. State*, 26 Tex. App. 260, 9 S. W. 888, it was held that a new trial would not be granted because the jury, while consulting, discussed other murders imputed to defendant, where the reference was but incidental, and the jury agreed not to be influenced thereby, and understood that they were concerned with nothing but

the charge on trial, and four of the jurors testified that they were not influenced by the other charges.

In *Williams v. State*, 33 Tex. Cr. App. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958, the state offered to prove that defendant, after arrest, attempted to commit suicide. The court excluded the evidence, and instructed the jury to disregard the matter. In the jury-room the matter was referred to, but all the jury agreed not to consider it. It was held this was not ground for a new trial.

2. **Unauthorized View or Inspection.**—As a general rule, the mere fact that the jury visited the place of the crime will not vitiate their verdict, without proof that they did so for the purpose of understanding the evidence, or conversed about the case or something to show a tendency to influence: *State v. Brown*, 64 Mo. 367. In explaining the reason for this rule, the court said that if a verdict should be set aside merely because of an unauthorized visit by the jury to the place of the crime without proof of something to show a tendency to prejudice the defendant, "then, when the offense is charged to have been committed at a county seat, generally a small village, over the whole extent of which one has a view from the courthouse window, and in which not infrequently the crimes for which persons are prosecuted are committed, the jury would have to be consigned to a dungeon to consider of their verdict, lest they might accidentally see some locality mentioned in the testimony."

Other cases which support this rule are *People v. Rowell*, 133 Cal. 39, 65 Pac. 127; *Tudor v. Commonwealth*, 19 Ky. Law Rep. 1039, 43 S. W. 187; *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415, 29 Atl. 505; *McDonald v. State*, 15 Tex. App. 493; *Commonwealth v. Brown*, 90 Va. 671, 19 S. E. 447.

But in *Nelson v. State* (Tex. Cr. App.), 58 S. W. 107, a conviction was set aside for the reason, among others, that the jury went to the place of the homicide and examined the relative positions of the defendant and the deceased, and the position of the only eye-witness to the tragedy, and made comments thereon. The court said: "As near as possible, jurors should be kept from the scene of the homicide, so their minds will be left free and unbiased by any extraneous matters not introduced during the trial."

3. **Taking Out or Consulting Records or Documents.**—On a trial for libel, after retiring, the jury found and read portions of a pamphlet containing the alleged libel. The pamphlet had been admitted in evidence, and partly read to the jury. It was held that the jury had "received evidence out of court," and, under Penal Code, section 1181, subdivision 2, a new trial should be granted: *People v. Thornton*, 74 Cal. 482, 16 Pac. 244. But that the jury in a criminal case, without permission of the court, took to their room papers which were given in evidence, if, so far as appears, the papers were taken inadvertently, without improper intervention by any person, and it is not shown that the jury made any use of them, is not cause for a new trial: *Bersch v. State*, 13 Ind. 434, 74 Am. Dec. 263.

So, too, Criminal Code, section 275, making it a ground for a new trial if the jury have received any papers or evidence not authorized by the court, does not apply to a folded paper accidentally taken by the jury on retiring, the contents whereof could not have influenced their verdict: *State v. Taylor*, 20 Kan. 643.

But where the county atlas was, at the request of a juror, carried into the jury-room, after the jury's retirement, and examined by them,

a new trial will be granted, in the absence of showing that the defendant had not been prejudiced: *State v. Lantz*, 23 Kan. 713, 3 Am. Rep. 215.

In *State v. Harris*, 34 La. Ann. 118, it was held that a new trial will not be granted to one convicted of manslaughter, because the jury accidentally had with them the written testimony taken at the inquest, it not appearing that the evidence was read, or that any harm resulted to the prisoner from the fact; and to same effect in *State v. Tindall*, 10 Mich. 212. But in *United States v. Clarke*, Fed. Cas. No. 14,810, 2 Cranch. C. C. 152, it was held that if the jury take out the coroner's inquest and depositions, and find the defendant guilty of murder, a new trial will be granted.

The fact that, at the trial of a criminal case on appeal in the superior court, a copy of the record of the lower court went to the jury with the other papers in the case, by inadvertence, does not entitle the defendant to a new trial: *Commonwealth v. Nash*, 135 Mass. 541.

4. Demonstrative Evidence.—It is no reason for setting aside a conviction of murder that, during a recess, one of the jurors examined a piece of the skull of the person alleged to have been murdered, which was lying on the district attorney's table, where the circumstances of the case showed that the juror could not have been misled thereby, and the fact of the juror having examined the skull being known to the prisoner's counsel before they entered the defense: *Wilson v. People*, 4 Park. C. Rep. (N. Y.) 619.

In *Kennon v. Territory*, 5 Okl. 685, 50 Pac. 172, defendant was on trial for larceny of a cow. Identification of the hide being material, it was placed before the witnesses and the jury without objection, and both prosecution and defense acted upon the theory that it was introduced in evidence. After the evidence was concluded one of the jurors, while the judge was temporarily absent from the room, stepped out of the jury-box over to where the hide was and looked at it, and afterward imparted to the jury some knowledge which was claimed they obtained from such inspection. It was held that such conduct did not prejudice the substantial rights of the defendant, the jury having fully examined the hide and noticed all its marks and peculiarities before that time, while it was being exhibited to them by counsel and the witnesses.

In *Hendricks v. State*, 28 Tex. App. 416, 13 S. W. 672, it was held that Code of Criminal Procedure, article 777, subdivision 1, which provides for a new trial in case "the jury, after having retired to deliberate on a case, have received other testimony," does not authorize the granting of a new trial in a murder case because the jury inspected the clothing worn by deceased at the time of the homicide, after they had retired, where the clothing was inadvertently left in the jury-room, and other undisputed evidence besides the clothing showed that deceased was shot in the back, and all the jurors testify that its inspection did not influence their verdict.

In *Taylor v. Commonwealth*, 90 Va. 109, 17 S. E. 812, the state put in evidence certain cartridge hulls picked up where the murder was committed. Defendant introduced other cartridge hulls of the same size, which had been taken from his gun after shooting it off during the trial, to show that the mark made by the plunger of his gun was different from the mark on the shells introduced by the state. He also put his gun in evidence, but it was not taken apart by

permission of defendant the gun was taken to the jury-room during their deliberations, where, on taking it apart, the jurors discovered that the plunger had been recently "tampered with." It was held there was no misconduct vitiating the verdict of guilty.

5. Statements by Jurors.

A. General Rule.—A verdict of conviction in a criminal case will be set aside where, during the deliberations of the jury, a juror makes statements to his fellows as of his personal knowledge concerning material issues in the case, and which influenced the jury in arriving at their verdict. There is little or no dispute among the courts as to the correctness of this rule, and among the numerous cases where it is pointedly announced may be mentioned *State v. Cross*, 95 Iowa, 629, 64 N. W. 614; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. Beam*, 1 Kan. App. 688, 42 Pac. 394; *State v. Burton*, 65 Kan. 704, 70 Pac. 640; *Richards v. State*, 36 Neb. 17, 53 N. W. 1027; *Feddern v. State*, 79 Neb. 651, 113 N. W. 127; *Booby v. State*, 4 Yerg. 111; *Donston v. State*, 6 Humph. 275; *Sam v. State*, 1 Swan, 61; *Ryan v. State*, 97 Tenn. 206, 36 S. W. 930; *McKissick v. State*, 26 Tex. App. 673, 9 S. W. 269; *Blocker v. State* (Tex. Cr. App.), 61 S. W. 391; *Battler v. State*, 33 Tex. Cr. App. 302, 109 S. W. 195; *Bailey v. State* (Tex. Cr. App.), 121 S. W. 1120.

In *Anchicks v. State*, 6 Tex. App. 524, a prosecution for rape, one of the jurors made affidavit to the effect that he was influenced in his finding by the statement of one of the jurors that he had lived in the county where a female witness for the defendant had resided, and knew that she was at the time kept by him, and was unworthy of belief.

So, also, where it appears from the uncontradicted affidavit of a juror that another juror stated, in consultation, that he knew the character of one of defendant's most important witnesses to be bad, and that he was unworthy of credit, and that affiant's verdict was naturally affected thereby, the verdict will be set aside: *McKissick v. State*, 26 Tex. Cr. App. 673, 9 S. W. 269.

In *Ellis v. State*, 33 Tex. App. 508, 27 S. W. 135, which was also a prosecution for rape, the jury stood ten to two for acquittal, but after discussing defendant's character they stood six to six. One of the jurors then told the others that he knew of the defendant's character, viz., that three years before, a neighbor had found defendant with his wife, in her bedroom, and deponent heard said neighbor warn defendant to leave the country, and that defendant did leave the neighborhood. The next ballot of the jury after these remarks was unanimous for conviction. It was held that a new trial must be granted because the jury had "received other testimony after retiring: Code Cr. Proc., art. 777, subd. 7.

In *Mitchell v. State*, 36 Tex. Cr. App. 278, 33 S. W. 367, 36 S. W. 456, which was a homicide case, it appeared that when the jury retired to consider their verdict, they stood eight for acquittal; that two of the jurors stated to the others that defendant had killed a certain man, and made other statements tending to show that defendant and other members of his family were of bad character. This was held sufficient misconduct to justify a new trial under Code of Criminal Procedure of 1895, article 817, section 7, granting a new trial where the jury, after having retired to deliberate, have received other testimony.

The reason upon which the rule, so fully established by the foregoing cases, rests, was tersely stated by the supreme court of Tennessee in *Sam v. State*, 1 Swan, 61: "The verdict of the jury must be found upon the evidence delivered to them in court in the presence of the judge and of the parties. And, as a consequence necessarily flowing from this doctrine, the rule was established at an early day that if a juror possessed any knowledge in respect to the matter in issue, as to which he might testify, he must be sworn as a witness and give his testimony openly in court as other witnesses: 3 *Easton's Commentaries*, 375. Such is the long established and inflexible rule, to which no exception can be admitted, either in civil or criminal cases. In criminal cases, more emphatically, there can be no exception under our law; because, among other rights absolutely secured by the constitution to the accused in all criminal prosecutions is the right 'to meet the witnesses face to face.'"

B. Presumptions.—There is some difference of opinion among the courts as to whether, in applying the rule with reference to statements of jurors as to facts within their personal knowledge, the jury will presume that the verdict of the jury was influenced by such statements, or whether the defendant must affirmatively show that he has been prejudiced.

In *Sam v. State*, 1 Swan, 61, it was held that where the evidence in a criminal case is conflicting, a statement by one of the jurors to his fellows, while they were deliberating as to their verdict, of facts in his personal knowledge, which will conduce in some degree to the decision of the contraverted point against the prisoner, will vitiate the verdict, and the onus is not upon the prisoner to show affirmatively that he has been prejudiced by the improper conduct of the jury. "It is enough that he may have been prejudiced, and the law will so presume."

But according to the weight of authority, the defendant must show that he has been prejudiced by the statements, or at least they must be such as would be calculated to influence the mind of a common juror.

Thus, in *Moore v. People*, 26 Colo. 213, 57 Pac. 857, a murder case it was held that the fact that, after the jury had retired to consider the verdict, certain jurors stated that defendant had killed another man some years before, does not constitute reversible error, where it does not appear that the jurors were influenced thereby, and the foreman and several of the jurors immediately protested against mentioning outside matter, the foreman cautioning the jury that they were to consider nothing except the evidence.

And in *State v. Woodson*, 41 Iowa, 425, defendant was on trial for murder. During the consideration of the case by the jury one of the jurors stated that he "was acquainted with deceased, who was a boastful young man, but innocent and quiet in disposition, and that if he made threats against defendant, he had no intention to carry them out." Two other jurors also insisted that defendant's motive in taking the life of deceased was found in the fact that deceased was a witness against defendant's brother in law, who was charged with some crime. In holding that these statements by the jurors as to their personal knowledge concerning matters not in evidence at the trial did not constitute such misconduct of the jury as to vitiate the verdict of manslaughter, the court, after stating that it had not been shown that the statements had the least effect upon the jury, said:

"We cannot presume that they had; on the contrary, we must presume that the jury was composed of honest and intelligent men, who understood that their verdict should be founded alone upon the evidence submitted to them. . . . We are clearly of the opinion that prejudice must be shown, or sufficient ground must appear for presuming prejudice, to authorize interference with the verdict on account of such matters"; and to same effect are *State v. Cowan*, 74 Iowa, 53, 36 N. W. 886, *Jack v. State*, 20 Tex. App. 656, *Cox v. State*, 28 Tex. App. 92, 12 S. W. 493, and *State v. Cross*, 95 Iowa, 629, 64 N. W. 614.

But a juror's statements to his fellows, not in evidence, made after retirement, that defendant, charged with larceny, was in the habit of stealing other things, is misconduct requiring a new trial: *Terry v. State* (Tex. Cr. App.), 38 S. W. 986; *Holmes v. State*, 38 Tex. Cr. App. 370, 42 S. W. 996.

Where, before a verdict had been reached, and while the jury were discussing the term of punishment, one of the jurors stated that accused was an ex-convict, and thereafter the jury agreed to a term of punishment greater than the minimum authorized, such statement is ground for new trial, though two of the jurors made affidavits that they were not influenced by it: *Hardiman v. State* (Tex. Cr. App.), 53 S. W. 121.

C. Statements Made After Verdict has Been Agreed upon.—Statements made by a juror to his fellows after the verdict has finally been agreed upon is not such misconduct of the jury as will vitiate the verdict. Thus, a new trial for misconduct of the jury in discussing in the jury-room another offense of which the defendant was reported guilty was properly denied, where it appeared that the other offense was not referred to in the jury-room till after the final vote of the jury was taken: *State v. Gay*, 18 Mont. 51, 44 Pac. 411. And a statement by one of the jurors to another that prosecutrix was of good character, made after they had unanimously determined defendant's guilt, was not prejudicial: *Gonzales v. State*, 32 Tex. Cr. App. 611, 25 S. W. 781. And where a jury have agreed on a verdict of guilty, and awarded the minimum punishment, the fact that incriminating evidence was afterward received from a fellow-juror in the jury-room is without prejudice: *Anglely v. State*, 35 Tex. Cr. App. 427, 34 S. W. 116.

But in *Blocker v. State* (Tex. Cr. App.), 61 S. W. 391, a murder case, after the jury had agreed on defendant's guilt, but before they had fixed the punishment, one of the jurors stated that deceased was not the first man defendant had killed, and it was also stated that, if certain evidence as to dying declarations of the deceased had not been excluded on defendant's objection, they would have known more about the reason defendant went to the penitentiary at a former time. It was held that this was sufficient misconduct to warrant a reversal of a judgment of conviction, under Code of Criminal Procedure, article 817, which authorizes the granting of a new trial when the jury receives material evidence after they have retired to consider their verdict.

In the later case of *Lankster v. State*, 43 Tex. Cr. App. 298, 65 S. W. 373, it was held that discussion by the jury, after having agreed that defendant was guilty of murder, but before fixing his punishment, of former verdicts against defendant in the same case, in which it was mentioned that he had been sentenced for twenty-five years'

confinement in the penitentiary, is misconduct requiring a reversal when the punishment assessed was not the least, though the juror made affidavits that such discussion did not influence them; and the same effect is *Hughes v. State*, 43 Tex. Cr. App. 511, 67 S. W. 104.

6. **Access to or Reading Newspapers.**—If the defendant in a criminal case has or may have been prejudiced by the reading of newspapers by the jury while in the discharge of their duty, the verdict will be vitiated: *People v. Stokes*, 103 Cal. 193, 42 Am. S. Rep. 102, 37 Pac. 207; *People v. Chin Non*, 146 Cal. 561, 80 Pac. 621; *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Ann. Cas. 176; *State v. Walton*, 92 Iowa, 455, 61 N. W. 179; *State v. Caine*, 124 Iowa, 161, 111 N. W. 443; *Cartwright v. State*, 71 Miss. 82, 14 South. 525; *State v. Jackson*, 9 Mont. 508, 24 Pac. 213; *Carter v. State*, 9 La. 440; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *United States v. Ogden*, 105 Fed. 371.

In holding that a new trial must be granted on account of misconduct of the jury, the court said: "This method of communicating and impressing upon the jury, or any member of it, the opinion of others, is open to the same condemnation which would be visited upon oral expressions of opinion touching a defendant injected into the body of the jury by some designing intermeddler. We can see no difference, unless in degree. The widely read and influential daily journal, speaking for, as well as to, the public, reflecting popular sentiment, as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single, private individual. We know of no reported case in which an outside person has been shown to have talked with the jury, or a member of it, concerning the accused when on trial for a high crime, and especially to have talked unfavorably to and with the jury of the accused, in which the verdict has not been set aside. It seems to us impossible to distinguish between the mischief done by oral and written or printed communications. In every instance in which improper influences have been brought to bear upon the jury there will arise the fear that the accused has not had that fair and impartial trial to which he was entitled": *Cartwright v. State*, 71 Miss. 82, 14 South. 525.

The reading by a jury during a murder trial of newspaper accounts correctly reporting the proceedings, and containing nothing of an unfair or prejudicial character, is not such misconduct as will require the granting of a new trial: *People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Gaffney*, 1 Sheld. 304, 14 Abb. Pr. 36.

And the mere fact that jurors, after they are impaneled, have read copies of a newspaper containing nothing about the case except that it was on trial, is not sufficient ground for a new trial: *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782. Or that some of the jurors read a newspaper report of the evidence given on the trial, when there is no reason to suppose that they were influenced thereby: *State v. Cucuel*, 31 N. J. L. 249; *United States v. Reid*, 12 How. 361, 11 L. ed. 1023.

In *State v. Williams*, 96 Minn. 351, 105 N. W. 265, it was held on a trial for murder that the fact that some of the jurors during the trial read certain newspaper articles in reference to the defendant is not ground for a new trial, when it affirmatively appears that the jury could not have possibly or intelligently returned any other verdict than the one they did return.

In *Farrer v. State*, 2 Ohio St. 54, where it was held that, when a jury without the knowledge of the court and without the presence, knowledge or consent of the prisoner, obtain a part of a newspaper purporting to contain a part of the charge of the court in the case they are considering, and use said information to guide their deliberations, the verdict ought to be set aside, notwithstanding the charge thus published may be correct.

The fact that, on a trial for murder, after the evidence had gone to the jury, two jurors read a newspaper which contained an accurate synopsis of the evidence, and also correctly stated that "defendant was not placed on the stand," is not ground for a new trial: *Williams v. State*, 33 Tex. Cr. App. 128, 47 Am. St. Rep. 21, 25 S. W. 629, 28 S. W. 958.

In *Moore v. State*, 36 Tex. Cr. App. 88, 35 S. W. 668, it appeared that while the jury were deliberating on their verdict in a prosecution for robbery, a newspaper was found in the jury-room containing a reference to the defendant and the robbery with which he was charged, and stating that one of the men who participated in the robbery was convicted and sentenced, and that defendant was under indictment in another part of the state. It was held that in the absence of a showing of prejudice by the presence of the paper in the jury-room, the verdict would not be disturbed.

7. *Receiving Mail*.—It was said by the supreme court of West Virginia, in *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799, that "No letters ought to be permitted to be received by the jury or by any member thereof who are trying a felony case, without being first inspected by the court so that the court could know that no influence calculated to injure the prisoner or the state was in that way brought to bear upon the jury." In announcing the opinion of the court, Johnson, President, said: "The reception of sealed letters by jurors during the trial of a prisoner, especially a capital case, renders the verdict vicious, and it should be set aside and a new trial granted the prisoner, who has been convicted, although the jurors, in the absence of the letters, swear that none of such letters so received in any manner related to the case on trial. . . . If the jury are permitted to receive sealed letters during the trial of a felony case, then in such a case the jury might as well not be kept together at all. No one would say, if a jury, disregarding the charge of the court, should separate and go among a crowd of people, that the verdict rendered by them against a prisoner in a felony case ought not to be set aside, although every juror might swear that he had no conversation with anyone on the case they were trying, and heard nothing said by others in relation thereto. The receipt of sealed letters, it seems to me, is more dangerous to the liberty of the citizen than a separation of the jury."

And the rule announced in this case has been applied in several other cases when the letters were received by the jury after the case had been submitted: *State v. Bland*, 9 Idaho, 796, 76 Pac. 780; *State v. McCormick*, 20 Wash. 94, 54 Pac. 764. But a letter and invoice handed to one of the jurors in a murder case by the deputy sheriff who had first read them was not ground for a new trial: *State v. Saylor*, 44 La. Ann. 783, 11 South. 132.

And the fact that in a petit larceny case a juror received and read a letter addressed to him was no ground for a new trial, when it ap-

peared that the letter had no reference to the prosecution: *State v. Magee*, 48 La. Ann. 901, 19 South. 933.

8. **Access to or Reading Law Books.**—There are some cases in which it has been held that if the jury in a criminal case, after retiring to deliberate upon their verdict, obtain access to law books bearing upon the case, it is misconduct which will vitiate their verdict: *Newkirk v. State*, 27 Ind. 1; *Jones v. State*, 89 Ind. 82; *Harris v. State*, 24 Neb. 803, 40 N. W. 317; *State v. Smith*, 6 R. I. 33.

In *Newkirk v. State*, 27 Ind. 1, the court said: "It is true that the constitution makes the jury the judges of both the law and the facts in criminal cases, but they must receive their knowledge of both in a proper manner during the trial and before they retire to deliberate on their verdict. The facts must be determined from the evidence given upon the trial, under the supervision of the court. Questions of law arising in the cause may be argued by counsel, and the trial is closed by the charge of the court to the jury, upon 'all matters of law which are necessary for their information in giving their verdict.' From these sources of information they must determine the law of the case, and cannot be permitted to take to their room communicative authorities for the purpose of ascertaining the law. Such a practice would be inconsistent with the whole theory of correct trials by jury, and would lead to the most pernicious consequences. If the jury disagree as to the charge of the court, or upon any question of law arising in the case, they may ask for further instructions to be given by the judge in open court, but they cannot be furnished with communicative law authorities for their own perusal."

But while the foregoing cases seem to hold that the mere fact that the jury in a criminal case has, after submission, obtained law books bearing upon the case, is sufficient misconduct to vitiate a verdict of guilty, according to the weight of authority, this will not constitute such misconduct when the defendant was not prejudiced thereby. As, according to many of the cases, unless it is shown by evidence that it affected the result or was prejudicial to the defendant.

Thus, it is not ground for reversal of a conviction, in a murder case, that the jury had in their room for a brief time a copy of the code but did not read it: *Lovett v. State*, 60 Ga. 257. Nor is it misconduct for a jury to procure and read law books after they had agreed upon their verdict, although it has not been formally read in open court: *State v. Wilson*, 40 La. Ann. 751, 5 South. 52, 1 L. R. A. 795; and to same effect is *Graves v. State*, 63 Ga. 740, where the court refused to grant a new trial because the jury, after they had agreed on their verdict, procured a copy of the code for the purpose of putting their verdict in proper form.

A reference by the jury during their deliberations to statutes found in the jury-room is not ground for a new trial, it not appearing that any prejudice resulted: *State v. Harris*, 34 La. Ann. 118; *Baxter v. State*, 86 Miss. 461, 38 South. 678; and to same effect is *State v. Hepper*, 71 Mo. 425; *State v. Spangh*, 200 Mo. 571, 98 S. W. 55; *Pepper v. Gaffney*, 14 Abb. Pr., N. S., 36; *People v. Dfaper*, 28 Hun. 1; *People v. Priori*, 164 N. Y. 459, 58 N. E. 668.

And in *Minos v. State*, 34 Tex. Cr. App. 472, 31 S. W. 380, it was held that the fact that a juror, in a prosecution for burglary, read a decision in one of the reports after the jury had retired, but before he had come to any conclusion as to the guilt of the defendant, and made affidavit that he was influenced thereby, is not ground for a

versal, where it does not appear how he was influenced by reading the case or that defendant was prejudiced thereby.

So, too, the reading of the statutes by the jury while deliberating on their verdict on a trial for murder, for the purpose of finding out what punishment might be inflicted under the different degrees, though, in a sense, misconduct, is not such misconduct as constitutes a ground for a new trial: *Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006.

But where a juror during the deliberation of the jury examined the code and thereafter agreed to a verdict of murder, though previously he had been in favor of a verdict of manslaughter, the verdict will be set aside: *Henson v. State*, 110 Tenn. 47, 72 S. W. 960.

III. Deliberation and Manner of Arriving at Verdict.

a. **Jury Should Deliberate as a Body.**—Where life and liberty are involved, the jury should not only be kept together from the commencement of the trial to its final termination, but after retirement they should deliberate and discuss the case as a body. "Law, reason, and public justice requires that the jury should confer together, touching the guilt or innocence of the prisoner," said the distinguished Lumpkin, speaking for the court in *Monroe v. State*, 5 Ga. 85, and after further saying that it would be establishing a most dangerous precedent to allow secret consultations, by two or more jurors at a time, in separate groups and out of the hearing of their fellows, continued: "Who can tell what influences of argument, persuasion, or otherwise might not be brought to operate, under these circumstances? One overpowering mind, in this way, would soon master and subdue the timid and doubtful, who, although individually weak and wavering, might muster courage to resist when united and associated with their fellows. False motives and reasons might be thus urged, which, if submitted to the whole panel, would be readily answered, and their influence averted." There is undoubtedly great force in the reasons thus stated by Judge Lumpkin why the jury should confer as a body when deliberating as to their verdict in a criminal case.

But the rule does not seem to be imperative, for in *State v. Turner*, 6 Baxt. 201, where defendant was on trial for murder, it was held that the jury was not guilty of misconduct, because, after retiring, they separated into squads and deliberated thus apart in regard to their verdict.

b. **Discussion and Arguments.**—The fact that jurors discuss among themselves features of the case not directly testified about is not ground for reversal: *Rorer v. State* (Tex. Cr. App.), 28 S. W. 951.

And where, on trial for burglary, a witness identified defendant in part because of his manner of shrugging his shoulders, and during the trial defendant shrugged his shoulders in the manner described by the witness, and the fact was observed by the jury, there was no impropriety in their discussing the fact in the jury-room: *People v. Mullen*, 49 Misc. Rep. 289, 19 N. Y. Cr. Rep. 589, 99 N. Y. Supp. 227.

But discussion by the jury, before determining the degree of defendant's offense and punishment, as to his failure to testify, is ground for a new trial, at least when it does not appear that it did not influence some of the jurors: *Wilson v. State*, 39 Tex. Cr. App. 365, 46 S. W. 251.

An affidavit of a juror in a criminal case that there was some discussion among the jurors as to the evidence of a witness, and that

he agreed to a verdict because he understood such witness to testify to a certain effect, does not show misconduct of the jury: *Blackwell v. State* (Tex. Cr. App.), 73 S. W. 960.

But in *Williams v. State*, 45 Tex. Cr. App. 240, 75 S. W. 509, while the jury were considering their verdict in a larceny case, a discussion arose as to the credibility of certain witnesses, and various juror detailed facts not in evidence relating to their credibility. There were affidavits that one juror had stated just prior to the calling of the case that he and another juror might as well go home, as they would not be received on the jury because defendant and his counsel knew they would convict defendant, and that another juror had stated before being selected that if they let him sit on the case he would "hang them darn horse thieves." None of these facts were in possession of the defendant or his counsel before trial. It was held to show misconduct requiring reversal.

And where a juror is not satisfied of the guilt of the prisoner, he assents to a verdict of guilty by suggestion of his fellow-jurors that the governor would pardon defendant if the jury, by their verdict, would recommend it, is sufficient cause for setting aside the verdict: *Crawford v. State*, 2 Yerg. 60, 24 Am. Dec. 467.

c. Experiments.—Experiments by jurors during their deliberation in a criminal case, to ascertain facts material to the case, but not included in the evidence, constitutes such misconduct as will vitiate their verdict. Thus, in a trial for murder, misconduct of juror in experimenting on their own account with a rifle similar to the one with which defendant killed accused, to see how far powder marks would be carried upon clothing by the fire, is ground for reversal: *People v. Conkling*, 111 Cal. 616, 44 Pac. 314.

And on a trial for an assault with intent to kill, defendant's counsel advised the jurors to try the experiment whether, as stated by witnesses for the state, worn-out boots would make certain marks in the sand. Members of the jury, after they had retired, tried the experiment, and it was held that this was a ground for reversal of a judgment of conviction: *State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782.

In *Jim v. State*, 4 Humph. 289, defendant was on trial for murder. It appeared in evidence that the shoes of the defendant were about half an inch longer than the tracks which left the house where deceased was shot. There was also the testimony of two witnesses that at the time the gun was fired which killed deceased, defendant was in a cabin adjoining the one in which the witnesses were; that before the shot was fired they heard him talking and knew his voice. After the jury had retired to consider their verdict, in order to ascertain what weight should be given to the evidence stated, they went out and measured the tracks of a juror walking and running to learn whether the tracks of a man running were not shorter than when walking, and thus found this to be true. They also sent the constable out of the jury-room and closed the door, and then talked louder than in the usual conversational tone, with the view of ascertaining whether their voices could be heard outside. The constable reported that he could not hear them. In setting aside a verdict of conviction and granting the defendant a new trial upon the ground of the jury's misconduct, the court said: "We cannot permit verdicts which have been obtained like this, upon uncertain and dangerous experiments, instead of a calm, deliberate and philosophical

examination of the proof, to stand where the lives of individuals are at stake."

In *Puryen v. State*, 50 Tex. Cr. App. 454, 98 S. W. 258, a murder case, the jury took into the jury-room, after their retirement to consider of their verdict, the bloody clothes of the deceased. The clothes had been introduced in evidence for the purpose of locating the position of the deceased, especially his right arm, at the time he was shot. Some effort was made before the jury by the district attorney to use the shot holes in the clothes to illustrate the position of the arm of the deceased, but he was interrupted while doing so and did not complete the illustration. The jury during their deliberations used the clothing to illustrate the position in which deceased's arm was at the time he was shot, as tending to show that at that particular time he was not reaching for a pistol. Some of the jurors also tried on the bloody clothes, and one of them became sick from the effect of this experiment. It was held that clothing introduced in evidence, if taken to the jury-room, should be used for the purpose for which it was introduced, and not used for experiments outside of that purpose.

But it seems that when the experiments are not made until after the verdict has been agreed upon, and the verdict is clearly right, the misconduct will not be sufficient to vitiate the verdict. Thus, in a prosecution for violating the local option law, where the defense is that the liquor sold was not intoxicating, a juror, by consent of defendant, drank nearly a quart of the liquor which was offered in evidence. Affidavits of jurors stated that he made no statement as to the effect of it until after the verdict was rendered, when he said in the jury-room that he believed that, if a person drank enough of it, it would intoxicate him. It was held that it was not proper practice to permit the juror to drink the liquor, yet in view of the fact that he made no statement to the other jurors as to the effect until after the verdict was rendered, and that the evidence was conclusive on the guilt of defendant, it was not cause for reversal: *Galloway v. State*, 42 Tex. Cr. App. 380, 57 S. W. 658.

d. Manner of Arriving at Verdict.—As a general rule, arriving at a verdict by lot, or in any other method except by the exercise of the judgment and weighing the evidence, constitutes such misconduct on the part of the jury as will vitiate their verdict. Hence, when the jury in a criminal case arrive at their verdict by agreeing that each juror shall set down on a slip of paper the term of imprisonment which he thought should be fixed, and dividing the aggregate of these figures by twelve, taking the quotient as their verdict, the verdict will be rendered invalid by reason of such misconduct: *Williams v. State*, 66 Ark. 264, 50 S. W. 517; *Walker v. State*, 91 Ark. 427, 121 S. W. 925; *State v. Branstetter*, 65 Mo. 149; *Crabtree v. State*, 3 Sneed, 302; *Joyce v. State*, 7 Baxt. 273; *Williams v. State*, 15 Lea, 129, 54 Am. Rep. 404; *Hunter v. State*, 8 Tex. App. 75; *Wood v. State*, 13 Tex. App. 135, 44 Am. Rep. 701; *Good v. State* (Tex. Cr. App.), 66 S. W. 1099, 67 S. W. 102; *Brookman v. State*, 50 Tex. Cr. App. 277, 123 Am. St. Rep. 838, 96 S. W. 928; *Craven v. State*, 55 Tex. Cr. App. 519, 117 S. W. 156, 16 Ann. Cas. 907.

But the decisions in these cases were based on the fact that the jury had previously agreed to be bound by the result thus obtained

by chance; and it is clearly established that when there was no such agreement, the verdict will not be invalid.

Thus, the fact that on a criminal trial the jury "chalked" for an average, merely as a proposition for the term of imprisonment, did not invalidate the verdict, when they had not made any previous agreement to accept the quotient as such term: *Batterson v. State*, 63 Ind. 531; *Crabtree v. State*, 3 Sneed, 302; *Glidewell v. State*, 2 Lea, 133; *Leverett v. State*, 3 Tex. Cr. App. 213; *Warren v. State*, 9 Tex. Cr. App. 619, 35 Am. Rep. 745; *Gaines v. State* (Tex. Cr. App.), 37 S. W. 331; *McAnally v. State* (Tex. Cr. App.), 57 S. W. 682; *Hill v. State*, 43 Tex. Cr. App. 533, 67 S. W. 506; *Wallace v. State* (Tex. Cr. App.), 97 S. W. 1050.

It has been held that when it is not shown that such balloting had any influence whatever in making up the verdict, the verdict will not be disturbed: *Dooly v. State*, 28 Ind. 239. Nor will a conviction be reversed because the amount of defendant's fine was fixed by dividing the total sum of the estimates of the several jurors by twelve, where it does not appear that any trick was resorted to to obtain an excessive fine: *Smith v. Commonwealth*, 98 Ky. 437, 33 S. W. 419. And where the jury agree to set down their individual verdicts, and divide the total by twelve, and be bound by the result, but do not carry out this agreement, and modify the result thus ascertained, there is no ground for setting aside the verdict: *Pruitt v. State*, 3 Tex. App. 156, 16 S. W. 773. So, also, where on a criminal trial the jury, in assessing the fine, agree to average the several assessments of each juror, but disagree to the amount so found, and impose a fine larger in amount than that determined by lot, there is no such error as will justify a new trial: *Reineke v. State* (Tex. Cr. App.), 23 S. W. 684. Neither will a new trial be granted because the jury, in fixing the term of imprisonment, agreed that each juror should write his verdict on a slip of paper, and that the sum total divided by twelve should be the term, when the result thus attained was three years and ten months, and the term fixed was four years: *Barton v. State*, 34 Tex. Cr. App. 613, 31 S. W. 671. Where jurors concurring in the guilt of the prisoner severally set down the time for which they think he should be confined in the penitentiary, and the aggregate is divided by twelve, and after the result is ascertained they all concur in it as their verdict, this is not misbehavior on the jury which will entitle the defendant to a new trial: *Thompson v. Commonwealth*, 8 Gratt. (Va.) 637.

Evidence that a juror proposed that, in determining the verdict, a majority should rule, which was assented to by the others, is not sufficient to cause the verdict to be set aside, when a subsequent ballot showed a disregard of the agreement, and on being polled, each juror assented to the verdict: *State v. Harper*, 101 N. C. 761, 9 Am. St. Rep. 46, 7 S. E. 730.

PENNSYLVANIA COMPANY v. PITTSBURG.

[226 Pa. 322, 75 Atl. 421.]

MUNICIPALITIES—Consolidation—Debts and Taxes.—The legislative act authorizing the consolidation of two or more cities may make the consolidated city liable for the indebtedness of the old municipalities, or provide for an equitable apportionment of existing burdens by requiring each of the respective municipalities to be responsible for its own indebtedness at the time of consolidation and providing for the payment thereof by taxation limited to the property located within the limits of the municipality contracting the same. (p. 1064.)

MUNICIPALITIES—Consolidation—Subjects of Taxation.—The act consolidating Pittsburg and Allegheny does not confer on the consolidated city power to create any new subjects of taxation within the old limits of each of the constituent cities, or within the limits of the consolidated city treated as a single municipality. (p. 1065.)

TAXATION.—Between the Power to Create a Subject of Taxation and the authority to levy a tax there is a wide difference. (p. 1066.)

MUNICIPALITIES—Consolidation—Subjects of Taxation.—Properties of a railway company in the city of Allegheny, not subject to taxation at the time of the annexation of that city to Pittsburg, are not, by the act of consolidation, made subject to taxation for the purpose of paying the indebtedness of the former city. (p. 1066.)

R. H. Hawkins, of Dalzell, Fisher & Hawkins, for the appellants.

Lee C. Beatty, first assistant city solicitor, and C. A. O'Brien, city solicitor, for the appellee.

328 ELKIN, J. This is an injunction bill filed to restrain the consolidated city of Pittsburg from collecting a tax of five and one-third mills upon the assessed valuation of certain real estate belonging to the appellant companies located in the former city of Allegheny, and which prior to the consolidation of the two cities was not subject to taxation as real estate because deemed to be essential and necessary to the exercise of the franchises of these public service corporations. The tax in question was levied by ordinance for "the purpose of providing sufficient revenue for the payment of the interest on the funded debt, and to provide sinking funds, as required by law, for the retirement of said debt at maturity." This ordinance covered generally all of the constituent parts of the consolidated city, but as to the old city of Allegheny it expressly provides as follows: "For the sinking fund and interest on the bonded debt, and for the payment of the separate floating indebtedness of the city of Allegheny as it existed prior to its annexation with the city of Pittsburg—upon all property taxable for state, county or city purposes within the limits of said city, as it existed prior to its annexation with the city of Pittsburg, five and one-third mills upon each dollar of valuation." A literal reading of the ordinance would seem

to be a complete answer to the contention made in behalf of the city seeking to levy and collect the tax in question. The officers authorized to assess the property and collect the tax have no greater power than the ordinance gave them, which was to levy and collect for the purposes stated a tax of five and one-third mills upon the valuation of "all property taxable for state, county or city purposes within the limits of said city, as it existed prior to its annexation with the city of Pittsburgh." It is conceded by all parties, and has been found as a fact by the learned court below, that the particular real estate affected by this proceeding and now sought to be taxed was not taxable for ³²⁹ state, county or city purposes prior to the consolidation of the two cities. The ordinance only imposed a tax on property taxable by the old city of Allegheny, and contains no warrant to include property which never had been, and under the law could not have been, taxed by that city. The law-making body of the consolidated city must have had this thought in mind, because the intention to limit the levy to property taxable by the annexed city at and prior to the time of annexation is clearly expressed. There is good reason for the action of councils thus taken. Section 5 of the consolidating act provides: "Each of the constituent cities, and the intervening land, if any, so consolidated, shall pay its own floating and bonded indebtedness and liabilities of every kind, and the interest thereon, as the same existed at the time of annexation; and the councils of the consolidated city shall levy, respectively, on the properties in each of the said cities and intervening land so consolidated, and as they existed at the time of annexation, a tax sufficient to provide funds for each to pay its own floating and bonded indebtedness and liabilities and interest, as the same may accrue." The power of the legislature to thus provide is not open to serious question. The general rule is that when two or more cities are consolidated into one municipality, the legislature, by the act authorizing the consolidation may make the consolidated city liable for the indebtedness of the old municipalities; or it may provide for an equitable apportionment of the existing burdens by requiring each of the respective municipalities to be responsible for its own indebtedness at the time of consolidation, and by providing for the payment of said indebtedness by taxation limited to the property located within the limits of the municipality contracting the same. It is not necessary to cite authorities to sustain this rule, as it is of general application unless otherwise provided by constitutional requirements. Here, then, we have in the act of consolidation an express provision that each of the constituent cities shall pay its own floating and bonded indebtedness and liabilities of every kind existing at the time of annexation and the interest thereon. The councils of the consolidated city are authorized to levy on ³³⁰ properties respectively located

within each of said cities a tax sufficient to provide funds to pay the existing indebtedness of each municipality at the time of consolidation. The legislature had the power to thus provide, and the language of the statute is so plain as to leave no doubt about its exercise. With the express provision of the act before them, the citizens of the two cities voted in favor of consolidation, but it was consolidation upon the conditions and subject to the provisions of the act authorizing the same.

As to existing floating and bonded indebtedness, each city was left with its own obligations, and the taxable property located within the territorial limits of each contracting municipality is subject to taxation for the purpose of meeting this burden which has not been shifted to other shoulders. In other words, property taxable by the former city of Allegheny remains subject to taxation for the purpose of paying its then existing bonded and floating indebtedness, and property then taxable by the old city of Pittsburg remains subject to taxation for the payment of its prior indebtedness. This, of course, does not mean that if by general statute, or rule of law, or added improvements, new taxable subjects are created in either city, they would be exempt from taxation. No such construction could or would prevail. But in this instance it is not necessary to rely on a rule of construction because the original ordinances under which the indebtedness of the city of Allegheny was created provide, *inter alia*, that "there is hereby levied and assessed, annually, upon all subjects now by law or hereafter made liable to assessment for taxation for city purposes, a tax sufficient to pay" interest and create a sinking fund as required by law. Not only do the original ordinances provide for the annual assessment and levy of taxes upon all subjects now by law or hereafter made taxable, but in the absence of any such provision, the words "taxable property" must be held to include all subjects of taxation within the territorial limits of the contracting municipality at the time the indebtedness was created, as well as all taxable subjects added in fact or by law during the continuance of the debt. The important fact to keep in mind in the present case is that ³³¹ only property taxable in the old city of Allegheny, or which under the law may become taxable therein, can be subjected to taxation for the purpose of liquidating its floating and bonded indebtedness at the time of annexation. The properties of the appellant companies sought to be taxed are essential and necessary to the exercise of the franchises of these public service corporations, and as such are not now, and never were, subject to taxation by the city of Allegheny for municipal purposes. The consolidating act did not confer upon the consolidated city the power to create any new subjects of taxation either within the old limits of each of the constituent cities, or indeed within the limits of the consolidated city treated as a single municipality.

There is a wide difference between the authority to levy and assess a tax and the power to create a subject of taxation. Municipalities are the creatures of the state, and have no powers except such as have been expressly conferred by the legislature or which arise by necessary implication. With this distinction in mind the difficulties which seem to have arisen in the present case are easily solved. The power conferred by section 8 of the consolidating act upon councils was to levy a tax upon taxable properties located in the respective cities, as they existed at the time of annexation. This did not include the power to create a new taxable subject in the former city of Allegheny for the purpose stated. Taxable subjects are created by general laws, except in some instances where, prior to the adoption of the new constitution, local acts were passed providing for the assessment of certain kinds of property, not subject to taxation under general statutes, for local purposes. Such acts could not now be passed, but when not repealed, they have been held to be in force within the limits of the district affected for the purpose intended. Real estate in the city of Allegheny was taxable under the general law, and was not affected by any local act imposing a tax for municipal purposes on the properties of the appellant companies. We find nothing in the consolidating act which authorized councils of the consolidated city to levy a tax upon any other property within the limits of the city of Allegheny for the purpose of paying its existing ³³² indebtedness than was taxable under general laws. There are other interesting questions passed upon by the learned court below and ably argued here, but for the reasons hereinbefore stated, the decree must be reversed, and no useful purpose will be served by a further discussion of them. We therefore hold that the properties of the appellant companies not subject to taxation at the time of annexation, were not made subject to taxation for the purpose of providing for the payment of the floating and bonded indebtedness of the former city of Allegheny and the interest accrued and accruing thereon, by the act of consolidation, and that by reason thereof the decree entered by the court below must be reversed.

Decree reversed, bill reinstated, and record remitted, with directions to enter such decree in accordance with the view herein expressed as will protect the rights of the parties.

Costs to be paid by appellee.

The Consolidation of Municipal Corporations is considered with reference to the constitutionality of the legislative enactment in *Pickburg's Petition*, 217 Pa. 227, 120 Am. St. Rep. 845; *State v. Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381. The legislature, on changing, dividing or annexing municipal corporations, may make provision concerning existing indebtedness, and its power so to do, unless restrained by special constitutional provision, is clear and ample. *Mayor of Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 25.

EXLER v. AMERICAN BOX COMPANY.

[226 Pa. 384, 75 Atl. 661.]

BANKRUPTCY—Preferences.—State and Federal Courts have concurrent jurisdiction under the bankruptcy act to set aside an unlawful preference, but when relief is sought in a state court and its jurisdiction is exercised, the rules of practice as established in the courts of that state prevail. (pp. 1067, 1068.)

BANKRUPTCY—Preferences—Striking Off Judgment.—It is only when the fact upon which the court is asked to strike off a judgment, regular on its face, is admitted or not questioned that it may be stricken off. Hence a court will not declare the lien of a judgment void because the judgment was entered within four months of the bankruptcy of the debtor, the allegation that he was insolvent within the meaning of the bankruptcy act at the date of the judgment being denied. (p. 1068.)

BANKRUPTCY.—An Order Declaring the Lien of a Judgment Void, and the land of the defendant not bound by it, because the judgment was entered within four months before the bankruptcy of the debtor, is in effect an order striking off the judgment. (p. 1068.)

John M. Freeman, D. T. Watson, Alexander Gilfillam and Harry F. Stambaugh, for the appellant.

Ralph Longenecker, of Gordon & Smith, for the appellee.

³⁸⁶ **BROWN, J.** On January 20, 1908, Joseph Exler, the appellant, entered a judgment in the court below against Theodore H. Geiselhart for three thousand two hundred and nineteen dollars and thirty cents upon a warrant of attorney contained in a judgment note dated September 3, 1907, and payable three months after date. On March 5, 1908, involuntary proceedings in bankruptcy were instituted against Geiselhart, and on April 25, 1908, upon his having been adjudged a bankrupt, Justus Mullert was appointed trustee of his estate. On June 13, 1908, the trustee presented his petition to the court below, setting forth that at the time the judgment was entered Geiselhart was insolvent, that, having been entered within four months of the institution of the bankruptcy proceedings, its existence and enforcement would work a preference in violation of the bankruptcy act, and an order was asked for, directing that it be stricken from the record so far as it affected the bankrupt estate of Geiselhart and the lot of land described in the petition. On July 25, 1908, the prayer of the petition ³⁸⁷ was amended, and the relief asked for was an order declaring the lien of the judgment to be null and void and releasing and discharging therefrom the property described in the petition. The rule granted on the amended petition was made absolute, on the ground that Geiselhart was insolvent on January 20, 1908, the court holding that if he was solvent at that time, the lien was valid, but, if insolvent, it was void.

In a proceeding like this, to set aside an alleged unlawful preference, state and federal courts have concurrent jurisdiction.

tion under the bankruptcy act, but when relief is sought in a state court and its jurisdiction is exercised, the rules of practice as established in the courts of that state prevail. *Collier on Bankruptcy*, 7th ed., 406, 674; *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417.

The judgment was regular on its face, and the appellant denied the right of the trustee to have it stricken off for any reason dehors the record. The fact upon which the court was asked to so summarily dispose of it—the insolvency of Geiselhart on January 20, 1908—was a disputed one, the supplemental answer averring unqualifiedly that on that date he was not insolvent within the meaning of the bankruptcy act. Under the unbroken line of our cases the court could not have stricken the judgment from the record. It is only when the fact upon which the court is asked to strike off a judgment, regular on its face, is admitted or not questioned that it may be stricken off. A judgment entered upon an admittedly forged warrant of attorney has no right to be on the record, and, upon admission of the forgery, the court having control of the record has power to strike it off. In such a case there is nothing to send to a jury: *Humphreys v. Rawn*, 8 Warr. 78; *Bryn Mawr Nat. Bank v. James*, 152 Pa. 364, 25 Atl. 835; *Long v. Lemoyne Borough*, 222 Pa. 311, 71 Atl. 211, 21 L. R. A., N. S., 474.

But it is contended that the rule as to striking off judgments ought not to apply in the present case, because all the court was asked to do, and all that it did under the amended petition, was to declare the lien of the judgment void and that the property mentioned in the petition was not bound by it. We confess our inability to recognize this distinction. In declaring ³⁸⁸ the lien to be null and void and that the real estate of Geiselhart was not bound by it, the court summarily struck it down. The very purpose of entering the judgment was to acquire the lien. As an obligation of the debtor the judgment note was as valid unrecorded as recorded, but it could become absolute security to the appellant only by being recorded and thereby becoming a lien upon the real estate of the obligor. The lien thus acquired became the most valuable incident to the obligation, and in striking it down, the practical effect was to strike off the judgment itself upon which it was based. With the lien gone the bare judgment remaining on the record was of no more value to the appellant as a claim against the bankrupt's estate than a due bill or a demand note. The life was taken out of the judgment, and it became a dead thing by the order of the court below. Its extinction was as complete as if the order had been one striking it from the record, and the rule with us as to such an order must prevail. It is to be remembered that the relief asked for was not equitable, but legal. The trustee stands upon what he alleges is his legal right under the bankruptcy act.

to have the lien of the judgment wiped out because Geiselhart was insolvent on the day it was entered. As this is the disputed question in the case, the court below was without authority to settle it. It was a question of fact upon which the alleged legal right of the trustee depended. In an equitable proceeding the learned judge might have found facts as a chancellor, but not so when he is asked on the common-law side of the court to enforce a legal right depending upon a disputed fact. Before such a right can be enforced, the disputed fact upon which it depends must be established by the verdict of a jury.

The order of the court below is reversed and the rule to show cause discharged.

Preferences in Bankruptcy and Actions to Set Them Aside are discussed in the recent cases of *Kahn v. Bledsoe*, 22 Okl. 666, 132 Am. St. Rep. 665, and authorities cited in the cross-reference note thereto. A demand is not necessary before bringing an action by a trustee in bankruptcy to set aside a conveyance or mortgage as a preference: *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725.

YOST v. COYLE.

[226 Pa. 458, 75 Atl. 721.]

JUDICIAL SALE.—Inadequacy of Price is not in itself a sufficient reason for disturbing a sheriff's sale. (p. 1070.)

JUDICIAL SALE.—Inadequacy of Price—Misdescription.—When there is not merely inadequacy of price at a sheriff's sale, but a misdescription of the property sold, plainly misleading bidders, it is the duty of the court to set the sale aside. (pp. 1069, 1071.)

Galen C. Hartman, for the appellants.

George E. Alter, of McKee, Mitchell & Alter, for the appellee.

459 **BROWN, J.** The sheriff's sale which the court below refused to set aside was on an execution issued upon the judgment which is the subject of the preceding appeal. Gross inadequacy of price and misdescription of property in the sheriff's advertisements were the main reasons urged for setting the sale aside, and are the only ones to be considered on this appeal. The property was sold to the appellee for \$11,600, subject to a mortgage of \$13,000 and accrued interest, making the actual price which he bid for it about \$25,000. In support of the allegation of inadequacy of price a number of witnesses testified that the property was worth from \$35,000 to \$40,000, and that it would have brought from \$5,000 to \$7,000 more than the price at which it was knocked

down if the description had been adequate. The inadequacy of the price was in itself no reason for disturbing the sale. When, however, there is not merely inadequacy of price, but a misdescription of the property sold, plainly misleading bidders, the proper exercise of the court's discretion in passing upon the application to set the sale aside must be reviewed.

The following is the sheriff's advertisement: "Lot of ground in Fourth Ward, formerly Fourteenth Ward, Pittsburgh. ⁴⁶⁰ Beginning on southeasterly corner of Bellefield avenue and Bayard street. Fronting 40 feet on Bellefield avenue and extending back on one side 101.65 feet and on the other side along Bayard street 106.06 feet, and having thereon a two story brick dwelling." The width of the lot on the rear is 83.93 feet, or more than double the front, but this does not appear in the advertisement. The lot is located in a portion of the city of Pittsburgh in which real estate commands high prices, and the more than double width of the lot on the rear was a most valuable incident to it. It fronted not only on Bellefield avenue, but on Bayard street, its frontage on that street being more than two and one-half times the frontage on Bellefield avenue, and the frontage on Bayard street had a depth at the rear of the lot of more than twice the depth of the front on Bellefield avenue. All this was concealed in the advertisement. A number of witnesses testified that from the advertisement they would have been led to believe that though the lines along Bayard street and on the opposite side were of unequal lengths, the lot was of uniform width throughout, for there was nothing in the advertisement to show that the line on Bayard street did not meet Bellefield avenue at right angles. The act of April 6, 1871 (Pub. Laws, 476), relating to sheriff's sales in Allegheny county, requires that the notice to be given by the sheriff of all judicial sales made by him shall be by printed handbills "fully describing the property to be sold according to the levy, with its improvements," and also by advertisements published in two daily newspapers three times before the day of sale, once in each consecutive week, designating briefly the locality and quantity of the property to be sold. The levy described the property as "beginning on the southeasterly corner of Bellefield avenue and Bayard street; thence south 15° 30' east along Bellefield avenue forty (40) feet to the northerly line of land of Jennie E. Palmer; thence north 74° 30' east along said line 101.65 feet to a pin; thence north 18° 57' west 83.93 feet to Bayard street and thence south 50° 7' west along Bayard street 106.06 feet to Bellefield avenue, at the place of beginning." If this description in the levy had been followed, as the act requires, there would have ⁴⁶¹ been no complaint about misdescription. The description of the property in the advertisement is not only insufficient and inadequate, but plainly misleading, and it may well be that the inadequate price shown to have been

bid for it was due to its misdescription. The description given in the advertisement was in plain disregard of the statutory requirement, for it did not describe the property to be sold according to the levy, nor did it give the quantity. The quantity according to the advertisements was about four thousand square feet. The actual quantity is about six thousand square feet, or one-half more. Under the circumstances, it was the plain duty of the court below to have set the sale aside. The decree confirming it is, therefore, reversed and the sale is set aside.

While a Judicial Sale will not be Set Aside for inadequacy of price, unless so gross as to shock the conscience (Costigan v. Truesdell, 119 Ky. 70, 115 Am. St. Rep. 241; George v. Norwood, 77 Ark. 216, 113 Am. St. Rep. 143; Koch v. West, 118 Iowa, 468, 96 Am. St. Rep. 394), yet inadequacy of price, especially if great, may be considered in connection with other irregularities in the proceedings, and the sale set aside upon slight additional circumstances indicating unfairness or fraud: Rogers v. Whitman, 56 Wash. 190, post, p. 1105; Lurton v. Rodgers, 139 Ill. 554, 32 Am. St. Rep. 214; Stroup v. Raymond, 183 Pa. 279, 63 Am. St. Rep. 758.

AMERICAN EXCHANGE NATIONAL BANK OF NEW YORK v. FEDERAL NATIONAL BANK OF PITTSBURG.

[226 Pa. 483, 75 Atl. 683.]

PLEDGE—Necessity of Delivery.—To Make a Valid Pledge as against other creditors, there must be an actual or constructive delivery of the possession of the property. (p. 1074.)

PLEDGE.—A Pledge of a Book Account is not effected by the delivery of a copy of the account, without a delivery of the book itself or without any assignment of the right of the owner therein. (p. 1075.)

PLEDGE—Insufficient Delivery of Book Account.—Where a debtor delivers a copy of a book account to a bank as a pledge, without delivering the book itself or making any assignment of his rights therein, and thereafter the account is collected through another bank with which he has an agreement to apply moneys passing through it to his indebtedness, the pledge to the first bank is not good as against the second bank, it and the debtor having no notice thereof. (pp. 1074, 1076.)

B. J. Jarrett, Willis F. McCook and Karl F. Overholt, for the appellant.

David E. Mitchell, Wm. A. Stone, Stephen Stone and William A. Griffith, for the appellee.

485 MESTREZAT, J. This case was tried before the court without a jury under the act of April 22, 1874 (Pub.

Laws, 109). The material and controlling facts are the following: The action was brought May 23, 1904, to recover \$4,687.49, with interest from May 23, 1903, being part of the proceeds of a draft drawn by the Eastern Tube Company to the order of the defendant bank on the Spokane Falls Gas Light Company for the sum of \$6,544.42.

In December, 1901, the Eastern Tube Company made a parol contract with the defendant bank by which it was agreed that the company would keep twenty-five per cent of the proceeds of discounts made for it by the bank as deposit as security to the bank, the said proceeds and the tube company's money on deposit to be security for the tube company's indebtedness to the bank. The tube company's balance was to be used as though it were collateral put up with the bank for its security, and to be applied in any case that the bank could have applied collateral security, whether the indebtedness was or was not due. Under this agreement the defendant bank discounted paper for the tube company, some of which was renewed from time to time.

On January 19, 1903, the tube company made its note in the sum of \$25,000 payable in four months to the plaintiff bank, and (as the note recites) deposited with the bank as collateral security "for the payment of this or any other liability or liabilities of ours to said bank, due or to become due, or that may have been heretofore or may be hereafter contracted," certain warehouse receipts, with the further provision that ⁴⁸⁸ "on the nonpayment of any liability or liabilities above mentioned the said bank . . . is hereby given full power and authority to sell, assign and deliver or collect the whole or any part of the above-named securities or any substitute therefor, or any addition thereto, . . . without demand or notice . . . and may become the purchaser of the whole or any part of such securities discharged from any right of redemption." The note was discounted by the plaintiff and the proceeds paid to the tube company. On March 26, 1903, at the request of the tube company, certain accounts receivable inter alia, four accounts against the Spokane Falls Gas Light Company, were submitted for one of the warehouse receipts held as collateral by the plaintiff bank which surrendered the receipt and received in its stead and as a substitute therefor said accounts, but there was no written assignment or delivery of the books containing the accounts to the plaintiff. The tube company agreed as plaintiff's agent, to collect the accounts for plaintiff and to pay over the proceeds, which were to be applied to the liquidation of its liabilities to the plaintiff which were due or to become due.

On May 5, 1903, the tube company drew on the Spokane Falls Gas Light Company for \$6,544.42 to the order of the defendant bank, which included the amount due on the four accounts, and as agent for the plaintiff bank deposited the draft on the same day in the defendant bank for collection. The draft was collected by the latter bank and the proceeds passed on May 20, 1903, to the credit of the tube company, which at that time had a general account with, and was a depositor of, the defendant bank.

On May 15, 1903, the tube company assigned in writing to the plaintiff bank a number of accounts aggregating more than \$30,000, among them being the four accounts against the Spokane Falls Company, aggregating \$4,687.49, and already regarded as being in the hands of the plaintiff as collateral security for payment of the note of January 19th, which would become due May 19, 1903. The tube company agreed in the assignment to collect and deliver to the plaintiff without cost all payments received by that company, the same to be applied ⁴⁸⁷ to the liquidation of its indebtedness to the bank due or to become due, or that may have been theretofore or might be thereafter contracted.

On May 21, 1903, a receiver was appointed for the Eastern Tube Company, and on May 22d, the defendant bank had in its hands a balance of \$21,907.95 of the tube company's money, which included the draft deposited by the tube company for collection. On the latter date the indebtedness of the tube company to the defendant bank was about \$100,000, and the bank, then in the hands of a receiver, applied to the indebtedness the entire deposit balance of the tube company, which was not more than twenty-five per cent of the indebtedness. At no time prior to the application of the proceeds of the draft to the tube company's indebtedness had the defendant any notice or knowledge of the claim by the plaintiff against the proceeds of the draft. This suit was the first claim made by plaintiff against the defendant bank for any part of the proceeds of the draft.

There was no evidence that the defendant was misled or injured by the conduct of the plaintiff, nor did it appear that the defendant bank made any advances on the credit of the draft.

The learned court below, in its conclusions of law, held that "in depositing the draft and collecting the account the agency of the tube company was nothing more than that it acted for the bank, the pledgee of the account with authority"; and that "the plaintiff by leaving the account in the hands of the tube company and authorizing it to collect it, but failing to take into its hands the evidence of in-

debtedness and to notify the Spokane company, is not entitled to judgment." Judgment was accordingly entered for the defendant, from which the plaintiff has taken this appeal.

The plaintiff contends that the defendant is not a bona fide purchaser for value, and was not misled or put to any loss by reason of any act of either the plaintiff or the tube company. The plaintiff bank also claims that it was a pledgee for value of the Spokane accounts before the draft was deposited for collection, and hence is entitled to the fund in controversy.

The position of the defendant bank is that it accepted the ⁴⁸⁸ draft in payment of an antecedent debt without notice of the plaintiff's claim, and that therefore the title passed to it as against the plaintiff; that at the time the draft was deposited the tube company had title to the accounts with the right to collect them, and that having collected them and deposited the money in the defendant bank, it had the right to retain the money under the pari agreement of December, 1901.

The plaintiff cannot recover in this action on the assignment of the book accounts made to it by the tube company on May 15, 1903. The money due on those accounts was collected by the tube company by means of the draft drawn by it in favor of the defendant bank which, when the money was collected, credited the amount to the account of the tube company and applied the sum to the indebtedness of the tube company to the bank. The plaintiff bank gave no notice to the Spokane company of the assignment to it of the tube company's accounts, and the defendant bank had no notice of the assignment when it collected the money and applied it to the indebtedness due it from the tube company. Under these circumstances, the title to the fund passed to the defendant bank: *Phillips' Estate* (No. 3), 205 Pa. 515, 97 Am. St. Rep. 746, 55 Atl. 211, 66 L. R. A. 760.

If the plaintiff bank is entitled to the fund in controversy, it must be by virtue of the pledge of the Spokane accounts to it as collateral security for payment of the note of January 19, 1903, given by the tube company to the plaintiff. In order to make a valid pledge as against other creditors, there must be an actual or constructive delivery of the possession of the goods. The delivery must be clear, unequivocal, complete and effective at all times so as to give notice to third parties of the pledgee's rights. A mere agreement by the debtor that the creditor shall take and hold certain property as security for his debt is insufficient: 31 Cyc. 801. Delivery of possession is sufficient if made by the transfer of the instrument which represents the property, such as a warehouse receipt, elevator receipt,

bill of lading, promissory note or an obligation or claim upon other persons. The delivery of a bank-book is sufficient to constitute a pledge of the book and money on deposit: *Boynton v. Payrow*, 67 Me. 587. In ⁴⁸⁹ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237, Rhodes, J., delivering the opinion, says (page 241): "Incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer of the title. Debts, negotiable instruments, stocks in incorporated companies, and choses in action generally, are pledged in that mode. Such transfer of the title performs the same office that delivery of possession does in case of a pledge of corporeal property. The transfer of the title, like the delivery of possession, constitutes the evidence of the pledgee's right of property in the thing pledged." In 22 *American and English Encyclopedia of Law*, second edition, 854, it is said: "As between successive pledgees without any communication with each other, that one who lawfully obtains possession at the time of the pledge, or subsequently, is entitled to be preferred. Where a contract or pledge is made, but there is no actual or constructive delivery of the goods to the pledgee, he obtains no lien, although he actually advances money on the faith of the contract of the pledge and although he acts with the utmost good faith." A book account is not pledged by the delivery of a copy of the account as security without an assignment, since such a copy does not represent the debt: *Cornwell v. Baldwin's Bank*, 12 App. Div. 771, 43 N. Y. Supp. 771.

Recurring to the facts of the present case, it will be seen that the plaintiff cannot sustain its claim to the fund in dispute on the ground that it was a pledgee of the Spokane accounts. The pledge was never completed by any actual or constructive delivery of the property pledged. This property consisted of four accounts or bills receivable which the tube company held against the Spokane Falls Gas Light Company. The accounts themselves, or rather the books containing the accounts, were never delivered to the plaintiff notwithstanding the note of January 19, 1903, stated that they had been deposited with the bank. It is conceded that no such delivery was made. There was a delivery of copies of the account to the plaintiff bank without any assignment or other transfer of the right of the tube company in or to the accounts. This manifestly was not an actual or constructive delivery of the accounts to the pledgee. The same delivery could have been made to as many ⁵⁰ parties as the tube company had creditors, and with like force and effect. It gave no notice to other parties purchasing or accepting the accounts as collateral security, or did it confer authority on the plaintiff bank to enforce payment against the Spokane company by an action at law.

The delivery of the copy, therefore, transferred neither the title nor the possession of the accounts to the plaintiff bank and hence was insufficient to create a lien on the accounts in favor of the bank as against subsequent purchasers, pledgees or creditors of the tube company without notice.

The plaintiff bank, not having completed its pledge by securing a delivery of the Spokane accounts, is not in a position to invoke the rule against the defendant, relied on by the appellant and enunciated in *First Nat. Bank v. Gregg & Co.*, 79 Pa. 384, and kindred cases, that as against the plaintiff the defendant could not claim the fund in dispute because it had made no advances or had given no new credits to the tube company on the faith of the accounts. In other words, before the plaintiff bank can insist upon the enforcement of that rule, it must show that it had a valid pledge of the Spokane accounts at the time the draft or its proceeds were deposited in the defendant bank.

The assignments of error are overruled and the judgment is affirmed.

Pledges and Collateral Securities are discussed in the note to *Grigg v. Day*, 32 Am. St. Rep. 711.

To Make a Valid Pledge There must be a Delivery of the property, either actual or constructive, and in the absence thereof good faith does not avail the pledgee: *Geilfuss v. Corrigan*, 95 Wis. 651, 66 Am. St. Rep. 143; *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 468; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 322. As to the sufficiency of the delivery, see *American Pig Iron etc. Co. v. German*, 126 Ala. 194, 85 Am. St. Rep. 21; *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302.

MCKINLEY v. MARTIN.

[226 Pa. 550, 75 Atl. 734.]

WILL—Condition Precedent—Vesting of Estate.—A clause in a will, following a devise to the testator's wife for life, "To my son Joseph I allow the house on Poplar Alley . . . ; if he is living & cohabiting with his divorced wife, he shall never inherit that property," creates a condition precedent; and if the son does not violate it before the testator's death, the estate vests absolutely in him, and is not defeated by his living with the divorced wife between the time when the will goes into effect and the termination of the life estate. (p. 1077.)

WILL—Time of Taking Effect.—Wills should be construed to speak and take effect as if executed immediately before the death of the testator, unless a contrary intent appears. (p. 1077.)

WILL—Vesting and Divesting of Estate.—A construction of a will is favored which vests an absolute estate rather than a contingent or defeasible one. The law regards with disfavor conditions subsequently divesting a vested estate. (p. 1077.)

George H. Quail, Charles A. O'Brien and Charles W. Ashley, for the appellant.

John M. Hunter, for the appellees.

551 PER CURIAM. This was an action of ejectment, and both parties claimed title under the following clause of the will of Arthur Martin, which followed a devise of his real estate to his wife for life: "To my son Joseph I allow the house on Poplar alley . . . ; if he is living or societing with his divorced wife, he shall never inherit that property, it shall go to Lizzie Martin McKinley, to support her fatherless children, Lizzie to pay Joseph ten dollars a year." It appeared at the trial that the son had lived with his divorced wife at times between the testator's death and the termination of the life estate, but there was no proof, nor direct offer of proof, that they had lived together between the date of the will and the testator's death. The learned trial judge held that the condition on which the son was to take was a condition precedent, and that the estate vested absolutely in him when the will went into effect, and that it was not defeated by his subsequent conduct. In this there was no error. Wills should be construed to speak and take effect as if executed immediately before the death of the testator, unless a contrary intent shall appear: Act of June 4, 1879, sec. 1, Pub. Laws, 88. A construction is to be favored which vests an absolute estate rather than a contingent or defeasible one. The law regards with disfavor conditions subsequently divesting a vested estate: Jackson's Estate, 179 Pa. 77, 36 Atl. 156.

The judgment is affirmed.

Conditions Precedent in Wills and Deeds are considered in the note to Brennan v. Brennan, 102 Am. St. Rep. 366.

A Will Takes Effect at the Death of the Testator: Rudolph v. Rudolph, 207 Ill. 266, 99 Am. St. Rep. 211; and presumptively speaks as of that date; Heaston v. Krieg, 167 Ind. 101, 119 Am. St. Rep. 475. But with respect to the objects of a gift or the persons to be benefited by it, a will is construed as speaking of the time when made, rather than of the date of the testator's death: Lavender v. Rosenheim, 110 Md. 150, 132 Am. St. Rep. 420.

The Law Favors the Vesting of Estates, and if possible construes the terms of a will as creating a vested estate rather than a contingent one: Patton v. Ludington, 103 Wis. 629, 74 Am. St. Rep. 910; Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Gray v. Whittemore, 192 Mass. 367, 116 Am. St. Rep. 246.

DICKSON v. McCARTNEY.

[226 Pa. 552, 75 Atl. 735.]

JUDICIAL SALE—Right of Ex-sheriff to Sue Bidders.—A sheriff whose term of office has expired may maintain an action against defaulting bidders to recover the amount of bids at a sale held by him while in office. (pp. 1078, 1079.)

JUDICIAL SALE—Failure of Title—Caveat Emptor.—A bidder at a sheriff's sale cannot refuse to pay his bid and take the property, on the ground that the sale will convey no title. (p. 1078.)

JUDICIAL SALE—Failure of Title—Remedy of Bidder.—If a bidder, between the time of his bid and the date of a resale, discovers facts relating to the title which causes him to reject it, and he has good reason for not making payment, his remedy is to apply to the proper court to have the sale set aside. (p. 1080.)

JUDICIAL SALE—Necessity of Tendering Deed.—It is not necessary for the sheriff at execution sale to tender a deed to the purchaser in order to hold him to his bid. (p. 1080.)

George H. Quail, for the appellant.

W. H. S. Thomson, Frank Thomson and Donaldson Brothers, for the appellees.

554 **POTTER, J.** This is an appeal by plaintiff from an order discharging a rule for judgment for want of a sufficient affidavit of defense. The action was assumpsit, and was brought in the name of James W. Dickson, sheriff, to recover from the defendants, who were defaulting bidders at a sheriff's sale, the difference between their bid and the amount realized at a subsequent sale of the property. The defendants question the right of a sheriff whose term of office has expired to maintain an action against a defaulting bidder, to recover the amount of his bid at a sale held by the sheriff during his term of office. In looking through our cases for light upon this point, it appears that in *Emery v. Drum*, 36 Pa. 123, the suit was by "Abram Drum, late sheriff of Luzerne county," to recover for the use of the plaintiff the amount of the defendant's bid at a sheriff's sale. The question of the right of the plaintiff to maintain the action after the expiration of his term does not seem to have been directly raised, but at any rate the action was sustained. In *Peck v. Whitaker*, 103 Pa. 297, suit was brought by "Aaron Whitaker, late sheriff of Luzerne county," against a defaulting bidder to recover the difference between his bid and the price realized at a subsequent sale of the property. The court below instructed the jury that the plaintiff was entitled to recover, and judgment in favor of the plaintiff was affirmed by this court. In the case of *Fife v. Bohlen*, 22 Fed. 878, a suit against the defaulting purchaser was brought by a sheriff after his term of office had expired. It was there held that the suit was

be maintained, Judge Acheson in his opinion saying (page 880): "The action was commenced more than two years after Fife's official term as sheriff expired, and this, it is claimed, is an obstacle to the maintenance of the suit. But it cannot be doubted that an ex-sheriff may sustain such action, especially in a case like the ⁵⁵⁵ present, where he sues for the use of lien creditors of the defendant in the execution under which he made the sale in question." There is no doubt but that the sheriff continues to be liable after the expiration of his term for his official acts, and that he and his sureties may be sued after he is out of office: Act of March 28, 1803 (4 Sm. Laws, 45), sec. 4; and act of April 3, 1860 (Pub. Laws, 650), secs. 1, 2. It would only be reasonable, therefore, that he should have the power to maintain a suit where the cause of action accrued during his term. In *Adams v. Adams*, 4 Watts, 160, Justice Kennedy, in speaking of the sheriff, said: "He is considered the principal himself in such cases, as well as the real party making the contract of sale. . . . He alone has the right to receive the money arising therefrom, and is responsible for the legal appropriation of it, unless it is brought by him into court for that purpose." The responsibility thus placed upon an outgoing sheriff to receive the proceeds of a sale and distribute them according to law would seem necessarily to carry with it the right to sue for the collection of such proceeds.

As a matter of sound principle, we have no doubt that an ex-sheriff may maintain such an action as this. The sheriff is merely the legal plaintiff, and the suit is solely for the benefit of the lien creditors entitled to the fund.

As to the second question raised by this appeal, we are equally clear. It is well settled that a bidder at a sheriff's sale cannot refuse to pay his bid and take the property, on the ground that the sale will convey no title. In the late case of *Pepper v. Deakyne*, 212 Pa. 181, 61 Atl. 805, Chief Justice Mitchell said (page 185): "A defaulting bidder is liable for the loss occasioned by his failure to comply with the terms of the sale, and it is equally well settled that the measure of damages is the difference of price on a resale fairly conducted upon terms not less advantageous to the purchaser than the first." In *Smith v. Painter*, 5 Serg. & R. 223, 9 Am. Dec. 344, Justice Duncan said (page 225): "The sale by sheriff excludes all warranty. The purchaser takes all risk. He buys on his own knowledge and judgment. Caveat emptor applies in all its force to him. If this were not the law, an execution, which is the end of the law, would only be the ⁵⁵⁶ commencement of a new controversy; the creditor kept at bay during a series of suits, before he could reap the fruits of his judgment and execution." In *Wells v. Van Dyke*, 106 Pa. 111, Justice Paxton said (page

115): "It is no answer to say that the plaintiff bought a worthless title. That is begging the question. The execution issued upon the bond was a valid execution against the husband, and the sale thereunder passed any title there may have been in him. . . . A man who buys a worthless title at a sheriff's sale, and pays for it, or is allowed a credit on his bid, which is substantially the same thing, has no standing to repudiate the transaction subsequently."

It may be that the enforcement of the rule which requires a bidder to make good his bid at a sheriff's sale will work hardship upon the defendants in this case. But if so, they have themselves to blame. They admit that between the time when they made the bid and the date of the resale, they learned the facts relating to the title, which caused them to reject it; yet they made no application to the court for relief. If they were misled or deceived, or had any good reason why they should not have been required to make payment of the purchase money, their remedy was to apply to the proper court to have the sale set aside. As Chief Justice Mitchell said, in *Pepper v. Deakyne*, 212 Pa. 181, at page 187, 61 Atl. 805, sheriff's sales "belong to the class of legal problems in which to have a fixed rule by which all parties may clearly and readily know their rights and responsibilities is more important than the theoretical perfection of the rule itself." Nor was it necessary for the sheriff to tender the deed to the purchaser in order to hold him to his bid. In *Allen v. Gault*, 27 Pa. 473, 67 Am. Dec. 485, Chief Justice Lewis said (page 479): "It is the duty of the purchaser to pay his money to the officer of the law, according to the conditions of the sale. The sheriff is not bound, like an individual, to tender a deed before he demands the money. The court will see that justice is done to the purchaser." In *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222, a case in which the superior court, in an action like the present one, reversed the order of the court below refusing judgment for want of a sufficient affidavit of defense, Henderson, J., said (page 228): "The averment that the sheriff ⁵⁵⁷ was bound to tender a deed to the defendant and demand payment of the balance of the purchase money cannot be maintained."

There is no suggestion or pretense that the resale was not made in exact accordance with the published conditions made known to the defendants at the time of the first sale.

The judgment is reversed, and the record is remitted to the court below, with direction to enter judgment against the defendants for want of a sufficient affidavit of defense, unless other legal or equitable cause be shown why such judgment should not be entered.

The Authority of Sheriffs After the Expiration of Their Terms of Office is the subject of a note to *Tukey v. Smith*, 36 Am. Dec. 705.

The Rule of Caveat Emptor Applies to Judicial Sales, and the purchaser acquires only such estate or interest as the debtor has: *Brady v. Carteret Realty Co.*, 67 N. J. Eq. 641, 110 Am. St. Rep. 502; *Milner & Kettig Co. v. De Loach Co.*, 139 Ala. 645, 101 Am. St. Rep. 63; *Manternach v. Studt*, 240 Ill. 464, 130 Am. St. Rep. 282; *Matson v. Johnson*, 48 Wash. 256, 125 Am. St. Rep. 924.

Vacating Satisfaction of Execution Because Title of Purchaser Fails, deals at length with the evolution of the "Remedy and the Status of Purchasers at Sheriffs' Sales" as the monographic note to *Sturdivant v. Ward*, ante, p. 35.

JORDAN v. CHAMBERS.

[226 Pa. 573, 75 Atl. 956.]

ADVERSE POSSESSION—Time When Title is Devested.—The effect of the statute of limitations is to transfer to an adverse occupant the title against which it has run; but the title of the original owner is unaffected and untrammelled until the last moment, and when it is vested in the adverse occupant by the completion of the statutory bar, the transfer has relation to nothing which preceded it. (p. 1083.)

DEED—After-acquired Title by Adverse Possession.—Where one in the adverse possession of land undertakes to convey the coal underneath when he has no title, but afterward he completes the adverse holding so as to acquire title thereby, he is estopped from denying the grantee's equitable ownership in the coal, and may be compelled to convey to him. (pp. 1083, 1084.)

DEED—After-acquired Title—Estoppel.—A conveyance before the grantor has acquired the title operates as an agreement to convey, which, when the title has been subsequently acquired, may be enforced in chancery; but the conveyance does not vest title of itself by estoppel. (p. 1084.)

DEED—After-acquired Title—Estoppel.—Where one conveys with a general warranty land which he does not own at the time, but afterward acquires the ownership of it, the principle of estoppel is that such acquisition inures to the benefit of the grantee because the grantor is estopped from denying that he had the title in question. (p. 1084.)

DEED—After-acquired Title—Estoppel.—The estoppel of a grantor, who subsequently acquires title for what he has previously undertaken to sell, inures only to the benefit of his grantee. Those not privies or parties to the original conveyance can take no advantage of the estoppel arising from it. (p. 1084.)

DEED—After-acquired Title by Adverse Possession.—Where the adverse occupant of land conveys the coal thereunder at a time when he has no title, but he or his successor afterward completes title by adverse possession, he holds it in trust for the grantees, and may be compelled to execute them a conveyance. But if his successor, after the expiration of the statutory period requisite to vest him with title, and after he has taken a deed for one-third of the coal from one of the three grantees, brings ejectment against the holder of the record title, he may recover the whole fee. The outstanding equitable title to two-thirds of the coal is of no avail to the record owner as against the holder of the legal title to the surface and the coal. (pp. 1084, 1085.)

EJECTMENT — Conclusiveness of Judgment as Between Defendants.—Where the original parties in ejectment both claimed from the holder of the record title, but other persons claiming the land by adverse possession are added as defendants, a judgment for the defendants, while conclusive against the plaintiffs, is not conclusive as between those defendants claiming by the record title and those claiming by adverse possession. (p. 1085.)

James P. Patterson, James H. Payne and Boyd Crumrine for the appellant.

Robert Woods Sutton, George C. Burgwin and George E. Shaw, for the appellee.

578 BROWN, J. The title to the land involved in this ejectment passed out of the commonwealth in 1817, and Mary Robb acquired title to it by deed dated September 15, 1832. After her death it was sold in 1837 by her administrator, the father of the appellant, under an order of the orphans' court for the payment of debts, and the title which the appellant claims passed to him through sundry conveyances, starting with the deed from Mary Robb's administrator to Hugh Toner and ending with that of the sheriff of Allegheny county to himself. Though an unbroken chain of title by deed was shown in the appellant, the proof submitted by the appellee, whose claim to title by adverse possession was sustained by the jury, was that from 1837 to 1897—a period of sixty years—possession of the land had never been taken by the grantee of Mary Robb's administrator nor by any subsequent grantee claiming under Toner.

The adverse possession upon which the appellee relied and recovered started in 1865. In that year—twenty-seven years after the sale by Mary Robb's administrator—Jane Robb, the widow of Oliver Robb, a son of Mary Robb, was in possession of the farm, living on it and claiming it as her own. There was no title in her out of Mary Robb. By her last will and testament, admitted to probate October 12, 1869, Jane Robb devised the farm to her son Robert. On August 16, 1870, he executed a general warranty deed for the coal underlying the property to Thomas J. Keenan, Malcolm Hay and Robert Woods. In 1874 his interest in the farm, excepting the coal, was sold at sheriff's sale, and, by various conveyances, it finally became vested in Herman Handel, to whom Thomas J. Keenan executed a deed for the one-third interest in the coal which Robert Robb had undertaken to convey to him in **579** 1870. Upon the death of Herman Handel the property passed to the appellee in 1897 under proceedings in partition in the orphans' court of Allegheny county. Under instructions free from error as to the measure of proof required from the appellee to sustain the title claimed to have been acquired by her by adverse possession, the jury, with ample evidence before them, found her title to be good.

It is most earnestly contended that, as the title to two-thirds of the coal is still outstanding in Malcolm Hay and Robert Woods, or their representatives, under the deed of 1870 from Robert Robb, a general verdict in favor of the plaintiff for the land, including the coal, ought not to be sustained. While at first blush this may seem plausible, it is clear, upon reflection, that it cannot avail the appellant. When Robert Robb conveyed the coal in 1870 he had no interest in it nor in the surface above it. In 1865—five years before—Jane Robb, his mother, became the adverse occupant of the property, and for five years after her death he continued the adverse possession as her devisee, but during those ten years neither she nor he acquired any right in the property as against the real owner or owners, and against them nothing could have been acquired by adverse possession until the full statutory period of twenty-one years' adverse possession had expired. During all those twenty-one years the trespassers could at any time have been driven from the land by the holders of the paper title. During that period there was no title at all in Jane Robb or in anyone claiming under her as the adverse occupier of the premises. In 1886, and not before, title by adverse possession became rooted in the land, but its roots went no deeper than 1886. "If, according to Lord Mansfield, the right of possession is taken away from the former owner, and according to Chief Justice Tilghman, it is acquired by the disseizor's occupancy for the statutory period, Judge Gibson was strictly accurate when he said, in *Graffius v. Tottenham*, 1 Watts & S. 494, 37 Am. Dec. 472, that the effect of the statute was to transfer to the adverse occupant the title against which it has run. He added, 'the title of the original owner is unaffected and untrammelled till the last moment, ⁵⁸⁰ and when it is vested in the adverse occupant, by the completion of the statutory bar, the transfer has relation to nothing which preceded it; the instant of conception is the instant of birth'": Woodward, J., in *Schall v. Williams Valley R. R. Co.*, 35 Pa. 191. By the deed from Robb to Keenan, Hay and Woods there was no severance of the coal. There could not have been, for the deed conveyed nothing to them. Neither these grantees nor anyone claiming under them at any time before or since the acquisition of the title by adverse possession in 1886 has made any attempt to sever the coal from the surface.

In 1886, when title by adverse possession vested in Handel, then in possession of the surface, not only it, but what was beneath it, vested in him; but when the title so vested in him he was in the same position as Robb would have been in in 1886, if still in adverse possession of the property, claiming ownership in it by such possession. Having undertaken to convey the coal when he had no title to it, if confronted by his con-

veyance of the same at the time of his acquisition of title by adverse possession, he would have been estopped, as against his grantees, from denying their equitable ownership in the coal and could have been compelled to convey to them. "It is not to be doubted that a vendor who undertakes to sell a full title for a valuable consideration, when he has less than a fee simple, but afterward acquires the fee, holds it in trust for his vendee, and will be decreed to convey it to his use." *Clark v. Martin*, 49 Pa. 299. In *Chew v. Barnett*, 11 Serg. & R. 389, Judge James Wilson conveyed to Chew before he had title to the property. A conveyance was subsequently made to him by his vendors under articles of agreement with him. To secure the purchase money he executed a mortgage upon the property upon which it was subsequently sold at sheriff's sale. When Chew, in an action of ejectment, sought to recover the property from the sheriff's vendees, it was held that their title was paramount to his, and it was said by Gibson, J.: "What is the nature of the estate which Mr. Chew acquired by the conveyance from Judge Wilson? When that conveyance was executed, the legal title was in Jeremiah Parker, by patents from the commonwealth; ⁵⁸¹ and Judge Wilson having nothing but an equitable title under the articles, could convey nothing more; his deed, therefore, passed to Mr. Chew only an equitable title. But it is said, the subsequent conveyance from Jeremiah Parker to Judge Wilson inured to the benefit of Mr. Chew. It did so; but only in equity, and to entitle him to call for a conveyance from Judge Wilson, and not as vesting the title in him, of itself as contended, by estoppel. The facts presented constitute the ordinary case of a conveyance before the grantor has acquired the title; in which the conveyance operates as an agreement to convey, which, when the title has been subsequently acquired, may be enforced in chancery." Where one conveys with a general warranty land which he does not own at the time, but afterward acquires the ownership of it, the principle of estoppel is that such acquisition inures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his warranty, that he had the title in question. *Burners v. Keran*, 24 Gratt. 42. But the estoppel of the grantor, who subsequently acquires title for what he had undertaken to previously sell, inures only to the benefit of the grantee, who can compel a proper conveyance after the acquisition of title by the grantor. Those who were not parties or parties to the original conveyance can take no advantage of estoppel arising from it: *Allen v. Allen*, 45 Pa. 400. Estoppels may be by deed, but estoppels by deed avail only in favor of parties and privies: *Sunderlin v. Struthers*, 47 Pa. 411. To this appellant the estoppel of the appellee as against Robert Robb's conveyance of the coal is unavailing, for he

was no party or privy to it. The situation as it existed at the time this ejectment was brought was a title in the appellee for herself absolutely to the surface and one-third of the coal, and as trustee for Hay and Woods, or those claiming under them, for an equitable title to two-thirds. But this outstanding equitable title to a portion of the coal was of no avail to the appellant as against the appellee, the holder of the legal title to the surface and of the coal, entitled under that title to possession of both.

In 1902 an ejectment was brought for this land by Rebecca ⁵⁸³ J. Bennett et al., claiming by descent from Mary Robb. The original defendant in the action was the present appellant, but the appellee and others, as claimants, were made codefendants. The jury were sworn as against all the defendants, and the verdict having been rendered in their favor, the further contention of the appellant is that his title is res adjudicata, in view of that verdict. All that need be said as to this is that the verdict was in favor of all the defendants but settled no title in dispute among themselves. Whether Chambers could assert title as against his codefendants, or any of them, remained, as the court properly said in overruling a motion for a new trial, to be settled in a controversy likely to arise between them. This is that controversy.

Nothing in the assignments of error calls for further discussion. They are all overruled and the judgment is affirmed.

The Passing of After-acquired Title by a Deed, or the estoppel of a grantor who acquires title for what he has previously undertaken to sell, is discussed in the notes to Trull v. Eastman, 37 Am. Dec. 129; Partridge v. Patten, 54 Am. Dec. 635; Frink v. Darst, 58 Am. Dec. 583; Ford v. Unity Church Society, 41 Am. St. Rep. 722. Recent cases discussing this question are: New England Mortgage etc. Co. v. Fry, 143 Ala. 637, 111 Am. St. Rep. 62; Bernardy v. Colonial etc. Mtg. Co., 17 S. D. 637, 106 Am. St. Rep. 791; Bessemer Irrigation Ditch Co. v. Woolley, 32 Colo. 437, 105 Am. St. Rep. 91; Walsh v. Abbott, 145 Cal. 285, 104 Am. St. Rep. 38; Altemus v. Nickell, 115 Ky. 506, 103 Am. St. Rep. 333.

SIEGWARTH'S ESTATE.

[226 Pa. 591, 75 Atl. 842.]

SPENDTHRIFT TRUST—Assignment by Beneficiary.—When a testatrix gives property to her executor to pay the income therefrom to her sons, "but no part of the principal of said estate is to be given to my said sons for five years after my death, and then only when in the judgment of my executor they shall have proven themselves to be entirely competent and qualified to take proper care of the same," an assignment by one of the sons within five years after the death of the testatrix is without effect, and his assignee cannot have an accounting against the trustee. (p. 1087.)

The portion of the will referred to in the opinion is as follows: "In respect to the share, part or portion of my estate, given to my sons Philip Siegwarth and William Siegwarth, I direct that the same be held by my executor, hereinafter named in trust for my said sons Philip Siegwarth and William Siegwarth, the income and clear annual profit arising from the interest or share hereby given is to be paid to my said sons Philip Siegwarth and William Siegwarth, but no part of the principal of said estate is to be given to my said sons Philip Siegwarth and William Siegwarth, for five years after my death, and then only when in the judgment of my executor, they shall have proven themselves to be entirely competent and qualified to take proper care of same, at which time the said trustee shall pay the same over to my said sons Philip Siegwarth and William Siegwarth, and in the event of the death of either of my said sons Philip or William Siegwarth, without issue, then their share or shares shall revert back to my estate, and shall go to and be divided among my remaining heirs."

W. A. Hudson, for the appellant.

R. S. Martin and Jere Carney, for the appellee.

⁵⁹² **ELKIN, J.** The appellant who is the assignee of the legatee filed a petition ⁵⁹³ in the court below asking for an accounting by the trustee of the cestui que trust treating his share of the estate as absolute, while in fact the executor holds it as part of the estate of the testatrix and is exercising supervision over it under the directions of the will. In the consideration of this case it must be borne in mind that we are dealing primarily with the estate of the testatrix and only secondarily with the share set apart for the benefit of her son who has undertaken to make an assignment of his interest to appellant. The estate belonged to the mother, and she could dispose of it as she chose and in any manner not unlawful. The son only took what his mother gave him and upon such conditions and restraints as she thought proper to impose.

We agree with the views expressed by the learned court below wherein it is held that irrespective of the character of the estate in William there is seated upon it an active trust at least for a period of five years and maybe longer, and inasmuch as the five-year period has not yet expired he has not come into possession of his share, which is still held by the executor in trust for the uses and purposes stated in the will. The duties of the executor with respect to the trust estate are active and continuing during the trust period and are being performed as the will directs. If this appeal be sustained, the intention of the testatrix to safeguard her benefaction against the improvidence or incompetency of the beneficiary will be defeated. This should not be allowed unless positive and imperative rules of law so require. We think it is not necessary to adopt a rule of construction the result of which will be to defeat the plain intention of the testatrix as expressed in the will. In this proceeding it is not necessary to consider or determine the kind and character of the estate given to William because the time has not yet arrived either for himself or for his assignee to demand that the estate be turned over to the person or persons ultimately entitled to the use and enjoyment of it. It is held in trust for the benefit of William as the will provides, and during that period the hands of all parties are tied so that the corpus of the trust estate at least may not be disturbed, and since the income was intended for the personal use of the son and the trust being ⁵⁹⁴ in its nature spendthrift, he should not be permitted to barter away what was given for his benefit before the time fixed for vesting the absolute estate in him either by the lapse of time or by his proving himself worthy to receive it as the testatrix directed. The petitioner has no standing to demand an accounting, and we find no error in the disposition made of the case by the learned court below.

Decree affirmed at the cost of appellant.

Spendthrift Trusts are discussed in the notes to *Smith v. Towers*, 9 Am. St. Rep. 405; *Garland v. Garland*, 24 Am. St. Rep. 686. Recent cases discussing the validity of such trusts are: *Morgan's Estate*, 223 Pa. 228, 132 Am. St. Rep. 732; *Merchants' Nat. Bank*, 140 Iowa, 308, 132 Am. St. Rep. 267; *Huntress v. Allen*, 195 Mass. 226, 122 Am. St. Rep. 243; *Wenzel v. Powder*, 100 Md. 36, 108 Am. St. Rep. 380; *Kessner v. Phillips*, 189 Mo. 515, 107 Am. St. Rep. 368. A testator may, by appropriate language, create an equitable estate for the life of a devisee, of which he shall be entitled to the possession and profits, but which shall be inalienable by him and beyond the reach of his creditors: *Mattison v. Mattison*, 53 Or. 254, 33 Am. St. Rep. 829.

BENDER v. BENDER.

[226 Pa. 607, 75 Atl. 859.]

WILL.—Interpretation Where Language is Clear.—A testator must be allowed to be his own interpreter when he expresses himself in language free from obscurity, which, as by him employed, conveys a certain definite meaning, to the exclusion of any other (p. 1089.)

WILL.—Construction of Word "or."—A devise to "Johannes Bender or his children" is substitutional, and the word "or" will not be construed to mean "and" if there is nothing in the general scheme of the will nor in any provision therein requiring such interpretation. The son, if he survives the testator, takes a fee. (pp. 1089, 1090.)

WILL.—Ordinary and Grammatical Sense of Words.—In construing a will it should be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity or some repugnance or inconsistency with the declared intention of the testator, as extracted from the whole instrument, will follow from so reading it. (pp. 1090, 1091.)

WILL.—Words and Limitations may be Supplied or Rejected when warranted by the immediate context or the general scheme of a will, but not merely on a conjectural hypothesis of a testator's intention, however reasonable, in opposition to the obvious sense of the instrument. (p. 1091.)

Wm. E. Schoyer, of Lyon & Hunter, for the appellant.

S. G. Nolin, D. S. McCann and James T. McDonald, for the appellee.

⁶¹⁰ **STEWART, J.** The case turns on the devise contained in the will of Philip Bender made March 13, 1895, and probated November 25, 1896. Testator gave, first, to his wife a life estate in all his property. Then, following a description of the particular premises here in dispute, he directed as follows: "House and lot to go to Johannes Bender or his children." Johannes was a son of the testator, and the plaintiff in the action below is a son of Johannes, by a first wife. Testator's widow died in 1904, Johannes surviving. The latter died October 23, 1905. By his last will duly probated he devised the lot in dispute to the defendant, who was his second wife. This sufficiently indicates the status of each of the several parties to the controversy. Philip Bender, whose will we are considering, left two daughters, both married, and three sons also married. He devised to each, in one form or another, a specific piece of property. The devise to each daughter was to her individually, unaccompanied by any words indicating that anything short of an absolute estate was intended by the testator. The several devises to the sons were alike in form, but differed ⁶¹¹ from the devises to the daughters in that in each case the devise was to the son, "or his children." We mention this circumstance only to note that Johannes acquired the same

estate in the lands devised to him that his brothers acquired in the land devised to them respectively; and the further fact, that for his own purposes, the testator clearly distinguished between the estates given his daughters and those given his sons. The case presents a single question, What estate or interest did Johannes acquire under the devise to him "or his children"? If a fee simple estate contingent upon his surviving the testator or the life tenant, as the case might be, then it follows that the estate became absolute in him, and passed to the defendant as his devisee. If, on the other hand, he took but a life estate, then the fee passed directly to the plaintiff for his proportional interest therein, whatever that might be. The action was ejectment; and a verdict was directed for the plaintiff, the court reserving as question of law the effect to be given the devise. A motion for judgment non obstante was subsequently dismissed, the court holding that the word "or" as it occurs in the devise should be read "and"; and that so corrected the devise gave to Johannes simply a life estate. We are not concerned to inquire what estate Johannes would take under this reconstructed devise. The question is, What estate did the testator intend him to take? Whence is derived the authority to make any alteration in the devise as written? Clearly this was a case where the learned court fell into serious error through attempting to construe something which did not call for construction. There was nothing in the devise that called for the application of artificial rules in order to discover the testator's intention. A testator must be allowed to be his own interpreter when he expresses himself in language free from obscurity, and which, as by him employed, conveys a certain definite meaning, to the exclusion of any other. When he succeeds in doing this he has expressed his own meaning, and that the law accepts as the equivalent of intention. That his testator so succeeded in this particular devise admits of no question. In grammatical construction the devise is ⁶¹² entirely correct; and it is so definite in expression and terms that but one meaning can be derived from it. It points unmistakably to an alternative gift, and with equal certitude to the intended alternate beneficiary. Why, then, shall there be an exposition of the devise contrary to the words used? That it is modified or changed in any way by subsequent reference to it in the will cannot be pretended, for it is not once referred to. That it conflicts with any general theme which can be derived from the will cannot be urged, for there is not a single provision dependent upon it, or which cannot be enforced concurrently with it. Were the devise uncertain because of ambiguity in some of the words used, it is quite possible that sufficient could be found in other parts of the will to resolve the doubt; but, entirely intelligible and

complete in itself, no borrowed light is needed for any purpose in connection with it. *Ex vi termini* the devise imports a substitutional gift, to provide against a possible failure of Johannes to take. This is peculiarly the case where the word "or" is interposed between the name of the devisee and words of purchase descriptive of the alternative. "The simplest form of a substitutional gift is effected by the use of the word 'or,' which is usually construed as implying substitution. But in order for a gift to be substitutional, the legatees seeking to put themselves in the place of the deceased legatee must show that they take by purchase and not by descent": 30 Am. & Eng. Ency. of Law, 812. Our own case of *Gilmor's Estate*, 154 Pa. 523, 35 Am. St. Rep. 855, 26 Atl. 614, besides being explicit and directly in point, makes such full reference to the authorities that other citation here is unnecessary. Case where the word "or," followed by words of limitation such as heirs or heirs of the body, has been changed into "and" is not infrequent; but our attention has not been called to a single one where the change was made when the words following the disjunctive were words of purchase. We do not say that the change may not be proper in any such case; but the reasons justifying it must not only be found in other parts of the will, but they must be positively compelling to the common understanding. It is argued that it was no part of testator's purpose to provide against the lapse of the devise to Johannes because it was wholly unnecessary to do so, since under the act of April 8, 1833 (Pub. Laws, 249), there could have been no lapse. Whether a lapse could or could not have occurred is of no consequence, so far as enabling us to understand what was in the testator's mind when he wrote his will. How are we to know what his understanding of the act of 1833 was, and how would it help us if we did know? The argument assumes that the testator had the act in his mind when he wrote the will, and knew that it prevented lapsing. From this assumption the deduction is made that he must have used the word "or" either advertently or by mistake. The non sequitur here is apparent. The argument proceeds, "If the word 'or' was not intended to prevent a lapse, it must unquestionably have been intended for some other purpose; and if the testator was not providing against a lapse, what other purpose could have been intended than to vest a fee simple in the children?" Such clearly was his purpose; but only in the event of the parent's failure to take. The same estate that the parent would take if he survived was given his children in the event of failure. We have indicated quite enough to show on what feeble basis the court relied for its justification in changing the language of the devise. At best it is pure conjecture. In construing a will the rule requires that it be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity

or some repugnance or inconsistency with the declared intention of the testator, as extracted from the whole will, should follow from so reading it. Where this occurs a construction may be adopted avoiding these consequences. Words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument. It is the expressed intention that governs. Here it is expressed in no uncertain way, and to give it effect this judgment must be reversed. It is so ordered, and judgment is now entered for the defendant.

The Construction of "and" for "or" or vice versa in wills is the subject of a note to *Janney v. Sprigg*, 48 Am. Dec. 565. According to *Gilmor's Estate*, 154 Pa. 523, 35 Am. St. Rep. 855, courts will transpose the clauses of a will, and construe "or" to be "and" and "and" to be "or" only when absolutely necessary to do so in order to support the evident meaning of the testator. But see *Geiger v. Kobilka*, 26 Wash. 171, 90 Am. St. Rep. 733.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

SCURRY v. CITY OF SEATTLE.

[56 Wash. 1, 104 Pac. 1129.]

LOST INSTRUMENT—Evidence to Establish.—To establish a lost instrument on behalf of the party asserting rights under it, the evidence must be clear, positive, and of such a character as to leave no reasonable doubt as to the terms and conditions of the writing. It is not enough that a witness is able to state his understanding of its legal effect, if he cannot give the substance of the contents of the instrument. (p. 1093.)

James Kiefer, for the appellants.

Scott Calhoun and Stephen V. Carey, for the respondent.

¹ FULLERTON, J. On February 7, 1890, the appellants executed and delivered to the city of Seattle a deed conveying to the city a triangular tract of land, situated at the junction of Broadway and Terrace avenues. The deed, while it contained no covenants of warranty, contained no words of limitation of any kind. The city desired the property for the purpose of constructing an engine-house thereon, and shortly after receiving the deed, did construct an engine-house on the property and installed therein a fire-engine and ² other fire-extinguishing apparatus. The city maintained the house as a fire station until sometime in the year 1904, when it constructed a more commodious fire station some little distance away, and moved its fire extinguishing apparatus there, abandoning the old house as an active fire station, although still using it as a place to store old equipment, or equipment not then in active use.

This action was begun by the appellants in 1905 to recover the property from the city. In their complaint the appellants alleged that the property was conveyed to the city on the express condition that it should remain the property of

the city as long, and as long only, as it should use the same as a fire station in which it kept therein for active use a steam fire-engine and hose-cart as part of the fire department system of the city, which conditions, it was further alleged, although not included in the deed proper, were set forth in a separate writing and delivered to the city along with the deed and as a part thereof; and that the city had abandoned the property as a fire station and ceased to use it as such. The allegations as to the conditions on which the property was conveyed to the city were put in issue by the city, and a trial had thereon, which resulted in a judgment in the city's favor.

The writing containing the conditions on which the deed was delivered could not be produced at the trial, and the appellants sought to establish its terms by parol evidence. To prove the contents of the lost instrument, there was only one witness, the husband of one of the appellants, and his memory of the language in which the agreement was stated, although he testified that he prepared it himself, was so indistinct as scarcely to rise to dignity of proof. While he stated with clearness his understanding of the legal effect of the instrument, he did not relate even the substance of the contents of the writing itself. In order to establish a lost instrument on behalf of a party asserting rights under it, the evidence must be clear and positive, and of such a character ³ as to leave no reasonable doubt as to terms and conditions of the instrument. It is not enough that it be established that an instrument containing some form of limitation at some time existed, nor is it enough that some witness is able to state his understanding of the legal effect of the instrument; the contents of the instrument must be substantially proven, and with such clearness that the court can determine its legal effect from the language used therein.

The rule as to the proof required to establish a lost instrument was early announced by the supreme court of the United States in the following language:

"When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself; the substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself; the safety which is expected from them would be much injured if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement": *Tayloe v. Riggs*, 1 Pet. 591, 7 L. ed. 275.

So in *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101, it was said: "The material question was as to the language of the written contract. . . . Whether lost or not, there can be no evidence, in the absence of mistake or fraud, of the intention of the parties, other than the written instrument itself. The rights of the parties must be ascertained from its terms: *Cal. Civ. Proc.*, sec. 1856. The code expressly provides, in case of lost instruments, for oral evidence of their contents: *Cal. Civ. Proc.*, secs. 1855, 1870, subd. 14. Evidence of the character received in this case imposes upon the court the construction of the contract by the witness. In *United States v. Britton*, 2 Mason, 464, Fed. Cas. No. 14,650, Mr. Justice Story remarked: 'If no such copy exists, the contents may be proved by parol evidence, by witnesses who have seen and read it, and can speak pointedly and clearly to its tenor and contents.'"

The supreme court of Illinois, commenting on testimony offered to prove the contents of a lost deed, uses this language: "Fort testifies he was present when it was made; that it was read over by Jamison; that the consideration was one hundred and ten dollars; that it was for the land in dispute, but whether it was a warranty or quitclaim deed, he does not know. He professes to give no part of its contents, or even its terms, except that it was a deed for this land from Gibbs to Dunn. To prove the contents of a written instrument, the vague recollections of witnesses are not sufficient to supply its place. The substance of the contract ought to be proved satisfactorily, and, if that cannot be done, the party is in the condition of every other suitor in court who has no witness to support his claim. When the parties reduce their contract to writing, the obligation and duties of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions of witnesses": *Rankin v. Crow*, 19 Ill. 626. See, also, 17 Cyc. 73 et seq.

Testing the evidence in the case at bar by these rules it seems to us to fall far short of establishing the fact that the deed from the appellants to the city was accompanied with a condition to the effect that it should become void in case the city ceased to use the property therein conveyed as a fire station in which it kept and maintained for active use a steam fire-engine and a hose-cart, as a part of the fire department system of the city of Seattle.

The judgment appealed from will stand affirmed.

Rudkin, C. J., Chadwick and Gose, JJ., concur.

Morris, J., took no part.

SUFFICIENCY OF THE EVIDENCE OF LOST DEEDS.

Although the law permits the contents of lost or destroyed instruments to be proved by parol evidence, yet the rule is strict, especially in the case of deeds, for it is the general policy of the law, adopted with a view to the prevention of fraud, that title to real estate shall pass by written instruments only. Hence the rule is well recognized that oral evidence to establish the contents of a lost or destroyed deed must be clear, positive, and satisfactory as to the essential or material parts of the instrument. No vague or uncertain recollections concerning the provisions of the writing will supply the place of the deed itself. The substance of the instrument must be proved satisfactorily: *Bennett v. Waller*, 23 Ill. 97; *Day v. Philbrook*, 89 Me. 462, 36 Atl. 991; *Moore v. Livingston*, 28 Barb. 543; *Edwards v. Noyes*, 65 N. Y. 125; *Scurry v. Seattle*, 56 Wash. 1, ante, p. 1092, 104 Pac. 1129.

"Where the issue involves the existence and contents of the written instrument, the doctrine would seem to be equally well founded, in principle, that, the greater the value of the instrument, the more conclusive should be the proof of its existence and contents. And where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss, and its contents should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. . . . It is the policy of the law, adopted with a view to prevent frauds, that title to lands shall pass only by written instruments; and the difference is more in name than in fact between giving effect to a parol conveyance of lands and establishing title to lands under an alleged lost deed, upon parol testimony of its contents and loss, unless the proof be clear and conclusive": *Thomas v. Ribble (Va.)*, 24 S. E. 241; *Carter v. Wood*, 103 Va. 68, 48 S. E. 553.

When it is attempted to overcome a record title by oral proof of a lost or destroyed deed, the evidence should be clear, convincing, and satisfactory. "This requirement does not militate against the rule that in civil suits a preponderance of evidence is all that is necessary. When an attempt is made to batter down recorded deeds by oral evidence of nonexistent and unrecorded deeds, the oral evidence must be clear and strong, satisfactory and convincing, or it will not preponderate. It must be plenary": *Connor v. Pushor*, 86 Me. 300, 29 Atl. 1083.

Perhaps authority can be found to the effect that oral proof of a lost writing should be such as to leave no reasonable doubt as to the substantial parts of the instrument: *Taylor v. Riggs*, 1 Pet. 591, 7 L. ed. 275; *Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166. However, it is probably more nearly accurate to say that, in civil cases, the proof should be such as to furnish clear and satisfactory evidence of the substantial parts of the deed; proof beyond a reasonable doubt can hardly be regarded as necessary: *Potts v. Coleman*, 86 Ala. 94, 5 South. 780.

The strictness of the rule of parol evidence of the contents of lost papers may justly be somewhat relaxed in cases where they have been lost, withheld, or destroyed by the person to be charged, since spoliation is scarcely in a position to claim the advantage of the rule: *Tisdale v. Tisdale*, 2 Sneed, 596, 64 Am. Dec. 775.

Parol evidence to prove the contents of a lost or destroyed deed should show its substantial parts. But it is not necessary that the witness should be able to state the contents with verbal accuracy; it is enough if he can state the substance of the contents: *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663; *Posten v. Rasette*, 5 Cal. 46; *Roe & McDowell v. Irwin*, 32 Ga. 39; *Fletcher v. Shepherd*, 174 L. 262, 51 N. E. 212; *Camden v. Belgrade*, 78 Me. 204, 3 Atl. 652; *Fry v. Leighton*, 24 N. H. 29; *Edwards v. Noyes*, 65 N. Y. 125; *Gilmer v. Fitzgerald*, 26 Ohio St. 171. Any rule less liberal than this would make parol proof of the contents of lost writings a practical impossibility.

The fact that a witness has derived his knowledge of the contents of the deed from hearing the instrument read, instead of from his own inspection, does not render his testimony incompetent, however its weight may be affected by that circumstance: *Laster v. Blackwell*, 128 Ala. 143, 30 South. 663. But a witness who knows nothing of the contents of a lost writing, except simply what has been told him by another person, would clearly seem incompetent to testify: *Crow v. Aby*, 55 Fla. 311, 45 South. 820; *Bourquin v. Northwestern R. R. Co.*, 79 S. C. 217, 60 S. E. 521.

A witness who is unable to recollect the substantial parts of a lost or destroyed deed, further than to give vague and uncertain impressions as to the contents of the instrument, will not be permitted to give his opinion as to the meaning and effect of the deed: *Crow v. Aby*, 55 Fla. 311, 45 South. 820; *Robbins v. Hubbard* (Tex. Civ. App.), 109 S. W. 773; *Scurry v. Seattle*, 56 Wash. 1, ante, p. 1092, 104 Pac. 1129.

DOUGLAS v. HANBURY.

[56 Wash. 63, 104 Pac. 1110.]

VENDOR AND VENDEE — Forfeiture.—When Time is Made of the Essence of a contract for the sale of land, the vendor may declare a forfeiture for nonpayment of the price or any installment thereof; but the right of forfeiture must be clearly and unequivocally proved, and may be waived by extensions of time or indulgence granted the purchaser. (p. 1098.)

VENDOR AND VENDEE — Waiver of Forfeiture.—Where the vendor of land, out of nineteen installments of the purchase price, accepts seventeen from a few days to a few months after maturity, he thereby waives a provision making time of the essence, and cannot thereafter declare a forfeiture until after demand for payment and the lapse of a reasonable time or by giving specific notice of an intention to claim a forfeiture. (p. 1098.)

Averill Beavers, Charles H. Gray and Geo. McKay, for the appellants.

Revelle, Revell & Revell, for the respondents.

⁶³ RUDKIN, C. J. On the fifth day of May, 1906, the plaintiff James E. Douglas, on behalf of himself and wife, entered into a contract with the defendant William E. Krause for the sale of the real property now in controversy, for the consideration of seven hundred and sixty dollars, to be paid as follows: Sixty dollars on execution of the contract, and ten dollars on or before the fifth day of each and every month thereafter, until the full payment of the purchase price, with interest on the deferred payments at the rate of eight per cent per annum. The contract contained this further provision:

“Time is the essence of the contract, and in case of failure of the said party of the second part to make either of the payments ⁶⁴ or perform any of the covenants on his part, this contract shall be forfeited and determined at the election of the said party of the first part; and the said party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained; and he shall have the right to re-enter and take possession of said land and premises and every part thereof.”

On the eighth day of September, 1906, the defendant Krause assigned the contract to the defendant Hanbury. Payments were made on the purchase price under the contract as follows: May 5, 1906, sixty dollars; installments for June, July, August, and September, 1906, with accrued interest, paid September 6, 1906; installments for October, November, and December, 1906, with accrued interest, paid December 15, 1906; installments for January, February, and March, 1907, with accrued interest, paid March 20, 1907; installments for April, May, June, and July, 1907, with accrued interest, paid June 27, 1907; installment for August, 1907, with accrued interest, paid August 25, 1907; installments for September, October, November, and December, 1907, with accrued interest, paid November 30, 1907. Up to this point there is no conflict in the testimony.

The defendant Hanbury testified that he tendered the installments for January and February, 1908, with accrued interest, to the plaintiff James E. Douglas on the fifth day of February, 1908, and that the tender was refused. His testimony was fully corroborated by another witness, but the fact of tender was denied by the plaintiff James E. Douglas. The plaintiffs, on the other hand, testified that they notified the defendant Hanbury by letter on the twenty-sixth day of December, 1907, that the January payment would fall due on January 5th, next, and that he must be ready with the money. Hanbury denied the receipt of any such letter. The present action was instituted by the

vendors to quiet their title as ^{es} against the contract of sale, and from a judgment in their favor, the present appeal is prosecuted.

The rule is firmly established in this state that, where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for nonpayment of the purchase price or any installment thereof: *Drown v. Ingels*, 3 Wash. 424, 28 Pac. 759; *Wilson v. Morrell*, 5 Wash. 64, 32 Pac. 733; *Pease v. Baxter*, 12 Wash. 567, 41 Pac. 89; *Jennings v. Dexter Horton & Co.*, 43 Wash. 301, 86 Pac. 576. But the rule is equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser: *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, 7 Am. Cas. 382; *Globe Mut. Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. ed. 387; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 52, 24 L. ed. 841; *Orr v. Zimmerman*, 63 Mo. 72; *Harris v. Troup*, 8 Paige, 422; *Estell v. Cole*, 62 Tex. 695; *Stewart v. Gates*, 30 Miss. 100; *Watson v. White*, 152 Ill. 364, 38 N. E. 902; *Monson v. Bragdon*, 159 Ill. 61, 42 N. E. 383.

In *Watson v. White*, 152 Ill. 364, 38 N. E. 902, the court said: "He knew that all along, from the beginning, the clause declaring time to be of the essence of the contract, and other like clauses, had, by tacit agreement, remained in abeyance, and that all claims under them had been continuously waived. It may be that the rights of Fix under said clauses of the contract were not absolutely and permanently waived, but from the standpoint of a court of equity they were at least temporarily suspended, and capable of being reinstated only by giving a definite and specific notice of intention to act under them. Good faith and square dealing required that much."

Of the nineteen monthly installments paid by the appellants, two were paid and accepted before maturity, and the remaining seventeen were paid and accepted from a few ^{es} days to a few months after maturity. Such a course of conduct constituted a clear waiver of the provision making time of the essence of the contract, and the vendors could not thereafter declare a forfeiture "until after demand for payment and the lapse of a reasonable time," as held by this court in *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026, or by giving definite and specific notice of their intention to claim a forfeiture, as held in *Watson v. White*, 152 Ill. 364, 38 N. E. 902. Common honesty and fair dealing required this much at their hands. The repeated indulgences granted to the purchaser clearly distinguished this case from *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1105.

The court below found all the facts in accordance with the claims of the respondents, based on the testimony of the respondent James E. Douglas, though this witness seems to have been contradicted by every witness he came in contact with at the trial. Two witnesses testified that a tender was made to him on February 5, 1908, but this he denied. Two other witnesses testified that he was notified of the assignment from Krause to Hanbury, but this he denied. He testified that he mailed a certain letter, but the receipt of the letter was denied. He testified that he demanded payment of the January, 1907, installment from the defendant Krause, but this, too, was denied. However, giving full force and effect to the respondents' testimony and to the findings of the court, a forfeiture should not have been decreed under the circumstances disclosed by the record in this case. The judgment is therefore reversed, with directions to dismiss the action.

Fullerton, Chadwick, Gose and Morris, JJ., concur.

Time as the Essence of Contracts for the Sale of Land is the subject of a note to Boldt v. Early, 104 Am. St. Rep. 265. While provisions in a contract for the purchase of land that time is of the essence are binding upon both parties, yet if either seeks to take advantage thereof upon failure of the other to perform strictly, he must do so promptly upon such failure: Keator v. Ferguson, 20 S. D. 473, 129 Am. St. Rep. 947; Souther v. Witt, 87 Ark. 593, 128 Am. St. Rep. 40.

A Vendor may Waive His Right to Declare a Forfeiture on the ground that payments are not made at the time stipulated for: Phillips v. Herndon, 78 Tex. 378, 22 Am. St. Rep. 59; Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158. If a vendor receives payment some twelve days after it is due without objection, and permits the rent for one year to remain unpaid nearly two weeks after it is due before notifying the vendee of her election to terminate the contract, she waives the benefits of a provision making time the essence, to the extent, at least, that she is required to give the vendee notice of her intent to terminate the agreement and give him a reasonable opportunity to comply with the same: Keator v. Ferguson, 20 S. D. 473, 129 Am. St. Rep. 947. See, also, Higinbotham v. Frock, 48 Or. 129, 120 Am. St. Rep. 796.

DAVIES v. WICKSTROM.

[56 Wash. 154, 105 Pac. 454.]

BOUNDARIES—Inconsistencies Between Courses and Distances.—The rule is not invariable that in case of inconsistency between distances and direction the latter controls, but it is necessarily affected to the extent that other legitimate aids are present or absent. (p. 1102.)

BOUNDARIES—Inconsistencies Between Calls.—The rule is not invariable that in case of inconsistency between calls the first controls, except perhaps in the absence of all other aids. (p. 1103.)

BOUNDARIES—Practical Location by Parties.—The construction put upon a deed by the parties in locating the premises may be resorted to in order to determine their intention when the language of the description renders the location of the land doubtful. (p. 1104.)

BOUNDARIES—Constructive Notice to Purchaser.—The backing and maintenance of a line fence, and the open and notorious possession of the inclosed land, indicate the practical construction placed by the parties on inconsistent descriptions in a deed, and give a subsequent purchaser upon inquiry as to such construction. (p. 1104.)

ADVERSE POSSESSION—What Constitutes.—Adverse possession is established by inclosing the land with a fence, starting and clearing off the timber, setting out an orchard and thereafter caring for the trees, under a claim of ownership. (p. 1104.)

George E. de Steiguer, for the appellants.

Bausman & Kelleher, for the respondent.

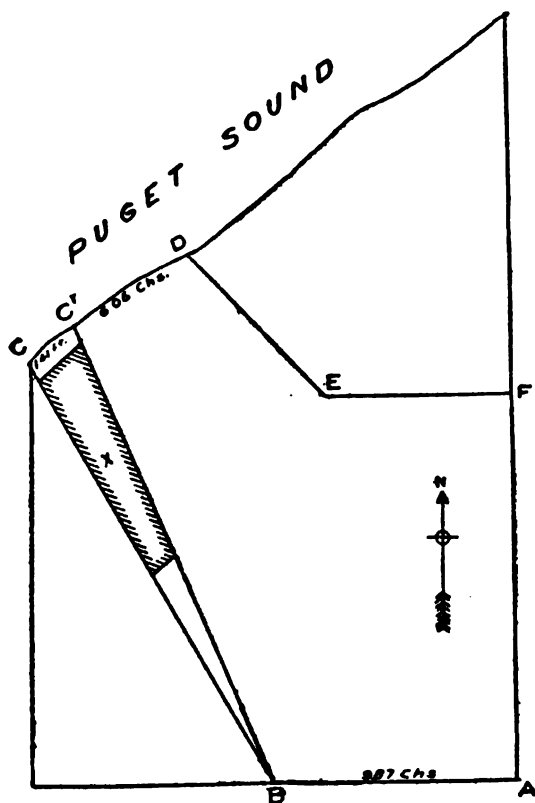
155 PARKER, J. This is an action of ejectment by which the plaintiffs seek to recover from the defendant certain land in West Seattle, which they claim he is unlawfully withholding from them. Trial was had by the court without a jury, resulting in findings and judgment in favor of defendant from which plaintiffs have appealed.

Reference to the accompanying plat, compiled from the record, which shows approximately the lines and land in dispute, will render the facts more readily understood, in connection with a statement of them. The substance of the findings made by the trial court are, that in 1874, by mesne conveyances from the United States, the defendant became possessed in fee simple of lot 1 of section 10, township 24 north of range 3 east, which includes the land in controversy; that in 1876 he sold and conveyed to Jacob R. Olsen and Jahan Brygger a portion of lot 1, described as follows:

"Commencing at the southeast corner of Lot 1 of Section 10, Township 24, North of Range 3 East, and running thence west along the south boundary line of said Lot 1, 9 chains and 87 links; thence north 30° 26' west 20 chains to the meander line of the shore of Puget Sound; thence along said meander line north 47° east 6 chains and 6 links, to the mouth of a small brook; thence south 37° 57' east 7 chains and 33

nks; thence east 10 chains and 1 link to the section line between Sections 10 and 11; thence south along said section line 6 chains and 46 links to the place of beginning."

156 PLAT OF LOT I.



X—Land in dispute.

D—Mouth of small brook.

That soon after the sale and conveyance, the defendant and his grantees measured along the shore line of Puget Sound a distance of six and six hundredths chains southwesterly from the mouth of the small brook mentioned in the deed, and established the dividing line between their respective lands, this being the line BC', intended to be described in the deed; that in the spring of 1895 defendant built a fence upon the line so established, which, together with others, inclosed the land in controversy; that defendant has maintained said fence and enclosure substantially ¹⁵⁷ ever since; that since the building of the fence defendant has uninterruptedly by himself and his agents and tenants, cleared, improved and cultivated

portions of the land, and for more than ten years prior to the commencement of this action has been in the actual, open, notorious, visible and uninterrupted possession of the land and is now in possession thereof, and during all of said time he has asserted the right of ownership and possession of said land adverse to plaintiffs and to all the world. Plaintiffs counsel excepted to these findings, especially to the portions relating to establishing of the line, building the fence thereon and acts of adverse possession, and requested findings favorable to plaintiffs as successors in interest, by mesne conveyances, of Olsen and Brygger; which being refused, noted exceptions to such refusal.

Learned counsel for appellant makes two general contentions, which are, in substance, that the trial court erred in holding, (1) that the deed from defendant to Olsen and Brygger did not convey the land in controversy; and (2) that defendant's adverse possession was such as to give him good title to the land involved.

It is plain that the calls in the deed of defendant to Olsen and Brygger are not consistent, in that the course given for the southwestern boundary, BC, if followed literally, will extend the northwestern or waterfront boundary. CC'D. about one hundred and forty-one feet in addition to the six and six hundredths chains called for in the description. This is on the assumption that the mouth of the small brook was, at the date of the deed, and has at all times since then been, in the same place, which we think is fully warranted by the evidence. It is argued by counsel for appellant that the course of the call BC must control the length of the call C'D. because, (1) "If there is an inconsistency between different calls, ordinarily the first call controls"; and (2) "If there is an inconsistency between distance and direction, direction controls." While there are decisions of the courts which, in a measure, seem to recognize these rules as ¹⁵⁸ aids in arriving at the true intention of the parties to a conveyance, we do not think any such rules can be deduced from the decisions so as to be made of universal application. The degree of aid such rules may render in controlling inconsistent calls in a description will necessarily be affected to the extent that other legitimate aids are present or absent. In *Warvelle vs. Vendors*, second edition, section 377, it is stated: "It is often stated, as a general proposition, that course controls distance, yet there is no universal rule that obliges us to prefer one to the other; and when natural and ascertained objects are wanting, and the course and distance cannot be reconciled, one or the other may be preferred according to circumstances."

In the case of *Preston v. Bowmar*, 6 Wheat. 580, 582, 5 L. ed. 336, Justice Story, speaking for the United States Supreme court, said: "It may be laid down, as a universal rule, that course and distance yield to natural and ascertained ob-

jects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances": See, also, *Loring v. Norton*, 8 Me. 61.

We believe the question of whether or not the calls will be controlling according to their order should also be determined upon the principle announced by these authorities, and that the rules sought to be invoked by learned counsel, whatever their influence may be in the absence of all other aids, they do not, by any means, have that degree of force the law gives to the rule which controls courses and distances by physical monuments upon the ground. The case of *Stokes v. Curtis*, 49 Wash. 235, 94 Pac. 1083, is cited as an instance where this court held the first call controlled the second. But it appears in that case that the latter call, being one of distance, read, "more or less," thus rendering it less certain than the former call, which read, "east," unqualified. In the ¹⁵⁹ cases of *Den ex dem. Harry v. Graham*, 18 N. C. 76, 27 Am. Dec. 226, and *Blackburn v. Nelson*, 100 Cal. 336, 34 Pac. 775, cited by counsel, the calls were held to be controlling in their order, but in those cases there seems to be an entire absence of all other aids in determining the intent of the parties. Our attention has not been called to any decision where the rule has been controlling, save in the absence of all other aids.

What have we then, beyond the uncertain and inconsistent language of these calls in the description, to assist us in arriving at the intention of the parties as to the land conveyed? It is elementary that when the language of the description renders the location of the land doubtful by insufficient or inconsistent description, the construction put upon the deed by the parties in locating the premises upon the ground may be resorted to for the purpose of determining their intention: 1 *Warvelle on Vendors*, 2d ed., secs. 373, 374; 2 *Devlin on Deeds*, 2d ed., sec. 1042; 13 *Cyc.* 627.

The finding of the trial court to the effect that the parties located the line BC' upon the ground soon after the execution of the deed, as their common boundary, is challenged by appellants' counsel as not being warranted by the evidence. We have read all of the evidence and are of the opinion this finding is fully sustained. If this controversy was between the respondent and his original grantees, there would be nothing further in the cause to determine. Their own construction of the deed would determine their rights.

What is there to give notice to the successors in interest of Olsen and Brygger, as these appellants have become by mesne conveyances, that this is the construction the parties gave to the deed? There is evidence which we think warrants the conclusion that about the year 1878 the respondent

built a fence upon the line BC' running back from C' as far as the southeasterly end of the land here in dispute to the foot of the hill, beyond which the land lies on a steep hillside, and that such fence remained there with the knowledge and consent ¹⁶⁰ of his grantees Olsen and Brygger, at least until after they parted with title to their land by deed to William H. Hughes and his associates in December, 1892, which deed describes the land in the same language as in the deed from respondent to Olsen and Brygger, the third call therein being "six chains and six links to the mouth of a small brook." Just how long this fence remained there is not clear, but it was removed while Hughes and his associates owned the adjoining land, and we think the evidence shows the removal was not by consent of respondent. Prior to 1895 William H. Hughes and wife acquired the interest of their associates. This brings us to the building of the fence by respondent on the line BC', in 1895, which with other fences inclosed the land in dispute with other land of respondent. This was the beginning of respondent's present adverse possession, as found by the trial court.

The appellants acquired their interest in the land from William H. Hughes and wife in July, 1897, by a deed which purported to convey the land in controversy with other land to the northeast. The evidence we think is clear that at the time the fence which respondent had built in 1895 on the line BC', which with others inclosed the land in dispute, was still there, and that respondent's possession was of such an open and notorious character as to inform the appellants he was then claiming to that line. This fence and possession of respondent was, we think, also sufficient to put the appellants upon inquiry and suggest to them the probability of that being the line intended as the southwestern boundary of the land described in the two earlier deeds upon which the title they were then acquiring rested.

As to the evidence of respondent's continuous adverse possession following 1895, it is very voluminous and somewhat conflicting. However, it tends strongly to show that he commenced to clear the land soon after inclosing it in 1895; that he set out a portion of the land to orchard, together with his other land adjoining, in the fall and winter of 1896-97, ¹⁶¹ then planting upon the disputed land twenty or twenty-five trees, which have been cared for ever since; that he built a corduroy road along and near the fence on the line BC' and also a gate in his waterfront fence near C' which have been maintained and used by him since inclosing the land; that he maintained the fence built in 1895 until the bringing of this action, though it also appears there were portions of the time when it became in a bad state of repair along the northerly portion (about one-half) of the land in dispute, which portion is low and at times covered by the tide. It is

clear that respondent at all times claimed to own the land. In view of all the evidence, we think the learned trial court was fully warranted in concluding that respondent was in continuous, visible possession of the land in controversy, adverse to appellants, accompanied by claim of ownership therein, for more than ten years prior to the commencement of the action: *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30; *Northern Pac. R. Co. v. Spokane*, 45 Wash. 229, 88 Pac. 135; 1 Cyc. 1022.

We are of the opinion that the judgment should be affirmed. It is so ordered.

Rudkin, C. J., Dunbar, Crow and Mount, JJ., concur.

The General Rules for the Location of Boundaries are discussed in the note to *Matheny v. Allen*, 129 Am. St. Rep. 990.

The Practical Location of Boundaries, or Their Establishment by the agreement or acquiescence of the parties, is the subject of a note to *Washington Rock Co. v. Young*, 110 Am. St. Rep. 682. A line between adjoining owners may be established by recognition and acquiescence, where they erect a permanent fence to mark the division line and for over ten years regard it as the true line, although neither of them intends to claim more than his deed gives him. The doctrine of adverse possession, strictly speaking, does not apply to such a case: *Bradley v. Burkhart*, 139 Iowa, 323, 130 Am. St. Rep. 528. See, also, *Pereles v. Gross*, 126 Wis. 122, 110 Am. St. Rep. 901; *Cox v. Daugherty*, 75 Ark. 395, 112 Am. St. Rep. 75; *Lewis v. Ogram*, 149 Cal. 505, 117 Am. St. Rep. 151.

ROGER v. WHITHAM.

[56 Wash. 190, 105 Pac. 628.]

JUDICIAL SALE—Duty of City Attorney.—A city attorney, in foreclosing an assessment lien, owes a duty both to the municipality and to the owner of the property, a violation of which renders the sale voidable at the suit of the party injured. (p. 1107.)

JUDICIAL SALE—Duty of City Attorney.—A city attorney, in foreclosing an assessment lien, owes the duty of making reasonable efforts to obtain the best price for the property and to locate and notify the owner. (pp. 1108, 1109.)

JUDICIAL SALE—Misconduct of City Attorney.—If a city attorney, in foreclosing an assessment lien, does not exercise diligence in locating and notifying the owner of the property, and bids in the property himself through a third person at an inadequate price, the sale may be avoided at the suit of the owner. (pp. 1107, 1109.)

JUDICIAL SALE.—While Mere Inadequacy of Price, unless gross as to shock the conscience, is not enough to warrant setting aside a judicial sale, still where there is a great inadequacy, slight circumstances indicating unfairness are sufficient to justify vacating the sale. Each case must stand upon its own peculiar facts. (p. 108.)

JUDICIAL SALE.—While an Attorney may Purchase at a judicial sale, the fact that he is the attorney directing the sale before him is not a bar to his purchase. (Am. St. Rep., Vol. 134—70)

comes a challenging circumstance. Such sales are not favored, and with slight attending circumstances, are enough to prompt the creation of the chancellor. (p. 1108.)

CITY ATTORNEY—Duty to Citizens.—A City Attorney owes the same duty to a citizen that he does to the municipality. He acts to some extent in the character of a trustee. (p. 1109.)

JUDICIAL SALE—Purchase by City Attorney.—Where a city attorney, in foreclosing an assessment lien, undertakes to enlarge his compensation or fatten the emoluments of his office by specialism nourished in the hope of personal gain, as where he purchases through a third person for an inadequate price, the sale may be avoided. (p. 1109.)

ALIEN—Forfeiture Against Expatriated Citizen.—There is no law which forfeits the property of a citizen who, for any reason, becomes expatriated. (p. 1109.)

EQUITY—Laches—Limitation of Actions.—The doctrine of laches will not bar an action brought within the period of limitation, unless there is some controlling equity. (p. 1109.)

Charles R. Crouch, for the appellants.

Todd, Wilson & Thorgrimson, for the respondents.

190 CHADWICK, J. On the nineteenth day of December, 1902, plaintiffs acquired the fee simple title to lot 33, block 74, Gilman ¹⁹¹ Park, now a part of the city of Seattle, but at all the times hereinafter mentioned a part of the city of Ballard, in King county. In December, 1902, the city council of the city of Ballard passed an ordinance declaring its intention to construct a sewer on Ballard avenue, and soon subsequent proceedings were had that an assessment of fifty-six dollars and ninety cents was levied against the property. The ordinance provided that all assessments should be paid in one payment, and within a limited time, to the treasurer of the city of Ballard. The assessment against lot 33 not having been paid within the time fixed as the date of delinquency, the council directed the city attorney, the defendant John W. Whitham, whom we shall hereafter refer to as defendant or appellant, to bring a suit to foreclose its lien. Service was had by publication, but no copy of the summons or complaint was ever served on plaintiffs, who were at the time, and for several years before that time had been, residing in Paris, France. Judgment was taken, and on the twelfth day of November, 1904, the property was bid in by defendant in the name of one E. B. Bodwell, for the sum of one hundred and eleven dollars and thirty-two cents, that being the amount of the assessment, penalties, interest and costs. Defendant paid out his own money, intending to acquire title to the property. On December 9th following Bodwell made a deed to defendant without consideration. The general taxes had been paid by plaintiffs up to and including the year 1904.

ant, then residing in San Francisco, to pay the 1905 taxes in due, but the money was returned. After a due season of correspondence, plaintiffs learned that the property was timed by defendant. About this time defendant discovered that the sale had not been confirmed; whereupon he attended that detail, and had the sheriff execute another deed to dwell, who in turn deeded the property to defendant. The property at the time it was first sold was worth three thousand dollars, and is now of increased value. Plaintiffs employed an attorney in the spring of 1907. This action was begun on July 21, ¹⁹⁰⁷ 1908, after a tender of one thousand dollars to cover all taxes and assessments which had been laid upon the property had been refused. There was no suggestion of the lien of the assessment on the county tax-ls. Other pertinent facts will be noticed in our discussion of the law of the case. The trial resulted in a decree in favor of plaintiffs, and defendant has appealed.

Respondents base their claim to reassert title to their property upon two principal grounds; the one, that the assessment was made under the law of 1901, whereas the law of 1891 would have been followed, and for that reason no lien was created; the other, that appellant, in abuse of his trust as attorney, bought the property at a grossly inadequate price, without exercising due diligence or making such inquiry as might have led to a discovery of the postoffice address of respondents, thus insuring notice of the pending suit. The defenses set up are, the validity of the foreclosure proceeding; that respondents are expatriated citizens; that this is a collateral attack upon the judgment; that the action was not begun within the time limited by law, and that respondents have been guilty of laches.

Without discussing the statutes of 1891 and 1901, we think the judgment of the lower court must be sustained upon the second ground urged by respondents. It is the duty of an attorney—and that duty will be laid with heavy hand upon a public officer who becomes a purchaser at a sale conducted for him for the public benefit—to exercise due care, and to pursue such sources of inquiry as are open to him and which may lead to the means of giving notice to the citizen whose property is about to be charged. Appellant cites the rule that any person can purchase at a judicial sale who has no duty to perform in reference thereto inconsistent with the character of a purchaser. But in this case appellant was confronted with a twofold duty, a duty to the city and a duty to the owner. If the duty is violated, the sale may be voided at the suit of the party injured.

¹⁹⁰⁷ While it is a primary rule that mere inadequacy of price, unless so gross as to shock the conscience, is not enough to set aside a judicial sale, it is also true that, when there is

a great inadequacy, slight circumstances indicating unfairness will be sufficient to justify a decree setting the sale aside: *Ballanetyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. Rep. 32, 51 L. ed. 803. It was there said, and even a cursory review of the authorities will bear out the statement, that "each case must stand upon its own peculiar facts." Now it fairly appears, and although disputed in part by appellant was found to be the fact by the trial court, that the property stood upon the county assessment-roll in the name of W. H. Vernon, a former owner, a resident of Ballard or Seattle and an acquaintance of appellant. Vernon had formerly been the agent of respondents and he knew their address. At the time of foreclosure there was a notation in figures "47128" on the margin of the tax-roll which, if inquired into, would have shown a letter thus numbered, preserved as a file by the county treasurer, and containing the name and address of respondent Auguste Roger, as well as the name of his agent in San Francisco who had paid the taxes. It would seem that the tax-rolls would be one of the first sources of inquiry in all cases where a public officer is called upon to ascertain the names of the owners of property which he is undertaking to subject to foreclosure to satisfy a claim of the municipality. While an attorney may purchase at a judicial sale, the fact that he was the attorney directing the sale becomes a challenging circumstance to be considered by the court. "Such purchase by the attorney, if at a greatly inadequate price, should cause vigilant scrutiny into anything which might affect the fairness or unfairness of the sale": *The Ruby*, 38 Fed. 622.

Such sales are not favored and, with slight attending circumstances, are enough to prompt the discretion of the chancellor.

194 "The attorney being himself, to some extent, implicated in the management of the sale, must show that it is perfectly fair—that the spirit and true intent of the decree has been complied with, and that due regard has been paid to the interest of all concerned, by making such effort as the circumstances indicate to be fair and reasonable to get the best price that can be procured for the property. And surely if the circumstances demonstrate that a fair and reasonable effort has not been made to get the best price, and that in consequence of this failure, the attorney has been able to make a great speculation with a corresponding loss to the party on the other side, neither the principles of equity nor that policy which consults the stability of judicial sales, and the confidence which should be reposed in them, requires that the attorney should be confirmed in his speculation, and especially if the disaffirmance of the sale could be attended with no injury, not even the injury of delay to the party to whose benefit the sale is decreed": *Busey v. Hardin*, 2 B. M.

(Ky.) 407. See, also, *Burke v. Daley*, 14 Mo. App. 542; *Clute v. Barron*, 2 Mich. 192; *Shroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. Rep. 512, 40 L. ed. 721.

And we may add to the quotation, that an equal duty was upon the attorney to locate the owner if possible. A public officer, especially a city attorney, owes the same duty to the citizen that he owes to the municipality. He acts to some extent in the character of a trustee. In this connection we indorse the utterance of the supreme court of Arkansas, in speaking of the right of an attorney for an administrator to purchase at his own sale: "The doctrine has been extended to all persons intrusted with the management and direction of sales, in such manner as to impose upon them the duty of taking care that the property may be sold to the best advantage for all concerned. They cannot purchase at all, however fair their intentions. As purchasers their interests would conflict with their duties, and the court of equity, regarding the weakness of ordinary men, takes from them all temptations by rendering them incapable of purchasing at all": *West v. Waddill*, 33 Ark. 575.

And also the case of *Wright v. Walker*, 30 Ark. 44, where ¹⁹⁵ the remark of Lord Thurlow, in *Hull v. Hallett*, 1 Cox, 134, that: "No attorney can be permitted to buy in things in a course of litigation of which he has the management. This the policy of justice will not endure," is adopted. Although the English rule in all its strictness has been modified to the extent that an attorney may become the purchaser, his right is not absolute. Its limitations are defined in the case of *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164. In that case Judge Rudkin traces the line of demarkation at that point where there is no legal or moral duty to protect the interests of the parties concerned. In this case there was both a moral and legal duty upon appellant, a public officer, appointed and directed to make the sale. In such cases all the books agree that the sale can be avoided if he undertakes to enlarge his compensation or fatten the emoluments of his office by speculations nourished in the hope of personal gain. The cases to sustain this proposition are too numerous to be cited here. They are collected in 17 Am. & Eng. Ency. of Law, p. 964, and 24 Cyc. 29, to which may be added *Coughlin v. Holmes*, 53 Wash. 692, 102 Pac. 772.

Speaking to the defenses interposed, the complaint and proofs are ample to charge defendant as a trustee; the question of collateral attack thus becomes immaterial. No rule of law has been cited, nor do we know of any, that will forfeit the property of the citizen who for any reason becomes expatriated. The action was begun within the period of limitation, and unless there be some controlling equity, the court will not conjure the doctrine of laches to defeat or destroy a statute fixing a time within which actions may be brought:

Cordiner v. Finch Investment Co., 54 Wash. 574, 103 Pac. 829.

The judgment is affirmed.

Rudkin, C. J., Fullerton and Gose, JJ., concur.

Morris, J., took no part.

A Purchase of Property by an Attorney at a Judicial Sale in which his client is interested is against public policy, and the client elect to treat him as a trustee; but if the client afterward deals with the attorney as the owner of the property, he thereby ratifies the purchase and is estopped from claiming the benefit thereof: Olson v. Lamb, 56 Neb. 104, 71 Am. St. Rep. 670. For other authorities on the question, see Cunningham v. Jones, 37 Kan. 477, 1 Am. St. Rep. 25; Elmore v. Johnson, 143 Ill. 513, 36 Am. St. Rep. 401; Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68.

CONNER v. SEATTLE, RENTON AND SOUTHERN RAILWAY COMPANY.

[56 Wash. 310, 105 Pac. 634.]

EVIDENCE.—A Car Conductor's Report of an Accident, made immediately thereafter in due course of his employment, is, so far as favorable to the railway company, merely a self-serving document, and hence not admissible in an action against it by an injured passenger. (p. 1112.)

NONSUIT.—Where a Defendant Voluntarily Proceeds With the Trial and introduces evidence after the denial of his motion for nonsuit, the correctness of the denial is to be determined in the light of all the evidence, and not by the state of the evidence at the time of the motion. (p. 1113.)

Morris B. Sachs, for the appellant.

Morris, Southard & Shipley, for the respondent.

310 PARKER, J. This action was brought to recover damages for personal injuries, alleged to have been sustained by the plaintiff while a passenger upon one of defendant's cars.

Plaintiff alleged in substance, in her complaint, that on November 25, 1905, she boarded one of defendant's cars as a passenger for hire, for the purpose of taking passage thereon; that defendant carelessly and negligently maintained and operated said cars with a trapdoor in the floor thereof near ³¹¹ the entrance, over which plaintiff was required to pass in order to reach a seat; that said trapdoor was negligently maintained at a sufficient elevation above the floor of the car so as to be a menace and danger to persons pass-

ing over same, all of which was unknown to her; that in passing from the rear entrance of the car to a seat therein, without any fault on her part, she stumbled upon said raised trapdoor, and by the sudden motion caused by the negligent starting of the car and by her stumbling upon said door she was violently thrown from her feet and precipitated upon the floor of the car with great force and violence, and was severely injured thereby; that if defendant had used reasonable diligence and care in the construction, maintenance and operation of the car, the accident and injury to her would not have occurred; that she was permanently crippled and deformed by reason of said injuries, describing them, and has suffered and will suffer great physical and mental pain, all to her damage in the sum of twenty thousand dollars, for which she prays judgment against defendant.

Defendant by its answer denied the allegations of negligence charged against it in plaintiff's complaint, and as an affirmative defense alleged, in substance, that if plaintiff was at the time and place alleged by her a passenger upon its car, she was a gratuitous passenger traveling as such upon a pass issued at her request, without any consideration whatsoever to defendant, which was issued to and accepted by her under the conditions indorsed thereon as follows: "In consideration of this free pass I hereby agree to assume and do assume all risk of accidents, damages and loss of property sustained by me, and I expressly agree with the Seattle, Renton and Southern Railway Company that it shall not be liable under any circumstances whether by reason of negligence of its agents or otherwise for any injury or loss to me as aforesaid."

Plaintiff replied denying the allegations of this affirmative defense. A trial upon these issues before the court and a jury ³¹² resulted in a verdict for two thousand four hundred dollars in plaintiff's favor. Thereupon defendant moved for a new trial, which the court denied and rendered judgment upon the verdict, from which this appeal is prosecuted.

It is first contended by learned counsel for appellant that the trial court erred in refusing to admit in evidence, offered on appellant's behalf, the report of the accident made in writing by the conductor of the car immediately following the accident, and very soon thereafter given to the defendant, in compliance with its rules. The theory upon which counsel sought to introduce this evidence is, using his own language: "The report was admissible as being original entries made in the regular and due course of the business of the company and made contemporaneously with the transactions recorded."

For the sake of argument, we may admit that the report was made in due course and in compliance with a rule and custom universally followed. Yet we are quite unable to show statements made in such report can escape the objection of being self-serving, in so far as they were favorable to appellant's contentions (and of course it was because they were so favorable, that they were offered to support its contentions), being made by appellant's agent and in its interest concerning facts which the agent at the time of taking them knew would most likely become matters of dispute and drawn into litigation. Indeed, it is evident that the very making of the report upon the facts surrounding the accident was prompted by the possibility of the respondent claiming damages and suing the appellant therefor. Counsel cite the case of *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 91 Am. St. Rep. 829, 67 Pac. 697, 56 L. R. A. 772, in support of his contention. In that case the question of fact was involved as to whether or not a woman was a passenger upon a certain car during a certain trip; she having testified that she had paid her fare by a transfer slip. The conductor's trip report, identified by him and offered in connection with his oral testimony, which had been made in usual course of business, ³¹³ showing that fares paid on that trip were cash fares, was admitted in evidence over objections, which was assigned as error. We think a careful reading of that decision will show that the court did not regard the report as self-serving, for the reason it was not made under circumstances when there were any inducements whatever to record the facts other than as they actually occurred at the time. It was nothing more or less than a simple matter of bookkeeping in the usual course of business, without any thought of future litigation drawing the facts so recorded in question. It was by reason of the absence of such considerations at the time of making the report that it was there admitted in evidence. In this case the record of the facts, in the form of the conductor's report, was made for the very purpose of aiding appellant in possible future litigation with the respondent. To admit such evidence would be a clear violation of the rule against self-serving declarations, so tersely stated by Judge Dunbar in the *Callihan* case on page 159, as follows: "It may be stated that the general rule is that the previous declarations of a witness out of court, and not sworn to, are not admissible to sustain his evidence given in court. The reason for this rule is that such declarations are or might be self-serving, and, as has frequently been said, make a witness' credibility depend more upon the number of times he had repeated the same story, than upon the truth of the story itself." We think the trial court correctly ruled in excluding this evidence.

Learned counsel for appellant contends that the trial court erroneously denied his motion for nonsuit at the close of respondent's evidence upon the trial, and also erroneously denied his motion for a new trial; both of which involved the sufficiency of the evidence to support a recovery by respondent. These two contentions are argued separately in appellant's brief, but in view of the fact it voluntarily proceeded with the trial and introduced evidence after the denial of its motion for nonsuit, the question of the sufficiency of the evidence ³¹⁴ is to be determined in the light of all the evidence, and is not limited to the state of the evidence at the time of the nonsuit motion: *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121. We have read the evidence brought here by statement of facts, and are convinced therefrom that there is ample evidence tending to show the negligence of appellant, and the nature and extent of the injuries to respondent resulting therefrom, if believed by the jury, to support their verdict.

As to the affirmative defense, that respondent was a gratuitous passenger traveling upon a pass, which was denied by her, the learned trial court fairly instructed the jury touching the legal effect upon her right to damages resulting from appellant's negligence if she was traveling upon such pass, leaving to the jury the question of whether or not she was then traveling upon such pass, or was a passenger for hire. Upon this question of fact the evidence was in conflict. She testified, however, directly and positively that she did not then possess any such pass, and that she then paid her fare in cash. It thus became a question for the jury to determine, which their verdict shows they resolved in her favor.

We find no error in the record and therefore affirm the judgment.

Rudkin, C. J., Dunbar, Crow and Mount, JJ., concur.

The Admissibility in Evidence of Books and Reports, other than books of account, is the subject of a note to *Eureka etc. Min. Co. v. Bullion etc. Min. Co.*, 125 Am. St. Rep. 841.

CARRUTHERS v. WHITNEY.

[56 Wash. 327, 105 Pac. 831.]

ESTOPPEL—Common-law and Equitable.—At the common law estoppel was founded on deeds and records of courts, but in equity estoppel is in pais. (p. 1118.)

ESTOPPEL.—The Idea of Equitable Estoppel is, that where a person wrongfully or negligently, by his acts or representations, causes another who has a right to rely upon them to change his condition for the worse, the person making such representations shall not be allowed to plead their falsity for his own advantage. (p. 1118.)

ADMINISTRATRIX—Estoppel to Claim Land Individually.—An administratrix who states in her inventory and petition for the sale of certain land that it belongs to the estate, and makes oral statements of like effect to creditors of the decedent and to purchasers at the sale, will be estopped, after her conveyance under order of court, from claiming any individual title or interest in the property. (p. 1119.)

Merrick & Mills, for the appellants.

Robert McMurchie, for the respondent.

327 DUNBAR, J. This is an action to determine adverse claims to a tract of land in Whatcom county, Washington, the action being brought by the respondent to quiet title to the same. Upon the trial of the case, the court found in favor of the plaintiff, judgment was entered in accordance with the prayer of the complainant, and appeal followed.

Both parties claim under one Emil Freiner, who died intestate in Snohomish county, Washington. The premises in controversy were concededly acquired by Emil Freiner under the homestead laws of the United States, patent therefor being issued to him September 28, 1898, and duly recorded. ³²⁸ On November 4, 1903, Freiner executed and delivered to his wife, Frances, a deed conveying the premises in controversy, which deed was duly recorded. After Freiner's death a petition for the probate of his estate was filed in the superior court of Snohomish county, and letters of administration were issued to Frances by said court. An inventory was made by the administratrix, and filed in the superior court of Snohomish county August 9, 1904. On September 28, 1904, the administratrix filed in such superior court a petition to sell real estate. The inventory included the lands in controversy. There was some question about the description of the land, which was afterward cured and it is now a conceded fact that all the lands in controversy were included in the order of sale, and were intended to have been included in the inventory and petition.

On the first day of October, 1904, the superior court issued its order to show cause why an order should not be granted to sell certain real estate at private sale, and on the

notice to creditors. Notice of sale of real estate was given, and the same was published. Thereafter the administratrix made her report of sale to the court, and the court fixed a date for hearing. Notice was given of such return day. Hereafter, on the twenty-fourth day of November, 1905, an order was made confirming the sale of such real estate, being the real estate in controversy here, to one Daniel Neeson, who paid to the administratrix the sum of six hundred and fifty dollars for said land, and the administratrix executed and delivered certain deeds conveying the said land in statutory form.

The court found the facts which we have briefly recited; that the administratrix had petitioned and prayed for authority to sell the real estate in controversy; that it was sold and confirmed, and that the deeds were made to Neeson as foresaid; also found that the defendant O. B. Whitney, subsequent to the conveyances aforesaid, obtained, for a consideration of five dollars, a quitclaim deed from the said Frances Freiner to the land in controversy, which said quitclaim deed was duly filed in the auditor's office of Whatcom county; that at and prior to the taking of the quitclaim deed, the defendant Whitney knew of the execution and delivery by said administratrix of the deeds aforesaid to the said Neeson, and of the subsequent conveyance to the Keith Investment Company by said Neeson. It appears in the proceedings that the Keith Investment Company sold the said land to the respondent. The court found that the said Frances Freiner never took under the deed from Emil Freiner, and never made any claim individually to said real estate, and that, prior to the sale thereof by her as administratrix, she had a conversation with Daniel Neeson, the purchaser at such sale, in which she represented to said Neeson that she was selling the whole of such real estate as the property of the estate of Emil Freiner, deceased.

Many exceptions are taken to the findings of the court by counsel for appellants, but there is only one pertinent proposition in this case, and that is whether the administratrix is estopped from raising the question of the validity of the sale to Neeson. It must be conceded that Whitney can take no better title to the land than his grantor, Mrs. Frances Freiner, had. The findings of the court, we think, are substantiated by the record in the case, most of which is documentary. It is the contention of the appellants that the status of this property as community property continued until, by reason of some act of the parties or by reason of the law, such status changed, and that such change occurred upon the execution and delivery of the deed from Emil Freiner to Frances Freiner; that the court had no jurisdic-

tion to order the sale of the property which by public record appeared to be the property of Frances Freiner; that it is a fact which exists that gives the court jurisdiction to sell real estate, and not the representations made in the declaration of the administratrix through the inventory filed. ³³⁰ Many cases are cited by counsel for appellants to the effect that an administrator who sells his own property as property of the decedent is not estopped from claiming title to his own property notwithstanding such sale, and no doubt there are many authorities to this effect as a general proposition.

The first case which is strongly relied upon by the appellants is *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889. In that case the general doctrine contended for was no doubt announced in the syllabus, viz., that an executor who represents in his petition for letters testamentary that certain property belonged to the estate of the decedent, and files an inventory including such property, is not thereafter estopped from claiming the property as his own. But upon an examination of the case itself, the syllabus may be considered as too broad. In that case the property did not go to sale. The plaintiff claimed under a conveyance from one Bird to Mary A. Smith. The defendants claimed that this conveyance was made to Mary A. Smith in trust for one J. P. Smith who, they claimed, paid the consideration therefor and from whom they derived title. Mary A. Smith left a will appointing J. P. Smith her executor. He applied for letters testamentary and, in his petition, represented that the property in controversy was a portion of the estate of the testatrix, and also included it in the inventory of the estate filed by him. J. P. Smith died pending the administration, and the plaintiff was appointed administratrix with the will annexed, and hence the contest over that particular portion of the property. The court decided the case somewhat upon the testimony, saying that there was no direct evidence that Mary A. Smith did not pay for the property, and that there was a conflict of evidence as to who actually paid the purchase money. The alleged trustee and beneficiary both died before the commencement of the action. All that the court said on this proposition is the following: "The appellant contends that [plaintiff], by representing ³³¹ in his petition for letters testamentary of the will of Mary A. Smith, that said property belonged to her estate, and filing an inventory of her estate which included said property, J. P. Smith was estopped from afterward claiming that it was his own. In *Carter v. McManus*, 15 La. Ann. 676, the court says, 'that admissions made by an executor or administrator in the course of judicial proceedings are made for the benefit of the estate represented by him, and

do not conclude his individual right by way of estoppel.' Another case very much in point is *Werkheiser v. Werkheiser*, 3 Rawle, 326. The facts in this case fall short of what is required to constitute an estoppel."

So that it will be seen that that case was decided on the authority of *Carter v. McManus*, 15 La. Ann. 676, and of *Werkheiser v. Werkheiser*, 3 Rawle, 326. An examination of those cases elicits the fact that they fall far short of the matters which are claimed to be matter of estoppel in this case. In *Carter v. McManus* all that was decided was that an application, made by the executor named in the will to have the will probated, was not a judicial admission which would estop the executor from claiming as his own property disposed of in the will. In *Werkheiser v. Werkheiser* it was decided that the presentation of a petition to the orphans' court, setting forth that the petitioner's father died seised of the premises therein described, leaving a widow and seven children, and praying the court to award an inquest, to make partition, etc., does not estop the petitioner from afterward maintaining an ejectment for the same premises, and proving that they were the estate of his mother who was his father's first wife, and descended to him as her heir, to the exclusion of his brothers and sisters, the children of a second wife. Under such circumstances the court said that such allegations would in most cases operate very slightly, if at all, against him; that nothing more was done in the case; that the plaintiff committed an error in presenting the petition and probably, upon discovering his mistake, relinquished the proceedings under it and adopted an action of ~~322~~ ejectment. In none of these cases was the land sold and other parties misled to their injury.

The American Law of Administration by Woerner, section 480, cited by the appellants, only announces the undoubted rule that, so far as covenants and words of warranty in an administrator's deed are fairly referable to their official capacity or duty, their effect is limited to the estate alone, and they in no manner affect the personal right or liability of the administrator; citing the instance that, where a widow administratrix in executing specific articles of sale by her deceased husband under order of the orphans' court, conveyed all her husband's estate and her own, in law and equity she was held not barred of her dower which was the only interest she had in the land. Many of these cases are dower cases, where the wife's right is more or less a technical right, and it would be reasonable to suppose that she might not think when she was selling the estate of the husband that there would be any claim that her dower would be conveyed.

A very positive, and it seems to us somewhat dogmatic, statement is made in *Baker v. Brickell*, 87 Cal. 329, 25 Pac.

489, 1067, a case cited by appellants, where the court, noticing this phase of the case, says: "The other circumstances, viz., the facts that Maria Baker qualified and was appointed administratrix of John H. Baker, and put the land in suit on the inventory returned by her to the probate court as assets of her intestate's estate in the administration of the estate, are entirely immaterial. We are aware of no law by which a person appointed administrator loses his land by so acting. There is no estoppel on Maria Baker to claim her own property under such circumstances. She no doubt acted in this matter through ignorance of her rights, or, if advised at all, from having been improperly counseled."

This, as a general proposition, we think is probably too sweeping a statement of law, the question of estoppel being largely a question of fact. We think it unnecessary to review ³³³ cases cited by counsel for respondent. They announce squarely the other doctrine, viz., that under such circumstances the administrator, or administratrix as the case may be, is estopped.

But these cases must all be considered with reference to the particular circumstances involved in the case. It makes no difference in this particular case whether the court acted with jurisdiction to sell the property. The deed of the administrator conveyed the property in terms to the purchaser, and in terms it was a deed, and the only question is whether, under the circumstances as shown by the record, the administratrix is estopped from questioning its validity and asserting her own title. Estoppel is an equitable proceeding, or speaking more accurately perhaps, it is the equitable result of a wrongful proceeding or act, a reliance upon which would, in the absence of an estoppel, work an injustice to an innocent person. At the common law estoppel was founded on deeds and records of courts, but estoppel in equity is estoppel in pais. The principle now applies because it has been found that the common-law rule was too narrow and inadequate for the attainment of justice under the multiplied transactions of modern times, and hence the equitable estoppel of the present day. The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage.

This is an extreme case, where there can be no question that the doctrine of equitable estoppel should apply. We would not lay down the harsh rule, such as seems to have been laid down in some cases cited by the respondent, that under all circumstances the representations made by an administratrix, through inventory filed, would estop her from

questioning the conveyance of her own interest; for there ³³⁴ might be an honest mistake which in good conscience she ought to be allowed to show or explain away. But in this case the representation was not only made in the declaration of what property belonged to the estate, but by petition to sell, by solemn deed of conveyance, by holding out to the world, and especially to the respondent, that the property which the administratrix now claims was the property of the estate, whereby she obtained, presumably as an heir of Freiner, an interest in the money obtained for the land sold. But the record also shows that the creditors of this estate had raised some question as to the validity of the sale to Mrs. Freiner, and that it was agreed between the administratrix, through her attorney, and the creditors, through their attorney, that this particular piece of land should be sold as property of the estate. It also shows that personally she represented to the purchaser that he was to receive title to all of the estate described in the inventory, if he would bid upon the same. Under such circumstances it would be an outrage upon justice to permit the administratrix or her grantee to question the validity of the deed conveying the property in controversy.

The judgment of the court is affirmed.

Rudkin, C. J., Mount, Crow and Parker, JJ., concur.

An Inventory is not Conclusive as to the Ownership of the Property, either as against third persons or the executor or administrator: In re Belt's Estate, 29 Wash. 535, 92 Am. St. Rep. 916.

STATE v. MONTGOMERY.

[56 Wash. 443, 105 Pac. 1035.]

CRIMINAL TRIAL—Misconduct of Prosecutor in Denouncing Witness.—For a prosecuting attorney to state that the prosecutrix, whose testimony on the stand is contrary to what she has told him out of court, has been tampered with and bought, is prejudicial error. (pp. 1120, 1122.)

CRIMINAL TRIAL—Misconduct of Prosecutor in Examining Witness.—It is prejudicial error for a prosecuting attorney, when the prosecuting witness denies the charge against the accused, to examine her on the details of the alleged crime as stated by her to him out of court, which statements she admits having made but declares that they are false and were made under duress. (pp. 1120, 1122.)

CRIMINAL TRIAL—Coercing Witness.—A Prosecuting Attorney may not threaten and intimidate witnesses, and place testimony obtained by duress before the jury, against one accused of crime. (pp. 1120, 1121.)

CRIMINAL TRIAL—The Practice of Extorting Testimony from witnesses by confinement, threats or duress is to be condemned. (p. 1122.)

DISTRICT ATTORNEY—Duty to be Fair and Impartial.—A prosecuting attorney represents the public interest, which is not promoted by the conviction of the innocent. It is his duty "to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen." (p. 1122)

Merritt, Oswald & Merritt, for the appellant.

Fred C. Pugh and V. T. Tustin, for the respondent.

⁴⁴³ **RUDKIN, C. J.** The appellant was convicted of the crime of rape on a female child under the age of eighteen years and prosecutes this appeal from the final judgment of the court. Numerous errors are assigned, in the admission and exclusion of the testimony, in the giving and refusing of instructions, and in the failure of the court to instruct the jury in writing; but few, if any, of these rulings are likely to occur on a retrial, and for that reason we deem it unnecessary to discuss or consider them at this time. Nor do we find it necessary to review the testimony, further than to say that it is sufficient to sustain the verdict, if believed by the jury. But ⁴⁴⁴ whether the appellant was guilty or innocent he was entitled to a fair and impartial trial, according to the forms of law, and we are constrained to hold that this right was denied him.

The prosecuting witness, a girl of the age of fifteen years was taken into custody about three months before the trial and was confined in the juvenile detention room from the time of her arrest until after the trial. She was called as a witness for the state at the opening of the trial, and testified that the appellant never had sexual intercourse with her at any time or place. The prosecuting attorney thereupon stated to the court, in the presence of the jury, that the witness had stated the contrary to him many, many times; that the witness had been tampered with, and bought, etc. He was then permitted to ask the witness leading questions. In answer to such questions, the witness freely admitted that she had told the prosecuting attorney that the appellant had sexual intercourse with her on three different occasions, but insisted that she was frightened into making such statements. The prosecuting attorney was then permitted, over the objection and protest of the appellant, to interrogate the witness at length relative to statements she had made wherein she admitted that the appellant had sexual intercourse with her at different times and places, with all the details and attendant circumstances. The witness admitted the making of all such statements, but insisted that they were absolutely false. She was thereupon withdrawn from the stand, to be recalled some hours later. After leaving the stand, she was first taken to the prosecuting attorney's office, and thence to the detention room and placed in charge of the matron. Before leaving her

the prosecuting attorney told her that he could send her to the penitentiary for perjury, and after he left, the matron told her that she would find the prosecuting attorney a very good friend but a very powerful enemy. The witness herself testified that the matron interceded with the prosecuting attorney in her behalf and asked him not to send her to jail.

⁴⁴⁵ The respondent contends that the prosecuting attorney and the matron only insisted that the witness should speak the truth, but the record shows only too clearly that the witness was given plainly to understand that her testimony given in the morning was not true, and that she should adhere to and reaffirm the statements made to the officers before the trial. The record clearly shows, also, that the witness was put under duress, and that her testimony was not voluntarily given when she took the stand the second time and testified against the appellant.

Notwithstanding the foregoing facts, the respondent earnestly insists that the weight of the testimony of this witness was for the jury, in the light of all the surrounding circumstances, and that this court may not interfere with the verdict. We readily concede that the weight of testimony is ordinarily for the jury, but this case presents the far more important question, whether a prosecuting attorney may threaten and intimidate witnesses, and place testimony obtained by duress before a jury, against one accused of a public offense. The duty of such officers has often been defined by the court.

In *Appeal of Nicely* (Pa.), 18 Atl. 737, the court said: "The district attorney is a quasi judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only—equal and impartial justice—and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence, he should act impartially. He should present the commonwealth's case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate."

In *Hurd v. People*, 25 Mich. 405, *Christiancy, C. J.*, said: "The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of ⁴⁴⁶ professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community."

In *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, the court said: "He is an officer of the state, provided at the expense of the state, for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unpreju-

acted by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial. Such is the view taken of the office of prosecuting attorney by the courts of this country as well as England, and we think it is the true view of his position."

"It is the duty of the prosecuting attorney to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of public justice": Cooley's Constitutional Limitations, 7th ed., p. 440, note 2. See, also, *Curtis v. State*, 6 Cold (Tenn.) 9; *March v. State*, 44 Tex. 64; *Gandy v. State*, 24 Neb. 716, 40 N. W. 302.

The conduct of the prosecuting attorney on the trial of this case did not measure up to these requirements. His statement, in the presence of the jury, that the prosecuting witness had been tampered with and was bought was both prejudicial and unwarranted. After the prosecuting witness had admitted that she had made contradictory statements out of court, her further examination as to the details of these statements, to the effect that the appellant had sexual intercourse with her at different times and places, with all the attendant circumstances, could have no other object than to bring these extrajudicial statements before the jury, to the manifest prejudice of the accused, and such a result must have been intended. Furthermore, courts of common law ⁴⁴⁷ have always excluded confessions extorted from prisoners, because, as said by Judge Cooley, the common law "recognized fully the dangerous and utterly untrustworthy character of extorted confessions, and was never subject to the reproach that it gave judgment upon them": Cooley's Constitutional Limitations, p. 442.

If extorted confessions are dangerous and utterly untrustworthy in character, is not extorted testimony open to the same objection? In *State v. McCullum*, 18 Wash. 394, 5 Pac. 1044, this court condemned the practice of extorting confessions from persons accused of crime by confining them in dark cells until a confession was wrung from them, and we must now add our condemnation to the practice of extorting testimony from witnesses by like means or by threats or duress of any kind. Such acts are declared criminal in some states, and public officers are not exempt from their provisions: *Gandy v. State*, 24 Neb. 716, 40 N. W. 302. While it is important that the appellant should be punished for his crime, guilty, it is of far greater importance that settled principles designed for the protection of life and liberty should not be overthrown; and if persons accused of crime cannot be

ed without using against them testimony wrung from
illing witnesses by threats of criminal prosecution and
risonment, it is better far that they should go free than
such practices should receive the sanction and approval
he courts.

is not our purpose to condemn the zeal manifested by
prosecuting attorney in this case. We know that such
ers meet with many surprises and disappointments in the
harge of their official duties. They have to deal with all
is selfish and malicious, knavish and criminal, coarse and
tal in human life. But the safeguards which the wisdom
ages has thrown around persons accused of crime cannot
disregarded, and such officers are reminded that a fearless,
artial discharge of public duty, accompanied by a spirit of
ness toward the accused, is the highest commendation they
hope for. Their devotion to duty is not measured,
like the prowess of the savage, by the number of their
ims. Believing that the appellant was not accorded a fair
l impartial trial in the court below, the judgment is re-
sed and a new trial ordered.

Parker, Dunbar, Crow and Mount, JJ., concur.

The Prosecuting Attorney in a Criminal Trial represents the majesty
the people; and, having no responsibility except fairly to discharge
duty, should put himself under proper restraint, and should not go
ond the evidence or the bounds of a reasonable moderation. If he
s aside the impartiality that should characterize his official action
become a heated partisan, and by vituperation of the prisoner and
eals to prejudice, seeks to procure a conviction at all hazards, he
ses properly to represent the public interest: *People v. Fielding*,
N. Y. 542, 70 Am. St. Rep. 495. See, also, *King v. State*, 51 Tex.
208, 123 Am. St. Rep. 881; *State v. Blackman*, 108 La. 121, 92 Am.
Rep. 377; *Haupt v. State*, 108 Ga. 53, 75 Am. St. Rep. 19; *State*
Warford, 106 Mo. 55, 27 Am. St. Rep. 322; *People v. Strauch*, 240
60, 130 Am. St. Rep. 255.

The Manner in Which Evidence is Obtained does not ordinarily affect
admissibility: See the note to *State v. Height*, 94 Am. St. Rep.
1; *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675; *Hammons*
State, 73 Ark. 495, 108 Am. St. Rep. 66.

THOMPSON v. ALLEN.

[56 Wash. 582, 106 Pac. 173.]

MARITIME LIEN—Work on Engine Designed for Vessel—One who, with notice of the circumstances, repairs an engine belonging to one person and installs it in a boat belonging to another person, with the view of a possible sale of the engine to the owner of the boat, which never takes place because the engine proves unsatisfactory and is removed, is not entitled to a lien on the boat or engine for "work done or material furnished" for the "construction, repair or equipment" of a boat. (pp. 1125, 1126.)

MARITIME LIEN—The Foreclosure of a Lien under the Washington code for work done or materials furnished in the construction or equipment of a boat is an ordinary civil action of foreclosure on the equity side of the court, which makes the action substantially of the same nature as the foreclosure of mechanics' liens. (p. 1126.)

MARITIME LIEN—There can be No Personal Judgment in an Action to foreclose a lien under the Washington code for work done or materials furnished in the construction or equipment of a boat, for the sum which the court may find due when the right for the lien fails, in the absence of any waiver. (p. 1126.)

Chas. E. Miller, for the appellant.

H. W. B. Hewen, for the respondent.

⁵⁸² PARKER, J. This is an action to foreclose a lien claimed by plaintiff upon a boat and certain machinery, consisting of a fifteen-horse power gasoline engine, alleged to be a part of her tackle, apparel and furniture. The action is founded upon Ballinger's Code, section 5953, which provides:

"All steamers, vessels, and boats, their tackle, apparel, and furniture are liable . . . (3) For work done or material furnished in this state, for their construction, repair, ⁵⁸³ or equipment, at the request of their respective owners." And, also, Ballinger's Code, section 5954, which provides: "Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, in rem, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court in this territory."

The rights involved in this appeal are only those of plaintiff and defendant Allen, and the facts shown by the record upon which those rights depend are practically undisputed; and in so far as necessary to be noticed, are as follows: Defendant Allen is the owner of a fifteen-horse power gasoline engine, and defendant Miller is the owner of a boat about twenty-seven feet long and seven feet wide. Plaintiff is a mechanic somewhat skilled in the repairing of such engines and boats, and was employed by defendant Allen to repair the engine with a view to selling it to defendant Miller to install

his boat as the motive power thereof. Plaintiff was the ans of bringing the two defendants together, looking to a proposed sale of the engine. In addition to repairing the gine, he also installed it in the boat at the instance of defendant Allen and by the consent of the defendant Miller, for al. This was all done in June and July, 1908. The defendants never agreed upon or consummated the sale, Miller claiming the engine was not satisfactory, and being unwilling pay the price asked by Allen.

On August 14, 1908, defendant Allen removed the engine om the boat, defendant Miller making no claim to it. A w days thereafter, on August 22d, plaintiff commenced this tion to foreclose his claim of lien for his work upon the gine, in which he prays for personal judgment against Allen ly for the amount of his claim, and that the same be deured a lien upon the boat and engine, the latter of which he ums to be a part of the boat, her tackle, apparel, and furniture. Upon a trial of the cause before the court without a ry, it being treated as being on the equity side of the court, rsonal judgment was rendered against Allen which was clared to be a lien upon the boat and engine as prayed 4 for, and the court ordered that, in making the sale of the operty to satisfy the judgment, the engine belonging to defendant Allen should be first sold; and if that did not yield ficient to satisfy the claim, then that the boat be sold. om this judgment and order defendant Allen has appealed.

The principal question presented by the assignments of ror is, Does the statute above quoted give respondent a lien on the engine belonging to appellant for the services rendered in the repair and installation thereof in the boat, under e facts shown by this record? And this question manifestly pends upon the question of whether or not the engine ever came a part of the boat, her tackle, apparel or furniture. ppellant contends that the engine never became a part there-, while respondent contends to the contrary. It is plain om the undisputed facts that the ownership of the boat and e ownership of the engine never became united, nor was the gine placed in the boat with a view to remaining there and coming a part thereof, under the ownership of appellant, ther separately or united with that of defendant Miller. In her words, it was never contemplated that appellant should, any extent, become the owner of any share in the boat or y part of her tackle, apparel or furniture. The engine was t repaired or installed in the boat for any such purpose, it solely with a view of a possible sale of the engine, which ver occurred, and which respondent knew might never occur hen he was performing labor upon the engine and its installation. Respondent himself testified, among other things, "Mr. llen spoke to me about fixing it, before he knew anything

about putting it into this boat at all; supposed to fix it up and put it in running shape, so it was capable of being sold later on; then Miller figured on it and I put it in his boat for trial." In view of these facts we are of the opinion that the services of respondent in the repairing and installation of the engine was not "work done or material furnished" for the "construction, repair or equipment" of the boat, and therefore he did not acquire any right ⁵⁸⁵ to a lien upon the engine by virtue of the statute above quoted. This view leads to a reversal of the judgment of foreclosure so far as it assumes to foreclose the lien upon the engine belonging to appellant.

What, then, becomes of the personal judgment rendered against appellant? This court has heretofore recognized that the foreclosure of a lien of this nature is an ordinary civil action of foreclosure upon the equity side of the court (*Washington Iron Works v. Jensen*, 3 Wash. 584, 28 Pac. 1015; *Callahan v. Aetna Indemnity Co.*, 33 Wash. 583, 74 Pac. 633), which makes the action substantially of the same character as in the foreclosure of mechanics' liens. In the latter class of actions it has been held by this court, in common with most others, that there can be no personal judgment in such a lien foreclosure for the sum which the court may find due when the right for the lien fails. This is apparently upon the theory that a defendant cannot be compelled to submit to a trial of his personal liability in an action which is in form equitable when the equitable claims made in the action fail. To compel him to so submit would be to take away his right of trial by jury: *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109. It is true that in such a foreclosure proceeding the defendant may waive his right in this respect to such an extent that the court may render a personal judgment against him, even though the plaintiff's equitable cause, to wit, the foreclosure of his lien, may fail. We do not think that in this cause the defendant has waived his rights in this respect. The theory of his defense, made manifest in this record at various stages of the cause, was that the court had no lawful right to render either a judgment of foreclosure against his engine or a personal judgment against him. The latter contention was made not only upon the merits, but also by reason of the form of the action.

We are of the opinion that the judgment of foreclosure, and also the personal judgment, must be reversed. The case ⁵⁸⁶ is therefore remanded to the superior court, with instructions to dismiss the same, without prejudice, however, as to respondent's right to sue for the value of his service.

Rudkin, C. J., Mount, Crow and Dunbar, JJ., concur.

A State Statute Giving a Lien Against Steamers, vessels, and boats valid: *Breen v. Kehoe*, 142 Mich. 58, 113 Am. St. Rep. 553; *Osman v.*

Birch & Co., 133 Cal. 479, 85 Am. St. Rep. 215. As to the jurisdiction of state courts to enforce liens of this character, see *Olsen v. Birch & Co.*, 133 Cal. 479, 85 Am. St. Rep. 215; *Scatcherd Lumber Co. v. Pike*, 113 Ala. 555, 59 Am. St. Rep. 147; *Globe Iron Works Co. v. Steamer*, 100 Mich. 583, 43 Am. St. Rep. 464; *The Victorian*, 24 Or. 21, 41 Am. St. Rep. 838; *Gindele v. Corrigan*, 129 Ill. 582, 16 Am. St. Rep. 292; *State v. Voorhies*, 39 La. Ann. 499, 4 Am. St. Rep. 274.

Maritime Contracts have reference to navigation upon the sea, and in some way to vessels actually being used in commerce or in navigation: *Olsen v. Birch & Co.*, 133 Cal. 479, 85 Am. St. Rep. 215. A contract for building a ship or supplying engines, timber, or other materials for its construction is not a maritime contract: *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 838.

BRADLEY ENGINEERING AND MANUFACTURING COMPANY v. HEYBURN.

[56 Wash. 628, 106 Pac. 170.]

SURETYSHIP.—A Corporation may Plead *Ultra Vires* as a defense to a contract of suretyship, when sued by one who has knowledge of the original relation of the parties. (p. 1128.)

BILLS AND NOTES.—Accommodation Maker.—The negotiable instrument act of Washington changes the law in reference to the liability of accommodation makers who sign a note as joint makers. (pp. 1128, 1129.)

BILLS AND NOTES.—In Construing the Negotiable Instrument Act any one section must be considered with reference to the others. The whole statute is to be looked to, and not merely the particular section in question. (p. 1129.)

BILLS AND NOTES.—A Holder for Value and a Holder in Due Course are in the same position, under the Washington negotiable instrument act, to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself. (p. 1130.)

BILLS AND NOTES.—An Accommodation Maker of a note is liable primarily under the Washington negotiable instrument act, and hence is not discharged by an extension of time to the principal debtor. (p. 1130.)

BILLS AND NOTES.—Accommodation Maker.—Under the Washington negotiable instrument act one who is apparently a joint maker of a note cannot show, in an action against him by a "holder for value," that he signed as accommodation maker and surety without consideration, which was known to the plaintiff. (pp. 1128-1130.)

JUDGMENT.—Merger of Original Demand.—An unsatisfied judgment against one of two joint makers of a note is not a bar to a subsequent action on the note against the other maker who was without the state at the time of the first suit and did not make an appearance therein. (p. 1131.)

MORTGAGE.—Application of Proceeds of Foreclosure.—A holder for value of notes secured by mortgage may apply the proceeds of foreclosure to the payment of any one or all of the notes, without regard to equities existing between the persons liable as joint makers. (p. 1131.)

Calder Jones, for the appellant.

B. B. Adams, for the respondent.

629 CHADWICK, J. The respondent brought this action to recover upon two promissory notes, executed by the Shann-nessy Hill Lead-Silver Mining Company, a corporation. E. M. Heyburn, and E. R. Ward. The complaint is the ordinary complaint upon a promissory note, in the usual form. The corporation was not served and did not appear in the action. E. R. Ward made default. E. M. Heyburn appeared, and without denying the notes, alleged that they were given in payment for certain mining machinery sold by the plaintiff to the defendant corporation, in which he had no interest other than as a stockholder therein; that while he signed the notes in the apparent capacity of a joint maker, he was in fact an accommodation maker and surety thereon, and received none of the benefits thereof, which facts were well known to the plaintiff, and that the plaintiff thereafter, without defendant's knowledge or consent and for a valuable consideration, extended the time of payment of the notes. The answer as a further defense alleged payment of the notes. Plaintiff's demurrer was sustained to the plea of release. The case was tried upon the issue raised by the plea of payment. The court found against the defendant upon that issue, and entered a judgment as prayed for in the complaint. The defendant E. M. Heyburn appeals.

Appellant argues that the court erred in sustaining the demurrer to the answer, for the reason that he was an accommodation maker, which fact may be shown by parol: that he was bound only as a surety, and that the extension of time to the principal released appellant as such surety. *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, and *Spencer v. Alki Point Transportation Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509, are relied upon to sustain this contention. The latter case is not in point; for, aside from the fact that it appeared that the indorser was a surety in fact and entitled to the protection afforded sureties, it is settled by an almost unbroken line of authority that a corporation may plead *ultra vires* as a defense to a contract of suretyship, when sued by one who has knowledge of the original relation of the parties. *Ogden on Negotiable Instruments*, sec. 124. Aside from this consideration, it is generally held that sections 29 and 64 of the negotiable instruments law (Laws 1899, p. 351, c. 149) are inapplicable to corporations: *Crawford's Annotated Negotiable Instruments Law*, 3d ed., p. 46, and cases there cited.

In *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, the court said: "The ruling of the trial court, to the effect that it is incompetent for one of two or more makers of a joint and several promissory note to show by parol that he is in fac-

only a surety, and that he was known to be such by the payee named in the note when the note was taken, is contrary to the ruling of this court in *Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 954, and *Bank of British Columbia v. Jeffs*, 15 Wash. 230, 46 Pac. 247."

The cases upon which that statement was based were decided before the passage of the negotiable instruments act, which clearly and intentionally changed the law in that respect (*Laws 1899, p. 351, c. 149*). Aside from this, it appears upon the face of the decision that such statement of the rule was dictum, for the opinion states: "It is apparent, however, that this question is not a material one here, unless it is to be held that the appellant Peter was entitled to show that the respondent had released him from liability on the note." And it was then held that a release by parol could not be shown.

But these cases must henceforth be resolved independently of all decisions based upon the law-merchant, notwithstanding the contention of appellant that the negotiable instruments act in no way affects the rights or changes the relation of the ⁶³¹ original parties to the contract. To sustain his theory that it does not do so, appellant cites section 58 of the law: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable": *Laws 1899, c. 149, p. 351, sec. 58*. If this section stood alone, there is reason for appellant's contention; but it is a primary rule of construction that one section of a statute must be considered with reference to others, so that the legislative intent may not be defeated. Looking, then, to the whole law and not to the particular section, we find that it is also declared:

"Sec. 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

"Sec. 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

When construed in the light of these sections, section 58 cannot be made to bear the construction put upon it by appellant. The law further provides:

"Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions: . . .

"(3) That he took it in good faith and for value."

"Sec. 59. Every holder is deemed prima facie to be a holder in due course."

When we consider that it was the object of the negotiable instruments act to make such instrument certain and to speak the true contract of the parties, thus saving the commercial world the hazard of trumped up defenses or the peril of trying out collateral issues such as suretyship, etc., in case of ⁶³² suit, it would seem that we cannot reject the other sections and give effect only to section 58.

Our conclusion is further fortified by section 192: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay same. All other persons are 'secondarily' liable." This section not only fixes an absolute liability on the one who, by the terms of the instrument, binds himself without qualification, but furnishes a rule of evidence as well. Nor do we think that this construction renders section 58 meaningless. The defenses there referred to must be held to be only such defenses as are permitted by the act itself, or such equities as do not deny the tenor of the bill.

Appellant admits that, if respondent was a holder in due course, he could not plead his present defense. We find no case in which this exact question was presented, but in the case of *Hermann's Exrs. v. Gregory*, 131 Ky. 819, 115 S. W. 809, it was held, in construing section 26, no particular reference being made to section 52, which might well have been done as it seems to us, that one who had taken the note of another and had paid another note owing by the maker to a bank, was a holder for value, and a defense of no consideration could not be set up. A holder for value, therefore, and a holder in due course are in the same position to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself. This construction harmonizes the several provisions of the law, and makes effectual the purpose of the law to make negotiable instruments in fact what they have been only in theory under the law-merchant, a certain medium of commercial exchange. Our conclusion also harmonizes with the several decisions of this court which are collected in *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751, wherein we held, without reference to the negotiable instruments act, that one who signed as maker was bound by the terms of his obligation. Being primarily liable as an accommodation maker, appellant was not ⁶³³ discharged by an extension of time to the principal debtor: *Eaton & Gilbert on Commercial Paper*, sec. 1206; *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 184.

66 Atl. 47, 10 L. R. A., N. S., 129, and note; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Cellers v. Meachem, 49 Or. 186, 89 Pac. 426, 10 L. R. A., N. S., 133, 13 Ann. Cas. 997.

On the trial it appeared that a chattel mortgage had been given to secure the payment of the notes made by appellant, as well as another note made by the corporation after his active participation in its affairs had ceased. After these several notes became due, an action was brought in the state of Montana where the property was then situate to foreclose the chattel mortgage. Appellant was a nonresident of Montana, and did not appear in that action. A foreclosure and sale resulted in a partial satisfaction of the judgment, the note of the corporation being paid off, and a slight sum being credited upon the obligations made by appellant.

It is urged that the notes sued on became merged in the judgment and that an independent action cannot now be maintained. The fact that the appellant was a nonresident and made no appearance in that action takes this case without the rule relied upon by the appellant.

"An unsatisfied judgment against one of two joint debtors does not bar a subsequent action upon the original claim against the other, where the latter, at the time the first suit was brought, was without the jurisdiction of the state and beyond the reach of legal service": 23 Cyc. 1209. See, also, 24 Am. & Eng. Ency. of Law, 2d ed., 760, 761; 2 Black on Judgments, 1st ed., sec. 771.

Appellant also argues that he was released by reason of the fact that he was deprived of the benefit of the security which was given by the maker at the time or after the notes were made. It was the recollection of appellant that a bill of sale was executed at the time the first notes were made and delivered. A careful reading of the testimony convinces us that the recollection of appellant in this regard is not borne out. It was not pleaded in his answer. The court made no finding that any instrument in the way of security other than the chattel mortgage was given, nor did appellant request any such finding. If it were true that a bill of sale had been given, it might be that appellant could claim credit for the reasonable value of the property as against a subsequent chattel mortgage. But there is no testimony to warrant us in holding that a bill of sale was in fact ever given. Whatever the hardship of the rule may be generally, and particularly as applied to this case, respondent was not bound to observe any equities existing between the Shaughnessy Hill Company and appellant, but might apply the proceeds of the sale under the foreclosure to the payment of any one or all of the notes as it saw fit: Smythe v. New England Loan & Trust Co., 12 Wash. 424, 41 Pac. 184.

There is no error in the record and the judgment must be affirmed.

Rudkin, C. J., Fullerton, Gose and Morris, JJ., concur.

Accommodation Paper is the subject of a note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 745. According to *Marling v. Jones*, 138 Wis. 82, 131 Am. St. Rep. 996, it is no defense by the maker of an accommodation note that the taker other than the person accommodated, whether indorsee or transferee for value, knew before and when he took the note that the accommodation maker received no consideration. According to *First Nat. Bank v. Johnson*, 133 Mich. 700, 103 Am. St. Rep. 468, an accommodation maker of a note is, legally speaking, a surety thereon. For other authorities discussing the nature of the liability of an accommodation maker or indorser, see *Evans v. Speer Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 919; *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 67 Am. St. Rep. 95; *First Nat. Bank v. Peltz*, 176 Pa. 513, 53 Am. St. Rep. 686; *Comer v. Dufour*, 95 Ga. 376, 51 Am. St. Rep. 89; *Philler v. Patterson*, 168 Pa. 468, 47 Am. St. Rep. 896; *Nashville Lumber Co. v. Fourth Nat. Bank*, 94 Tenn. 374, 45 Am. St. Rep. 727; *Robertson v. Rowell*, 158 Mass. 94, 35 Am. St. Rep. 466. A corporation can be held on accommodation paper indorsed by its treasurer only by showing special authority in him to make the paper as he did or by showing that the corporation received the consideration: *Pelton v. Spider Lake etc. Co.*, 132 Wis. 219, 122 Am. St. Rep. 963.

INDEX TO THE NOTES—VOL. 134.

- Banks and Banking**, pass-books, accounts in, balancing of, 1024, 1025.
pass-books, balances struck in amount to accounts stated, 1022.
pass-books, balances struck in, failure to object to, when amounts to admission of correctness, 1022, 1023.
pass-books, balancing of, defined, 1021.
pass-books, conclusiveness of, 1023, 1024.
pass-books, definitions of, 1021.
pass-books, duty of banker respecting, 1026.
pass-books, duty of depositor to examine, 1021, 1026.
pass-books, legal conception of, 1020.
pass-books, object of, 1020, 1021.
pass-books, popular conception of, 1019.
pass-books, return of to depositor, what imports, 1021.
- Boundaries**, declarations made by former owners respecting, 621, 622.
declarations of former owner respecting after parting with the land, 623-625.
hearsay evidence to establish, 618, 621, 622.
limitations upon rule admitting hearsay evidence of, 622.
- Building Contracts**, acceptance of work, owner, when cannot refuse, 682.
action to recover upon where there has been a substantial performance only, 693-696.
cost of remedying defects, when a test of substantial performance, 691-693.
deductions from the contract price, when should be the difference between the value of the building as completed and its value as it ought to have been completed, 686.
deductions to be made when the contract has been specifically, but not wholly, performed, 684, 685.
deviations, cost of correcting, when shows that there has not been a specific performance, 691.
deviations from strict performance of should be allowed with caution, 687.
deviations which are fatal to recovery upon, 687-691.
equitable rules applicable to when substantially performed, 680, 681.
express exclude implied, 679.
good faith, absence of on the part of the contractor precludes his recovery though he has substantially performed, 683.
good faith on the part of the contractor, when entitles him to recover upon, 681, 682.
quantum meruit, amount recoverable upon, 685.

Building Contracts, quantum meruit, recovery upon cannot exceed the purchase price, 694.

quantum meruit, recovery upon, when allowable, 680, 681.

substantial performance of, burden of proof of, 695, 696.

substantial performance of, character of action maintainable upon, 678, 693-696.

substantial performance of, costs of completing the contract, when a test of, 691.

substantial performance of, damages or deductions allowable after, 682.

substantial performance of, defects and variations which preclude a recovery notwithstanding, 686, 687.

substantial performance of, delay in the completion of the work when not fatal to the claim of, 693.

substantial performance of, entitles the contractor to recover after the allowance of damages which will give the owner substantially what he contracted for, 691.

substantial performance of, entitles the contractor to the contract price less the sum required to complete the contract price, 684.

substantial performance of is a question of fact, 695.

substantial performance of is essential to any recovery upon, 679.

substantial performance of is not inconsistent with defects, 687.

substantial performance of, measure of recovery upon, 678, 679, 681, 684.

substantial performance of, measure of recovery upon is the same whether the action is upon contract or upon a quantum meruit, 694.

substantial performance of, rule applicable to right of recovery upon, 678, 680.

specific performance of, what amounts to, 686.

specific performance of, what precludes a recovery on the ground that it does not exist, 691, 693.

specific performance of, when entitles contractor to recover upon, 679, 680.

time of completing the work, whether a test of substantial performance, 693.

unimportant deviations and omissions, effect of, 679, 680.

willful deviations by the contractor precludes a recovery by him, 683, 684.

Conditional Sale, bona fide purchaser, Alabama rule respecting, 284.

bona fide purchaser, Illinois rule respecting, 278.

bona fide purchaser, Indiana rule respecting, 283, 284.

bona fide purchaser, Mississippi rule respecting, 280.

bona fide purchaser, Pennsylvania rule respecting, 278.

bona fide purchaser, position of, where not protected by statute, 278.

bona fide purchaser, protection of, 278.

- Conditional Sale**, bona fide purchaser takes only his vendor's title, when, 278.
- bona fide purchaser, Tennessee rule respecting, 280.
- construing contracts of for the purpose of giving effect to all their parts, 279.
- effect of giving vendee authority to resell, 279.
- estoppel arising from selling goods to retail dealer or one known to be engaged in business of selling, 283, 284, 285.
- estoppel of the original vendor from denying subvendee's title where vendee is authorized to sell, 280.
- exception to rule that vendor can confer no greater title than he has, 279.
- implied authority to resell must rest on business usages, 285.
- indicia of ownership of title, 279, 280, 282, 285.
- limitations of rule as to implied authority to resell goods sold on, 285.
- mortgage, effect of vendor's giving purchaser power to make, 281.
- negotiable instruments and other personal property, not subject to the law of, 277, 278.
- possession of property, effect of upon sale to bona fide purchaser, 279.
- purchasers in course of trade take good title notwithstanding, 285.
- resale by authorized vendees, 280.
- resale, effect of giving purchaser implied power of, 281.
- retail dealers, sales to, when give implied power of resale by, 282.
- subvendee, title of where original vendor is authorized to sell though the vendor reserves title, 280.
- where there is authority to sell, express or implied, 281.
- Confession**, judgments of against married women, 940, 941.
- Confidence Game**, admissibility of evidence of other similar offenses on prosecution for, 367.
- antiquity of the offense, 363.
- bill of particulars, necessity for lies within discretion of court, 366.
- conflicting decisions on, in Missouri, 365.
- constitutionality of statute fixing form of indictment for, 364.
- definitions of, 364.
- description of offense of, 365, 366.
- distinction between and false representation, and puffing statements, 368.
- essence of the crime is the reliance on false pretense, 364, 367.
- extraterritorial force of statute, 368.
- illustrations of the "gold brick" class of swindles, 368.
- illustrations showing what amounts to, 366-368.
- indictment for and its sufficiency, 364, 365.
- misnomer of party defrauded in, effect of, 365.
- statutory enactments, foundation of modern, 363.
- sufficiency of indictment if offense is substantially set forth, 366.

variance between indictment for and proof of, 300, 301.
where the confidence game is disguised as a business transaction,
368.

Corporations, Dissolved, acting in the name of, 310.

- actions pending, abatement of, 311.
- actions pending, effect of dissolution on, 311.
- authorizing continued use of name for purposes of winding up
313.
- borrowing of money by, 311.
- by whom the rights of can be exercised and actions maintained
310.
- commencing actions or suits depending on authority to that end
311.
- continuation of powers of for limited period, 313.
- contracts, making and carrying out, 310.
- difference between English and American law on the subject, 309.
- different effect of actions on death of individual and of corporation,
312.
- effect of statutes keeping alive for specific purposes, 310.
- effect on choses in action assigned to, as to suing in name of corporation,
311.
- effect on issue of patent after dissolution, 310.
- effect on pending actions and suits, 311.
- equitable supervision of the rights of creditors of, 313.
- equity, powers and property of, equity rules respecting, 309.
- exclusiveness of statutory remedies declared in North Carolina
only, 313.
- execution against, proceedings under, 312.
- execution cannot be issued by, 312.
- execution may be issued by winding-up trustees, 312.
- execution may issue on judgment assigned prior to dissolution by,
312.
- executory contracts with dissolved corporations terminate with
the dissolution, 311.
- general rule that they can exercise no rights and maintain no
proceedings, 310.
- general statement of effect of dissolution, 309.
- how may acquire title and rights, 310.
- if dissolution occurs between execution and levy of writ, it does
not affect proceedings, 312.
- inroads of statutory on common law in preventing abatement and
further prosecution of actions against, 315.
- laws preventing from becoming absolutely defunct, 313.
- legislation on the subject in the different states, 314, 315.
- new business of, 310.
- remedies against, statutory, whether exclusive, 313.
- right to act in the name of, 310.

Corporations, Dissolved, rule as to powers of in the United States, 309.

special legislation in Alabama for corporation whose charter was forfeited, 313.

statutory extensions of functions of, 312.

transfers of stock of, 312.

winding up by making directors trustees, 315.

winding-up purposes, statutory enactments permitting, 315.

creditors' Bill, sureties, right of to maintain, 567.

Declarations of Former Owners of Land. See Evidence.

deeds, lost, evidence, oral to establish by a witness who has only heard them read, 1096.

lost, evidence, oral to establish by a witness who is unable to recollect the substantial parts of, 1096.

lost, evidence, oral to establish by a witness who speaks from hearsay only, 1096.

lost, evidence, oral to establish must be clear, positive and satisfactory, 1095.

lost, evidence, oral to establish must show the substantial parts, 1096.

lost, evidence, oral to establish, preponderance of is sufficient, 1095.

lost, evidence, oral to establish, value of the instrument as affecting, 1095.

lost, evidence, oral to establish, whether should leave no reasonable doubt, 1095.

lost, evidence, oral to establish, where they have been lost or are withheld by the adverse party, 1095.

Definition of account stated, 1021.

of balances, 1021.

of confidence game, 364.

of disorderly house, 820.

of equitable estoppel, 172.

of estoppel, 173, 175.

of heat of passion, 730.

of malice, 729.

of manslaughter, 727.

of murder, 726, 727.

of pass-books, 1021.

Disorderly House, criticism of certain decisions respecting, 819.

definitions of, 820, 822.

disturbance of the peace is not essential to, 821.

gaming-houses, 820.

house where usurious business is conducted, 823.

includes every house to which people resort for purposes injurious to public morals, health or safety, 820.

Am. St. Rep. Vol. 134—72

Disorderly House includes every place where inmates behave so as to make it a nuisance, 820.

instances of, 825.

is one where lewd, dissolute or drunken persons resort, 820.

liquor, includes every house in which is unlawfully sold, 825.

mere assemblage of persons for some unlawful act, whether constitutes, 821, 822.

prostitution, house of, 820.

tests of, 820, 824.

Elegit, practical abolition of remedy by, 36.

Estoppel, equitable, fraud is the basis of, 173.

equitable, what is, 172, 173.

fraud in encouraging an act to be done, 177.

See Frauds, Statute of.

Evidence, declarations of former owners of land are not competent to destroy vested rights, 612.

declarations of former owners of land after making a sale or after the inception of a lien, 617.

declarations of former owners of land as against a purchaser for value, 613, 614.

declarations of former owners of land, confusion of decisions respecting, 611.

declarations of former owners of land, in disparagement of title made before former owner has parted with possession, 611.

declarations of former owners of land, limitations upon admissibility of, 615, 616-618, 620.

declarations of former owners of land made after they have parted with title or possession, 616-618, 623, 624.

declarations of former owners of land must be by persons now deceased, 621, 625.

declarations of former owners of land must be made ante litem motam, 620.

declarations of former owners of land must not be self-serving, 620.

declarations of former owners of land, purposes for which admissible, 612.

declarations of former owners of land, title restricted to matters provable by parol, 614.

declarations of former owners of land to contradict title of record, 615, 616.

declarations of former owners of land to show character and nature of possession, 615.

declarations of former owners of land to show knowledge of the existence of a mortgage, 612.

declarations of former owners of land to show sale of the property by them, 613.

Evidence, declarations of former owners of land to show that an apparent deed was a mortgage, 618.

declarations of former owners of land to show the date of the delivery of a deed, 616.

declarations of former owners of land to show title or interest of another in the property, 612, 613.

declarations of former owners of land, whether admissible if the owners are still living, 625.

See Deeds, Lost.

Execution. See Judgment.

Execution Sale, caveat emptor, rule of, when not applied to purchasers at, 38.

failure of title at, when does not entitle the purchaser to relief, 39.

of property to which the defendant had no title, purchasers under, when entitled to relief, 38.

purchaser at, when entitled to relief for failure of title, 36, 37—40.

Frauds, Statute of, assisting to consummate a fraud, 174.

change of position in consequence of acts or words of the other party, 176.

change of position which will create estoppel to plead, 175, 176.

conduct which will estop a party from pleading, 175.

equitable estoppel against pleading, grounds of, 174, 176.

equitable estoppel, prejudice to the party asserting, necessity for, 177.

estoppel, equitable, against pleading or asserting, 173, 174.

estoppel, equitable, fraud is the basis of, 173.

estoppel, equitable, pleading, necessity of, 173.

estoppel, equitable, pleas of, replies to, 173.

part performance of contract for personal services, 174.

pleading to take advantage of a confidence reposed, 174, 175.

Fraudulent Conveyances, sureties' right to maintain as against persons claiming under their principal, 567.

Indorsement Without Recourse, contracts implied by, 996.

effect of, 995, 998.

effect of, where there are several indorsements, 993, 994.

form of, 993.

liability as vendor is not limited by, 995, 996.

liability on a warranty of genuineness, 996.

liability resulting from, 995—997.

need not precede the signature of the indorser, 993.

negotiability of instrument is not affected by, 998.

parol evidence is not admissible to show that it was unqualified, 994.

parol evidence respecting, admissibility of, 993, 994.

parol evidence to show to which indorser applicable, 995.

unqualified indorsement, cannot be shown to be, 994.
warranty of title notwithstanding, 996, 997.
what is, 993.

Judgment, elegit, practical abolition of, 36.

execution upon, apparent satisfaction of when no actual satisfaction has taken place, 36.

execution upon, satisfaction by elegit, when may be set aside, 36.

execution upon, satisfaction of, power of courts to vacate, 37.

execution upon, satisfaction of, void proceedings to set aside, 38.

execution upon, to what entitled, 35.

revivor of by scire facias for failure of title, 38.

satisfaction of, equitable remedy to vacate, 38, 39.

See Married Woman.

Jury Trial, burden of proof as to the effect of statements made by a juror as to his own knowledge, 1054.

burden of proving the misconduct of the jury, 1040-1042.

communication of jurors with outsiders respecting matters not connected with the case, 1043.

conversation or communication with or in the presence of a juror, 1040.

conversation or communication with or in the presence of a juror, presumption arising from, 1041.

liquors, intoxicating, decisions holding that the use of by jurors is always misconduct, 1034.

liquors, intoxicating, decisions holding that the use of must be shown to have been prejudicial, 1037, 1038.

liquors, intoxicating, drinking after the cause is submitted and while it remains under consideration, 1039.

liquors, intoxicating, drinking of, burden of showing the effect of, 1040.

liquors, intoxicating, drinking of during the pendency of a trial when deemed not prejudicial, 1037.

liquors, intoxicating, drinking of during the pendency of a trial when deemed prejudicial, 1037, 1038.

liquors, intoxicating, drinking to the extent of unfitting jurors for duty, 1040.

liquors, intoxicating, drinking where a capital case is under submission, 1039, 1040.

liquors, intoxicating, drinking with a witness for one of the parties, 1038.

misconduct of a juror in communication with judge not in open court, 1045, 1046.

misconduct of a juror in communicating with other jurors and with officers, 1047-1050.

misconduct of a juror in conversing with counsel, 1046.

misconduct of a juror in conversing with witnesses, 1045.

- Jury Trial**, misconduct of a juror in communicating with outsiders on matters not connected with the case, 1043.
- misconduct of a juror in occupying same bed or room with the sheriff or bailiff in charge, 1048.
- misconduct of a juror in taking meals and otherwise being in the presence and hearing of outsiders, 1041, 1042, 1053.
- misconduct of a juror, test of, where it consists of communication with outsiders, 1044.
- misconduct of the jury, discussions and arguments amounting to, 1059.
- misconduct of the jury does not always entitle the losing party to a new trial, 1034.
- misconduct of the jury in acting on the suggestion that the defendant, if convicted, will be pardoned, 1060.
- misconduct of the jury in arriving at their verdict by lot, 1061.
- misconduct of the jury in arriving at their verdict by taking an average, 1062.
- misconduct of the jury in criminal cases which will entitle the defendant to a new trial, 1034.
- misconduct of the jury in deciding that the majority shall rule, 1061.
- misconduct of the jury in discussing other crimes imputed to the defendant, 1050.
- misconduct of the jury in examining exhibits and other demonstrative evidence, 1052.
- misconduct of the jury in making experiments during their deliberations, 1060, 1061.
- misconduct of the jury in not deliberating as a body, 1059.
- misconduct of the jury in reading law books, 1058.
- misconduct of the jury in reading or having access to newspapers, 1056, 1057.
- misconduct of the jury in receiving evidence out of court, 1050-1052.
- misconduct of the jury in taking papers and other evidence to their room, 1051.
- misconduct of the jury in the manner of arriving at their verdict, 1062.
- misconduct of the jury in the use of intoxicating liquors, 1034.
- misconduct of the jury may consist of the misconduct of a single juror, 1034.
- misconduct of the jury, prejudice from is not presumed, 1054.
- misconduct of the jury, presumption of prejudice from, 1041, 1042.
- misconduct of the jury, tests to show when prejudicial, 1036.
- officers in charge of the jury, statements of entitling the losing party to a new trial, 1049.
- permitting juror to go to the postoffice to receive mail, 1043.
- receiving notes and communications from outsiders, when is not misconduct, 1043.
- receiving evidence out of court, presumption as to effect of, 1050.

- Landlord and Tenant**, demise, covenant implied by, when broken, §1
 duty of the former to put the latter in possession, American rule respecting, 917, 920.
 duty of the former to put the latter in possession, English rule respecting, 916, 917.
 holding over by tenant, landlord, when liable to the new tenant because of, 922.
 landlord failing to put tenant in possession, whether may recover rent, 922.
 liability of the former if he had no power to devise, 920, §1.
 liability of the former if a stranger obtains possession after the commencement of the lease, 917.
 liability of the former under a covenant to put his tenant in possession, 919.
 liability of the former where he has a right of possession, 922.
 liability of the former where the tenant in possession refuses to surrender to another tenant, 917, 918.
 liability of the former who knows that he will not be able to put his tenant in possession, 917.
 quiet enjoyment, covenant of does not apply against acts of stranger to the title, 921.
 reasons for the English rule requiring the former to put the latter in possession, 919.
 rent being payable before the commencement of the term implies a liability on the part of the landlord if he does not put the tenant in possession, 922.
 rents, loss of for failure to put tenant in possession, 922.
 stranger, acts of are not impliedly covenanted against by the lease, 921.
 tenant holding over, whether liable to a new tenant, 920.
Limitation of Actions, in suits by sureties to be reimbursed for payments made on the debt of their principal, 559.
 payment by sureties of debts barred by the statute of limitations, 564, 565.
Lost Deeds. See Deeds.

- Manslaughter**, by killing in the heat of passion, but with a dangerous weapon, 728.
 by killing in the heat of passion, but in a cruel manner, 728.
 by killing without design to produce death, 728.
 by one committing a trespass, but not intending to commit any crime, 728.
 by one engaged in committing a misdemeanor, 728.
 classification of, 728.
 definitions of, 727, 728.
 differences between and murder, 727, 729.
 heat of passion, causes of, whether material, 730, 731.
 heat of passion, what is within the meaning of the law of, 731.

Manslaughter in the first degree, 728.

in the second degree, 728.

killing by negligence, 728.

killing, cooling time, question of, what to be considered in determining, 733.

killing, whether must be both unlawful and intentional, 731.

malice, absence of, 728, 729.

malice, absence of is essential to the crime of, 728, 730.

malice, implied, 729.

malice, when inferable, 729.

passion, what is, 731.

provocation must be reasonable, 732.

provocation, necessity for, 733.

provocation to reduce a killing to, 730, 732.

Married Woman, contract of is void at the common law, 928, 931.

contracts of, judgments based upon, whether are void, 931, 932.

coverture, failure to plead, whether estops from denying validity of the judgment, 937-939.

criminal liability of, 935.

equity, right of to sue in, 928.

judgments against by confession, 940, 941.

judgments against by default or consent, 941, 942.

judgments against, coverture appearing by the record, whether are void, 936.

judgments against, decisions declaring them to be void, 930.

judgments against for debts contracted while unmarried, 939, 940.

judgments against for deficiency on the foreclosure of a mortgage, 934.

judgments against for tort committed before coverture, 933, 935.

judgments against for tort committed during coverture, 935.

judgments against in actions commenced while unmarried, 940.

judgments against may be personal, 933.

judgments against, modification of the common law respecting, 930.

judgments against, on antenuptial contracts, 933.

judgments against, personal, when may be rendered, 933, 934.

judgments against, presumptions for or against the validity of, 936.

judgments against, record of, whether must show a transaction for which she was liable, 935.

judgments against respecting separate estate are valid, 939.

judgments against upon contract she is not capable of making, 929.

judgments against upon note signed by herself and husband, 934.

judgments against, validity of, the general American rule, 929.

judgments against, when not void at the common law, 933.

judgments against, where husband is not joined as a party, 932, 933.

Married Woman, judgments against, where husband died during the pendency of the action, 940.

judgments against, where statutes have modified common-law obligations of, 941, 943.

judgments against, where the fact of coverture does not appear on the record, 936.

judgments against, where the fact of coverture has not been pleaded, 937-939.

judgments against, whether and when void, 928-935.

judgments against, whether may be held void for presumed coercion of husband, 935.

legal existence of, suspension of in that of the husband, 923.

status of at the common law, 931.

statutes affecting rights of, 928.

whether within the jurisdiction of the courts at the common law, 928, 935.

Negotiable Instruments, conditional sales, application of law of to, 277, 278.

See Indorsement Without Recourse.

Principal and Surety, action against principal before maturity of the debt, but after payment made, 564.

action by sureties to compel the principal to pay the debt, 568.

action by the administrator of the surety against the principal, 559.

action of surety against principal before payment made, 559.

assignment of judgment to surety and his right to enforce it, 558.

assumpsit by the latter against the former, when maintainable, 558.

creditors' bill, when maintainable by sureties, 567.

defense of suit, right of surety to require the principal to make, 558.

defense to suit, payment by surety after knowledge of, 559.

defenses not known to the surety do not prevent his recovery against his principal, 560.

demand of surety for payment is not essential to his right to recover, 561.

equitable remedies available to sureties against their principal, 566-568.

estoppel of principal to deny that surety was liable for debt paid by him, 560.

fraudulent conveyances by principal, suit by surety for recovery from, 567.

joint and several liability of the principal to two or more sureties, 558.

judgment against surety, effect of as evidence against his principal, 560.

Principal and Surety, judgment, dormant, effect of payment of by surety, 560.

liability of surety to pay debt must exist to entitle him to recover of his principal, 559.

liability of the former to reimburse the latter, 557.

liability of the principal to pay the debt is an essential to his liability to his surety who pays it, 560.

limitations of actions in favor of surety for reimbursement, 559.

negotiable paper, payment of debt by, 563.

notice to principal to defend, 558.

payment by surety, at what time may be made, 561.

payment by surety before maturity of the debt paid, 563, 564.

payment by surety by giving a new note or other obligation, 561, 562.

payment by surety, necessity for, when must be shown, 561.

payment by surety of a debt barred by the statute of limitations, 564, 565.

payment by surety, when deemed voluntary, 564.

payment by surety, when does not entitle him to proceed against his principal, 559, 561.

payment by surety without suit or judgment, 561.

payment in good faith by surety, when creates liability against principal, 560.

payment of the debt by the surety makes his principal his simple contract debtor, 557.

promise of the former to reimburse the latter, when implied, 558.

reimbursement of the latter by the former, implied promise of, 557.

remedies against principal given by statute, whether cumulative, 565.

remedies in equity in favor of surety and against principal, 566.

subrogation, right of surety to, 566.

usurious note, payment of by surety, when does not entitle him to recover of his principal, 560.

Subrogation, sureties, right of, 566.

Tort, Waiver of to Sue in Assumpsit, advantages of suing in one form of action rather than in the other, 191.

amendment to complaint, to show whether action is in tort or in contract, 191.

construction of complaints favors actions in contract, 190, 191.

conversion into money, whether necessary to sustain action, 192, 194.

election is not made unless the party has two inconsistent remedies, 190.

election of, when takes place and becomes irrevocable, 189.

election, what amounts to, 189, 190.

election where remedies are concurrent and consistent, 190.

- Tort, Waiver of to Sue in Assumpsit, exceptions to the general rule**
respecting, 196.
for infringement of patent, 195.
general right of, when exists, 189.
in actions against carriers, 193.
in actions against physicians and surgeons for malpractice, 195.
in actions against shippers, 195.
in actions between tenants in common, 196.
in actions for trespass and injury to standing timber, 195, 196.
in actions for use and occupation, 196.
in cases of bailment, 194.
in cases of fraud, deceit or false representations of agents, 194.
intent to elect is not material when acts in fact amount to an
election, 189, 190.
trover, waiving to sue in assumpsit, 192.
trover where goods have been changed in character by the trans-
feesor, 192.
what additional elements are immaterial, 189.
what is, 189.
where broker converts securities, 194.
where carriers have made written contracts, 193.
where goods converted have been returned, 195.
where goods have been stolen, 195.
where money has been converted, 192.
where moneys have been collected by trespassers, 196.
-

INDEX—VOL. 134.

ABATEMENT AND REVIVOR.

See Divorce, 17, 18.

ACCOMMODATION PAPER.

See Bills and Notes, 7-9.

ACTIONS.

CONVERSION—Waiver of Tort—Action in Assumpsit.—

Where a petition alleges that the plaintiffs own specified personalty, and the only conversion by the defendants alleged is that they "wrongfully and tortiously took possession of said personal property, and carried said personal property away, thereby converting same to their own use, with the intent to deprive the plaintiffs of said personal property," and such petition further alleges that the plaintiffs waive the tort and sue for the value of the personal property, held, (a) such petition is subject to demurrer on the ground that the plaintiffs cannot maintain an action in assumpsit for the value of the property, but their remedy is confined to an action ex delicto; (b) where such action is brought for the value of the property, and the plaintiff in his petition expressly waives the tort, the action cannot be maintained as an action ex delicto, and the petition should be dismissed upon an appropriate demurrer thereto. (Ga.) Woodruff v. Zaban, 186.

See State.

Notes.

Tort, Waiver of to Sue in Assumpsit, advantages of suing in one form of action rather than in the other, 191.

amendment to complaint, to show whether action is in tort or in contract, 191.

construction of complaints favors actions in contract, 190, 191.

conversion into money, whether necessary to sustain action, 192, 194.

election is not made unless the party has two inconsistent remedies, 190.

election of, when takes place and becomes irrevocable, 189.

election, what amounts to, 189, 190.

election where remedies are concurrent and consistent, 190.

exceptions to the general rules respecting, 196.

for infringement of patent, 195.

general right of, when exists, 189.

in actions against carriers, 193.

in actions against physicians and surgeons for malpractice, 195.

in actions against shippers, 195.

in actions between tenants in common, 196.

in actions for trespass and injury to standing timber, 195, 196.

in actions for use and occupation, 196.

in cases of bailment, 194.

in cases of fraud, deceit or false representations of agents, 194.

intent to elect is not material when acts in fact amount to an election, 189, 190.

trover, waiving to sue in assumpsit, 192.

- Tort, Waiver of to Sue in Assumpsit, trover where goods have been changed in character by the tort-feasor, 192.**
 what additional elements are immaterial, 189.
 what is, 189.
 where broker converts securities, 194.
 where carriers have made written contracts, 193.
 where goods converted have been returned, 195.
 where goods have been stolen, 195.
 where money has been converted, 192.
 where moneys have been collected by trespassers, 196.

ADDITIONAL SERVITUDE.

See Highways.

ADMINISTRATION.

See Executors and Administrators.

ADMIRALTY.

See Maritime Liens; Shipping.

ADOPTION.

1. **ADOPTION.**—The Children of a Foreign Adoption whose rights are to be adjudicated upon here are regarded, it seems, in the same light as though they had been duly adopted under the laws of this state. (N. Y.) *Matter of Leask*, 866.

2. **ADOPTION**—Limitation in Deed or Will.—Under the New York statute of adoption a limitation in a deed or will to a child or children, or conditioned upon the survivorship of a child or children, is not deemed to include an adopted child if the grantor or testator is a stranger to the adoption. (N. Y.) *Matter of Leask*, 866.

See Wills, 15.

ADVANCEMENTS.

See Descent and Distribution.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION**—What Constitutes.—Adverse possession is established by inclosing the land with a fence, starting to clear off the timber, setting out an orchard and thereafter caring for the trees, under a claim of ownership. (Wash.) *Davies v. Wickstrom*, 1100.

2. **ADVERSE POSSESSION**—Extent of Possession.—The entry without color of title on land does not oust a person in actual possession of a larger tract of which such land forms a part, except to the extent of the actual inclosures made by the person entering. (Ky.) *Meade v. Ratliff*, 467.

3. **ADVERSE POSSESSION**—Time When Title is Devested.—The effect of the statute of limitations is to transfer to an adverse occupant the title against which it has run; but the title of the original owner is unaffected and untrammelled until the last moment, and when it is vested in the adverse occupant by the completion of the statutory bar, the transfer has relation to nothing which preceded it. (Pa.) *Jordan v. Chambers*, 1081.

4. **ADVERSE POSSESSION**—Remainderman and Life Tenant.—During the life of the tenant for life neither his possession nor that of his grantee can be adverse to that of the remainderman. (N. Y.) *Jefferson v. Bangs*, 856.

5. ADVERSE POSSESSION—Remainderman and Mortgagee.—The rule that a mortgagee's possession runs against those entitled to an estate in remainder has an exception where he enters, not merely as mortgagee, but by virtue of having a limited interest such as a life estate, and the exception applies to his transferee of the mortgage and life estate. (N. Y.) *Jefferson v. Bangs*, 856.

6. ADVERSE POSSESSION—Presumption of Grant.—When one has had possession of property in such a way and for such a time as to make it adverse, a deed will be presumed, and the presumption may exist although the jury may disbelieve the actual execution of such a grant. (Md.) *Cadwalader v. Price*, 603.

7. PRESCRIPTION—Presumption of Grant of Land.—When land has been held adversely for fifteen years, the law conclusively presumes a grant; and if the adverse holding has not been continuous for that time, still the law may presume a grant from this and other circumstances. Whether the presumption of a grant will arise depends not alone upon the length of time that has elapsed, but upon all the circumstances. (Ky.) *East Jellico Coal Co. v. Hays*, 436.

8. PRESCRIPTION—Presumption of Grant of Land.—When Limitation has not run, other facts may be shown justifying the presumption of a grant. (Ky.) *East Jellico Coal Co. v. Hays*, 436.

9. PRESCRIPTION—Presumption of Grant Against Subsequent Purchaser.—A purchaser with notice stands in the shoes of his vendors, in respect to the presumption of an adverse grant of the land. (Ky.) *East Jellico Coal Co. v. Hays*, 436.

10. LAND—Adverse Possession.—The party in adverse possession of land has the right to have a trial of his cause at law. (Ark.) *La Cotts v. Pike*, 48.

See Champerty; Ejectment; Partition; Tenancy in Common, 4-6.

ADVERTISING SIGNS.

See Landlord and Tenant, 5, 6.

AFTER-ACQUIRED TITLE.

See Deeds, 12-16; Mortgages, 2.

AGENCY.

See Principal and Agent.

ALIENS.

ALIEN—Forfeiture Against Expatriated Citizen.—There is no law which forfeits the property of a citizen who, for any reason, becomes expatriated. (Wash.) *Roger v. Whitham*, 1105.

AMUSEMENT PLACES—SCENIC RAILWAY.

See Carriers, 26-28.

ANIMALS.

DAMAGES—Value of Dog—Nonassessment.—The fact that a dog is not assessed does not prove that it is of no value, especially when the evidence shows it is valuable. (Ark.) *El Dorado & Bascom Ry. Co. v. Knox*, 17.

See Commerce, 5-8; Railroads, 13-16.

APPEAL AND ERROR.

Appellate Practice Generally.

1. APPEAL AND ERROR—Peremptory Instruction to Return Verdict—Question Presented.—Where, after all evidence had been

taken, the trial court gave the jury a peremptory instruction to return a verdict for the defendant, the only question an appeal presents is whether the evidence was sufficient to warrant a verdict for the plaintiff at the strongest probative value. (Ark.) *McGray v. Ultima Thule A. & M. Ry. Co.*, 24.

2. **APPEAL**.—Where the Trial Court in the Course of a Written Opinion recites the facts as he finds them, and thereupon dismisses the petition, the defendant is not entitled to appeal from the overruling of his motion to eliminate certain statements from the opinion as not sustained by the evidence. (Iowa) *Commercial Nat. Bank v. Gilinsky*, 406.

3. **APPEAL**.—Findings of Fact are not Essential to the Review of a judgment or order, under section 4107 of the Iowa code, when made they may be assailed by the appellee as not warranted by the evidence, in order to sustain the judgment. (Iowa) *Commercial Nat. Bank v. Gilinsky*, 406.

4. **APPEAL**.—Instructions not Incorporated in Abstract.—The supreme court will not review an assignment of error upon rulings of the trial court upon instructions which are not incorporated in the abstract. (Ill.) *People v. Weil*, 357.

5. **APPEAL**.—Improbability of Testimony.—The Supreme Court cannot disregard testimony simply because it may seem improbable, when it is not contrary to natural law. (Ill.) *O'Callaghan v. DeWood Park Co.*, 331.

6. **APPEAL**.—Appellate and Supreme Courts.—In Common-law Actions the Judgment of the Trial Court, affirmed by that of the appellate court, is binding upon the supreme court as to the facts. (Ill.) *Rigdon v. More*, 328.

7. **APPEAL**.—The Burden of Showing Error on the Part of the Trial Court rests upon the plaintiff in error. (Ga.) *Weeks v. Hark Lumber Co.*, 213.

8. **APPEAL**.—Whether Action will be Treated as Equitable at Law.—Where a suit in equity was transferred to the common-law docket by an order of court, which order was ignored by the court and the parties and the case tried as an equitable action, it will be so treated on appeal. (Ky.) *Phillips v. Stewart*, 441.

9. **APPEAL**.—Review of Commissioner's Report.—The fact that there were no exceptions filed to the report of a commissioner does not prevent a review of the order of confirmation. (Ky.) *Webster v. Cadwallader*, 470.

10. **APPEAL**.—Facts Agreed to by Parties.—When a case comes to the supreme court on a report stating that the facts afterward recited "appeared in evidence," such facts must be treated as agreed to by both parties, and the trial judge regarded as justified in making rulings of law upon them accordingly. (Mass.) *Newburyport v. Spear*, 652.

Change in the Law.

11. **APPEAL AND ERROR**.—Act Passed Pending Appeal.—Effect.—Where the law has been changed after a decree and before judgment on appeal, the appeal decision must be controlled by the law at the time of such appeal, when the language of the statute clearly indicates that it shall have a retroactive effect. (Ark.) *Pelt v. Payne*, 45.

Exceptions and Assignment of Error.

12. **APPEAL**.—An Error in Decree or Judgment cannot be Made Ground of Exception to the overruling of a motion for a new trial. (Ga.) *Bond v. Sullivan*, 199.

13. APPEAL.—An Assignment of Error Containing the Exception.—"That the court erred in its entire charge to the jury, in failing to exempt from the consequences to be visited upon the grantor this defendant, who was thus deprived of all his defenses arising out of the estoppel, silence and fraud of the plaintiff, and the prescriptive holding of the premises in dispute," is too vague and general to raise any question for decision in this court. (Ga.) *Bond v. Sullivan*, 199.

14. APPEAL AND ERROR.—Specifications of Insufficiency of the Evidence to Support the Finding—Fraud, Statute of.—Where there is a finding that the defendants entered into a contract with the plaintiff, and the testimony taken at the trial refers to a contract claimed to have been entered into by the defendants by their agents, and such agents could have been authorized so to do only by a writing signed by the defendants, a specification that there is no evidence that the defendants entered into the contract with the plaintiff is sufficient to present the question of the want of authority because no authority was conferred in writing. (Cal.) *Seymour v. Oelrichs*, 154.

15. APPEAL AND ERROR.—A specification of the insufficiency of the evidence is sufficient, if it is as specific as the finding assailed. (Cal.) *Seymour v. Oelrichs*, 154.

16. APPEAL.—Exception to Amendment of Issue.—An exception to an allowance, over objection, of "the amendment to the issue which is in the record," there being two such amendments in the record, and nothing further to indicate to which of them the objection and the ruling of the court applied, is insufficient as an assignment of error. (Ga.) *Thornton v. Ferguson*, 226.

Harmless Error.

17. APPEAL.—Errors not Calling for Reversal.—Other grounds of error complained of are not of such character as to require the grant of a new trial. (Ga.) *Thornton v. Ferguson*, 226.

18. APPEAL AND ERROR.—Harmless Error.—Where a judgment is right upon the undisputed testimony, no prejudice can result to an appellant from any instruction given by the court. (Ark.) *Kansas City Southern Ry. Co. v. Carl*, 56.

Reversal and Trial De Novo.

19. APPEAL.—Reversal and Trial De Novo—Right to Jury.—In an ordinary civil action at law, in which the parties are entitled as a matter of right to a jury trial, the supreme court can reverse the judgment and remand the cause with directions to the trial court to enter the proper judgment only where the error occurred after the verdict was entered. Where errors have intervened prior to the entry of the judgment, and the cause is reversed therefor, it must be remanded for a trial de novo. (Ill.) *Rigdon v. More*, 328.

20. APPEAL.—Reversal of Verdict.—Where There is a Substantial Conflict in the Evidence, the verdict of a jury will not be reversed on appeal. (Idaho) *Eaves v. Sheppard*, 256.

21. APPEAL.—Whether Reversal Required.—No ground of the motion for a new trial requires a reversal. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

ARREST.

ARREST.—A Person Suspected of the Commission of a Crime may lawfully be arrested by the sheriff or police, held in custody until a preliminary hearing of the charge against him can be had, and then be committed to jail or held to bail for the action of the grand jury. (Md.) *Downs v. Swann*, 586.

See Criminal Law, 1.

1. **ASSAULT—Inadequate Damages.**—A Verdict of Once Cost for an unprovoked assault, perhaps not violent in itself, but publicly made and accompanied by insulting language, is inadequate, and should be set aside by the court. (Me.) *Leavitt v. Dow*, 534.

2. **ASSAULT—Damages for Injury to Feelings.**—One may recover not only for injuries to his person, but for mental suffering and humiliation directly resulting from an assault upon him in public. (Me.) *Leavitt v. Dow*, 534.

3. **ASSAULT—Inadequate Verdict, Setting Aside.**—It is the duty of the court to set aside a verdict for grossly inadequate damages awarded for an assault. (Me.) *Leavitt v. Dow*, 534.

ASSAULT TO MURDER.

See Homicide, 4.

ASSESSMENTS.

See Judicial Sales, 7-11.

ASSISTANCE, WRIT OF.

See Mortgage, 16.

ASSUMPSIT.

See Actions.

ATTORNEY AND CLIENT.

1. **ATTORNEY—Authority to Consent to Judgment.**—A verdict and judgment rendered with the consent of counsel is binding upon the client, in the absence of fraud and collusion upon the part of the counsel with whose consent such verdict and judgment is rendered. (Ga.) *Adkins v. Bryant*, 211.

2. **CITY ATTORNEY—Duty to Citizens.**—A City Attorney owes the same duty to a citizen that he does to the municipality. He acts to some extent in the character of a trustee. (Wash.) *Roger v. Whitham*, 1105.

See District Attorney; Judicial Sale, 7-11; Trial, 3; Writs, 1.

ATTORNEY FEES.

See Costs, 4; Limitation of Actions, 3.

AUDITOR.

See Municipal Corporations, 19-23.

AUTOMOBILES.

1. **AUTOMOBILE—Negligent or Inexperienced Operator.**—When a beginner in the management of an automobile is concentrating his whole attention in executing a reverse curve, not on what is ahead of him, and does not see a pedestrian until right upon her, and she does not stop, as he should, within a foot or two, but runs some eight feet after striking her, the juridical cause of the accident is the autoist's inattention to what was ahead of him, in combination with his lack of skill in managing the machine. (La.) *Naves v. Dielmann*, 508.

2. **AUTOMOBILE—Negligent or Inexperienced Operator.**—When a pedestrian, attempting to avoid an automobile, runs nearly halfway across the street before she is struck by the machine, which is going so slowly that it could be stopped within a foot or two, the juridical cause of the accident is the fault of the autoist in running

upon the streets without knowing how to make an emergency stop. (La.) Navailles v. Dielmann, 508.

3. **AUTOMOBILE—Injury to Frightened Pedestrian.**—Where the act of an old lady in running in front of an automobile is not voluntary, but simply the result of terror induced by the approach of the machine, it does not constitute negligence on her part. (La.) Navailles v. Dielmann, 508.

4. **AUTOMOBILE—Doctrine of Last Chance.**—Where an old lady, in terror at the approach of an automobile, runs in front of it, and the autoist has time to stop the machine before striking her, the case is covered by the last chance doctrine. (La.) Navailles v. Dielmann, 508.

5. **AUTOMOBILE—Complaint in Action for Damages.**—A complaint in an action for personal injuries sustained from being run over by an automobile, which sets forth the facts surrounding the accident, and alleges that the autoist "was driving or running said automobile in a careless and reckless manner and that he failed and neglected to stop said automobile," is sufficiently specific. (La.) Navailles v. Dielmann, 508.

6. **AUTOMOBILE—Evidence of Excessive Speed.**—The testimony of a witness that an automobile, which struck a boy, ran "a good deal faster than a horse trots; it went pretty fast," does not prove excessive speed, it not appearing that the statutory speed was exceeded and there being evidence that the car ran but little more than its length after striking the boy. (Mich.) Zoltovski v. Gzella, 752.

7. **AUTOMOBILE—Absence of Lights on an Automobile in the Night-time** is evidence of negligence in its operation on the streets. (Mich.) Zoltovski v. Gzella, 752.

8. **AUTOMOBILE.**—It is Contributory Negligence in a Boy thirteen years old to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thought to look to see whether any vehicle is approaching. (Mich.) Zoltovski v. Gzella, 752.

9. **AUTOMOBILE—Liability for Act of Chauffeur of Hired Car.**—Where the owner of an automobile lends it, with a licensed chauffeur in charge, under an agreement for a specified amount for the use of the car with the driver for two days, the chauffeur to be under the directions of the hirer, the owner is liable for an injury to a third person caused by the negligence of the chauffeur in operating the car. (Mass.) Shepard v. Jacobs, 648.

BAIL.

1. **BAIL.**—When Bail is Given, the Principal is regarded as delivered into the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. (N. Y.) Netograph Mfg. Co. v. Scrugham, 886.

2. **RECOGNIZANCE.**—Where a Complaint is Lodged Against A, and B, being arrested, recognizes under A's name, and defaults the recognizance, a scire facias upon the recognizance cannot be maintained against A, nor against his sureties, because not joined with the real principal. (Me.) State v. Messier, 541.

BAILMENT.

See Livery-stable Keeper.

BANKRUPTCY.

1. **BANKRUPTCY**—Trust Property Subsequently Conveyed.—Property held in trust for a debtor, and not subject to the demands of creditors at the time of his discharge in bankruptcy, is not rendered liable to debts antedating the discharge by a subsequent conveyance to him in pursuance of a discretion given to the trustee. The fact that the trustees delayed the conveyance until his debts were wiped out by the bankruptcy proceedings works no fraud upon his creditors. (Iowa) *Robertson v. Schard*, 430.

2. **BANKRUPTCY**—Exemptions Under State Laws.—The bankruptcy act (Act July 1, 1898, c. 541, sec. 6, 30 Stat. 548 [U. S. Comp. Stats. 1901, p. 3424]) recognizes exemptions allowed by state laws, and, when the trustee agrees to submit the question of exemption to a state court, he must be held to waive the rules of the bankruptcy court, and a failure of the bankrupt to make a claim in the schedule will not necessarily be considered as a waiver. He can amend his schedule before distribution of his assets to claim exemption. (La.) *Harrelson v. Webb*, 529.

3. **BANKRUPTCY**—Suit in State Court.—Plaintiff sued defendant, the trustee in bankruptcy of a partnership, of which defendant was a member, and also of the individual members, for \$2,000, part of the purchase price of property sold in the bankruptcy proceedings, which plaintiff claims a homestead right. The suit was brought in the state court by agreement. (La.) *Harrelson v. Webb*, 529.

4. **BANKRUPTCY**—Preferences.—State and Federal Courts have concurrent jurisdiction under the bankruptcy act to set aside an unlawful preference, but when relief is sought in a state court and its jurisdiction is exercised, the rules of practice as established in the courts of that state prevail. (Pa.) *Exler v. American Box Co.*, 1067.

5. **BANKRUPTCY**—Preferences—Striking Off Judgment.—It is only when the fact upon which the court is asked to strike off a judgment, regular on its face, is admitted or not questioned that it may be stricken off. Hence a court will not declare the lien of a judgment void because the judgment was entered within four months of the bankruptcy of the debtor, the allegation that he was insolvent within the meaning of the bankruptcy act at the date of the judgment being denied. (Pa.) *Exler v. American Box Co.*, 1067.

6. **BANKRUPTCY**—An Order Declaring the Lien of a Judgment Void, and the land of the defendant not bound by it, because the judgment was entered within four months before the bankruptcy of the debtor, is in effect an order striking off the judgment. (Pa.) *Exler v. American Box Co.*, 1067.

BANKS AND BANKING.

Bank Accepting Its Own Stock as Collateral.

1. **BANK**—Accepting Its Own Stock as Collateral.—Under the provisions of section 2976, Revised Codes, a bank is prohibited from accepting as collateral its own capital stock, except in cases where the taking of such collateral shall be necessary to prevent loss upon debt previously contracted in good faith. That section prohibits certain acts by the bank, but fails to impose any penalty or forfeiture for its violation, and the creditors of the bank should not be punished and the purchaser of stock rewarded by permitting him to avoid the contract, for the reason that it is prohibited by the statute. (Idaho) *Meholin v. Carlson*, 286.

Checks Drawn by City Treasurer.

2. **BANKING—Checks Drawn by City Treasurer.**—A city treasurer, in the absence of any provision in the charter varying the general law, can, by virtue of his official authority, control the custody of the city's money and draw necessary checks for that purpose, and the fact that they do not disclose on their face that they have been authorized is not notice to the bank that they should not be paid. (Mass.) *Newburyport v. Spear*, 652.

3. **BANKING—Check Drawn by City Treasurer.**—The fact that a check drawn by the treasurer of a city on its bank account is made payable to his order, and is indorsed by him, is not notice to the bank that the check has not been authorized and should not be paid. (Mass.) *Newburyport v. Spear*, 652.

Certified Check.

4. **CERTIFIED CHECK—The Effect of the Certification of a Check** by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. (N. J. L.) *Times Square Automobile Co. v. Rutherford Nat. Bank*, 811.

5. **CERTIFIED CHECK—The Obligation of the Bank to the Payee** of a check which it has certified at his request is the same as if the funds had been actually paid out by the bank to him, redeposited by him to his own credit, and a certificate of deposit issued to him therefor. (N. J. L.) *Times Square Automobile Co. v. Rutherford Nat. Bank*, 811.

6. **CERTIFIED CHECK—Revocation by Drawer.**—After the payee of a check has procured the bank to certify it, the bank may not refuse to honor the check because instructed by the drawer not to pay it. (N. J. L.) *Times Square Automobile Co. v. Rutherford Nat. Bank*, 811.

Deposits or Loans to Cashier.

7. **BANKING—Deposits or Loans to Cashier.**—Where a depositor claims that three items of deposit were in the usual course of banking, while the bank claims that they were private loans to the cashier, and the evidence on the issue is conflicting, the question is for the jury. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

8. **BANKING—Deposits or Loans to Cashier.**—Where, in an action by a depositor to recover an alleged balance of deposit, he contends that the deposits were in the usual course of banking, while the bank claims that they were private loans to the cashier, it is proper to refuse an instruction to the jury that if they find that the general manager and treasurer of the plaintiff company and the cashier of the defendant bank made an arrangement by which the amount of money represented by the disputed deposits was intended as an individual loan to the cashier and was received by him as such, there can be no recovery. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

Balance Struck in Pass-book.

9. **BANKING—A Balance Struck in a Pass-book** is in effect an account stated between the bank and its depositor. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

10. **BANKING—A Balance Struck in a Pass-book** may be impeached for fraud or error, but in the absence of such impeachment the bank is estopped from denying its liability as shown by the account as stated. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

11. **BANKING—Balance Struck in Pass-book.**—Whether or not a bank is estopped from denying its liability for a balance struck in

a pass-book by reason of fraud or error depends upon the facts which are for the jury. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

12. BANKING—Balance Struck in Pass-book.—The presumption is that a balance struck in a pass-book is correct, and the burden is on the bank to show the contrary, when it attempts to evade responsibility. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

See Garnishment, 5, 6.

Note.

Banks and Banking, pass-books, accounts in, balancing of, 1024, 1025.
 pass-books, balances struck in amount to accounts stated, 1022.
 pass-books, balances struck in, failure to object to, when amount to admission of correctness, 1022, 1023.
 pass-books, balancing of, defined, 1021.
 pass-books, conclusiveness of, 1023, 1024.
 pass-books, definitions of, 1021.
 pass-books, duty of banker respecting, 1026.
 pass-books, duty of depositor to examine, 1021, 1026.
 pass-books, legal conception of, 1020.
 pass-books, object of, 1020, 1021.
 pass-books, popular conception of, 1019.
 pass-books, return of to depositor, what imports, 1021.

BASTARDY.

BASTARDY PROCEEDINGS—Nonresident Mother.—The resident father of a bastard child, begotten and born out of the state of a woman not then nor now a resident of the state, is subject to her suit in the county of his residence to compel him to contribute to the support of the child. (Me.) *Roy v. Poulin*, 573.

BENEFIT ASSOCIATION.

Power to Change By-laws.

1. BENEFIT SOCIETY—Power to Change By-laws.—The reservation of a general power to amend its by-laws does not authorize a mutual benefit association to adopt an amendment forfeiting or substantially reducing the benefits to which a pre-existing member is entitled under his contract. (N. Y.) *Wright v. Knights of Maccabees*, 838.

2. BENEFIT SOCIETY—Power to Change By-laws.—The reservation of a general power to amend its by-laws does not authorize a mutual benefit association to adopt an amendment increasing the rate of assessments, as against pre-existing members, at least when such increase is not necessary to the continued existence of the association. (N. Y.) *Wright v. Knights of Maccabees*, 838.

Protection of Name from Infringement.

3. FRATERNAL ASSOCIATION—Proprietary Right in Name.—Persons who associate themselves together to promote fraternal benevolence and charity are authorized to use a name by which they will be known, and under certain circumstances will be protected in the use of the name chosen. The name may be such as indicates the purposes of the association, or it may be arbitrary or fanciful. *Creswill v. Grand Lodge Knights of Pythias*, 231.

4. FRATERNAL ASSOCIATION—Protection of Name Against Infringement.—Where an association known as the Knights of Pythias with a supreme lodge incorporated in the District of Columbia, and a grand lodge unincorporated in this state, the main objects of which were fraternal and benevolent, but which received and expended large amounts of property and had an insurance feature, acquired a

Checks Drawn by City Treasurer.

2. **BANKING—Checks Drawn by City Treasurer.**—A city treasurer, in the absence of any provision in the charter varying the general law, can, by virtue of his official authority, control the custody of the city's money and draw necessary checks for that purpose, and the fact that they do not disclose on their face that they have been authorized is not notice to the bank that they should not be paid. (Mass.) *Newburyport v. Spear*, 652.

3. **BANKING—Check Drawn by City Treasurer.**—The fact that a check drawn by the treasurer of a city on its bank account is made payable to his order, and is indorsed by him, is not notice to the bank that the check has not been authorized and should not be paid. (Mass.) *Newburyport v. Spear*, 652.

Certified Check.

4. **CERTIFIED CHECK.**—The Effect of the Certification of a Check by the bank upon which it is drawn depends upon whether it is done at the request of the drawer or of the holder. (N. J. L.) *Times Square Automobile Co. v. Rutherford Nat. Bank*, 811.

5. **CERTIFIED CHECK.**—The Obligation of the Bank to the Payee of a check which it has certified at his request is the same as if the funds had been actually paid out by the bank to him, redeposited by him to his own credit, and a certificate of deposit issued to him therefor. (N. J. L.) *Times Square Automobile Co. v. Rutherford Nat. Bank*, 811.

6. **CERTIFIED CHECK—Revocation by Drawer.**—After the payee of a check has procured the bank to certify it, the bank may not refuse to honor the check because instructed by the drawer not to pay it. (N. J. L.) *Times Square Automobile Co. v. Rutherford Nat. Bank*, 811.

Deposits or Loans to Cashier.

7. **BANKING—Deposits or Loans to Cashier.**—Where a depositor claims that three items of deposit were in the usual course of banking, while the bank claims that they were private loans to the cashier, and the evidence on the issue is conflicting, the question is for the jury. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

8. **BANKING—Deposits or Loans to Cashier.**—Where, in an action by a depositor to recover an alleged balance of deposit, he contends that the deposits were in the usual course of banking, while the bank claims that they were private loans to the cashier, it is proper to refuse an instruction to the jury that if they find that the general manager and treasurer of the plaintiff company and the cashier of the defendant bank made an arrangement by which the amount of money represented by the disputed deposits was intended as an individual loan to the cashier and was received by him as such, there can be no recovery. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

Balance Struck in Pass-book.

9. **BANKING.**—A Balance Struck in a Pass-book is in effect an account stated between the bank and its depositor. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

10. **BANKING.**—A Balance Struck in a Pass-book may be impeached for fraud or error, but in the absence of such impeachment the bank is estopped from denying its liability as shown by the account as stated. (Pa.) *Greenhalgh Co. v. Farmers' Nat. Bank*, 1016.

11. **BANKING—Balance Struck in Pass-book.**—Whether or not a bank is estopped from denying its liability for a balance struck in

BILL OF PARTICULARS.

See Criminal Law, 2.

BILLS AND NOTES.*In General.*

1. **BILLS AND NOTES.**—In Construing the Negotiable Instrument Act any one section must be considered with reference to the others. The whole statute is to be looked to, and not merely the particular section in question. (Wash.) Bradley Engineering & Mfg. Co. v. Heyburn, 1127.

2. **BILLS AND NOTES.**—A Holder for Value and a Holder in Due Course are in the same position, under the Washington negotiable instrument act, to challenge any defense based upon a collateral agreement or upon equities existing between the makers by holding up the instrument itself. (Wash.) Bradley Engineering & Mfg. Co. v. Heyburn, 1127.

3. **BILLS AND NOTES.**—Holder in Due Course.—The fact that an indorsee of a note knows that the paper arose out of an executory contract, of the terms of which he is cognizant, does not prevent his being a holder in due course nor permit a subsequent breach of warranty in such contract to be urged as a defense to his action on the note. (N. C.) Bank of Sampson v. Hatcher, 989.

4. **BILLS AND NOTES.**—Negotiability.—The Expression in a Note that it is given for the purchase price of property does not affect its negotiability. (N. C.) Bank of Sampson v. Hatcher, 989.

5. **BILLS AND NOTES.**—Necessity of Words of Negotiability.—To render a note negotiable, within the purview of Civil Code, section 3694, it must be payable to the payee and to his order, or assign or bearer. (Ga.) Mackin v. Blalock, 220.

6. **BILLS AND NOTES.**—Negotiability of Due-bill.—The indorsement of a due-bill, containing no negotiable words, is chargeable with notice of all defects in the consideration, although he takes it for value and before due. (Ga.) Mackin v. Blalock, 220.

Accommodation Paper.

7. **BILLS AND NOTES.**—Accommodation Maker.—The negotiable instrument act of Washington changes the law in reference to the liability of accommodation makers who sign a note as joint makers. (Wash.) Bradley Engineering & Mfg. Co. v. Heyburn, 1127.

8. **BILLS AND NOTES.**—An Accommodation Maker of a note is liable primarily under the Washington negotiable instrument act, and hence is not discharged by an extension of time to the principal debtor. (Wash.) Bradley Engineering & Mfg. Co. v. Heyburn, 1127.

9. **BILLS AND NOTES.**—Accommodation Maker.—Under the Washington negotiable instrument act one who is apparently a joint maker of a note cannot show, in an action against him by a "holder for value," that he signed as accommodation maker and surety without consideration, which was known to the plaintiff. (Wash.) Bradley Engineering & Mfg. Co. v. Heyburn, 1127.

Indorsement Without Recourse.

10. **BILLS AND NOTES.**—That an Indorsement is "Without Recourse" does not affect the question of the indorsee's notice of an infirmity in the paper. (N. C.) Bank of Sampson v. Hatcher, 989.

Note.

Indorsement Without Recourse, contracts implied by, 996.

effect of, 995, 998.

effect of, where there are several indorsements, 993, 994.

proprietary right in the name by which it was known and under which it operated, no other association of persons organized for similar purposes had the right to fraudulently copy or infringe upon that name. The mere addition to the distinctive name of the defendants' association of the words "of North America, South America, Europe, Asia, Africa, and Australia, jurisdiction of Georgia," cannot be declared, as matter of law, to constitute such a difference as to make the name so altered free from the complaint of being an infringement, or to render the finding of the jury that there was a fraudulent infringement contrary to law. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

5. FRATERNAL ASSOCIATION—Protection of Name Against Infringement.—Upon an application to the superior court for the grant of a charter for a private corporation, the law of this state makes no provision for another person to make himself a party to the proceeding for the purpose of resisting or objecting to the grant of the application. But another corporation or association which has acquired a proprietary right in a name may apply to a court having equitable jurisdiction to enjoin the applicants from fraudulently appropriating such name and obtaining a charter under it for a similar organization, and copying its insignia, badges and emblems, to the detriment of the plaintiff. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

6. FRATERNAL ASSOCIATION—Laches in Protecting Name.—The evidence authorized the jury to find that there had been no such laches on the part of the plaintiffs as to bar them from a right to equitable relief. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

7. FRATERNAL ASSOCIATIONS—Conflicting Names—Foreign and Domestic Corporations.—Under the facts of this case, the rulings made by some courts that generally a foreign corporation has no right to enjoin a domestic corporation, which has been chartered under a similar name, from continuing to do business thereunder, especially in the absence of fraud, are not applicable. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

8. FRATERNAL ASSOCIATION—Protection of Name from Infringement.—This was not a suit between two corporations chartered in the District of Columbia under the general incorporation act of May 5, 1870. The incorporated supreme lodge of the plaintiffs' association was a party, but that of defendants' association was not so. An assignment of error based on a contrary hypothesis was without merit. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

BIGAMY.

1. BIGAMY—Extraterritorial Force of Statute.—A statute providing that "if any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere," every such offender shall be guilty of a felony, the expression "or elsewhere" is unconstitutional and of no effect. (N. C.) *State v. Ray*, 1005.

2. BIGAMY—Marriage Contracted Without the State.—Parties coming back into the state after a bigamous marriage contracted without the state cannot be punished in this state under a statute providing that "if any person, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere," every such offender shall be guilty of a felony, for the expression "or elsewhere" is of no effect because contrary to the law of the land. (N. C.) *State v. Ray*, 1005.

9. **BOUNDARIES.**—The Declarations of a Former Owner of a farm and a landing, as to the boundaries of the latter, made at a time when he had no interest and before any controversy had arisen, are admissible in evidence in an action of ejectment, he being dead at the time of the trial. (Md.) *Cadwalader v. Price*, 603.

Notes.

Boundaries, declarations made by former owners respecting, 621, 622.
 declarations of former owner respecting after parting with the land, 623-625.

hearsay evidence to establish, 618, 621, 622.

limitations upon rule admitting hearsay evidence of, 623.

BUILDING CONTRACTS.

See **Contracts**, 6-11.

CAR REPORTS.

See **Evidence**, 9-11.

CARRIERS.

Of Goods.

1. **CARRIERS—Restriction of Liability in Contract—Interstate Commerce Act.**—The "Hepburn amendment" to the interstate commerce act (June 29, 1906) renders nugatory any stipulation in bill of lading for through interstate shipment which exempts the initial carrier or his connecting carrier from liability for loss caused by either of them. (Ark.) *Kansas City Southern Ry. Co. v. Carl*, 56.

2. **CARRIERS—Policy of the Law.—Public Policy** forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. (Ark.) *Kansas City Southern Ry. Co. v. Carl*, 56.

3. **CARRIER—Interest in and Protection of Property.**—A carrier is a bailee of property for hire, and has such an interest therein that he may resort to any means for its protection to which the absolute owner could have recourse, and may recover the full value of the property from the wrongdoer who destroys it. This is true although the real owner may also have an action against the same wrongdoer for the value of the property destroyed. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

4. **CARRIERS—Negligence—Burden of Proof.**—Where goods are shipped over connecting lines of carriers on a through bill of lading and on reaching their destination a box is missing, in an action therefor against the last carrier, the burden of proof is on it to show that the loss did not occur on its line. (Ark.) *Kansas City Southern Ry. Co. v. Carl*, 56.

5. **CARRIER.—The "Public Enemy" for Whose Acts in Destroying Property a carrier is not liable** means the enemy of the country, not of the carrier, and does not embrace mobs and rioters. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

6. **CARRIER—Liability for Loss of Cars of Other Companies.**—The liability of a carrier, in possession of cars of other companies as bailee, for their destruction by mobs or in riots, is absolute, and the measure of liability is the full value of the cars destroyed. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

7. **CARRIER—Disobedience of Shipper's Directions.**—A carrier is liable for damages to goods resulting from disobedience of directions given by the owner and assented to by the carrier, respecting the mode of conveyance. And if a carrier accepts a package marked with legible directions as to carriage, he is liable for loss arising from

Indorsement Without Recourse, form of, 993.

- liability as vendor is not limited by, 995, 996.
- liability on a warranty of genuineness, 996.
- liability resulting from, 995-997.
- need not precede the signature of the indorser, 993.
- negotiability of instrument is not affected by, 998.
- parol evidence is not admissible to show that it was unqualified, 994.
- parol evidence respecting, admissibility of, 993, 994.
- parol evidence to show to which indorser applicable, 995.
- title, transfer of by, 998.
- unqualified indorsement, cannot be shown to be, 994.
- warranty of title notwithstanding, 996, 997.
- what is, 993.

Negotiable Instruments, conditional sales, application of law of to, 277, 278.

BONDS.

See Principal and Surety.

BORNER RECORD.

See Evidence, 10, 11.

BOUNDARIES.

1. BOUNDARIES—Inconsistencies Between Courses and Distances.—The rule is not invariable that in case of inconsistency between distances and direction the latter controls, but it is necessarily affected to the extent that other legitimate aids are present or absent. (Wash.) *Davies v. Wickstrom*, 1100.

2. BOUNDARIES—Inconsistencies Between Calls.—The rule is not invariable that in case of inconsistency between calls the first controls, except perhaps in the absence of all other aids. (Wash.) *Davies v. Wickstrom*, 1100.

3. BOUNDARIES—Practical Location by Parties.—The construction put upon a deed by the parties in locating the premises may be resorted to in order to determine their intention when the language of the description renders the location of the land doubtful. (Wash.) *Davies v. Wickstrom*, 1100.

4. BOUNDARIES—Constructive Notice to Purchaser.—The building and maintenance of a line fence, and the open and notorious possession of the inclosed land, indicate the practical construction placed by the parties on inconsistent descriptions in a deed, and put a subsequent purchaser upon inquiry as to such construction. (Wash.) *Davies v. Wickstrom*, 1100.

5. BOUNDARIES—Proof of Corner or Line by Reputation.—It is competent to prove the location of a corner or line of a public survey by reputation. (Ky.) *Phillips v. Stewart*, 441.

6. BOUNDARIES—Evidence of Reputation.—Where Processioners call upon old people in the neighborhood to locate a corner where a gate-post once stood, and from the location pointed out by them a surveyor runs a line, he and the processioners, after the death of these witnesses, may, in order to show the location of the corner and lines, testify to the facts brought out at the processioning proceedings. (Ky.) *Phillips v. Stewart*, 441.

7. BOUNDARIES.—The Declarations of Persons Since Deceased are admissible to prove private boundaries. (Md.) *Cadwalader v. Price*, 603.

8. BOUNDARIES.—Traditional Evidence is Admissible to prove private boundaries. (Md.) *Cadwalader v. Price*, 603.

from the evidence that he was guilty of contributory negligence in going upon the front platform, is properly refused if it ignores its contention that he went there by the direction of the conductor, without knowing that he was disregarding a rule of the company. (Ill.) *Coburn v. Moline & Watertown Ry. Co.*, 377.

18. CARRIER—Negligence of Passenger in Ignoring Rules.—Although a passenger may be guilty of contributory negligence in disregarding a rule of the company of which he has knowledge, still he is under no duty to use diligence to find out what the rules of the carrier are. (Ill.) *Coburn v. Moline & Watertown Ry. Co.*, 377.

19. CARRIER—Duty to Accept Sick Passenger.—A carrier is bound to take as passengers all who offer themselves, ill or well, provided the carrier can furnish the necessary accommodations and the passenger is willing to pay for what he demands. But when a person who is ill presents herself for transportation by water, it is her duty to state the fact that she is ill and make special arrangements for her transportation as a person in need of medical attention. (Mass.) *Connors v. Cunard Steamship Co.*, 662.

20. CARRIER—Duty to Accept Sick Passenger.—A carrier by water is not bound to receive, as an ordinary passenger, a person in need of medical attention. Hence, where a ticket is bought for such a person, without giving notice of her condition, and she presents herself for embarkation as an ordinary passenger, and the ship's surgeon discovers that she will need medical attention during the voyage, which attention has not been arranged for, but which the carrier is depended upon to furnish, she may be rejected. (Mass.) *Connors v. Cunard Steamship Co.*, 662.

21. CARRIER—Action by Rejected Passenger.—In an action of tort against a steamship company for refusing to accept a person as passenger, if the plaintiff's evidence discloses that the intending passenger was unable to travel without medical attendance and depended upon the carrier to furnish it, and had obtained an ordinary ticket without disclosing her condition to the carrier, a verdict for the defendant should be directed as a matter of law, despite the fact that the burden of proving a justification is on the defendant. (Mass.) *Connors v. Cunard Steamship Co.*, 662.

22. CARRIER—Recovery of Money Paid for Ticket.—Where a ticket was purchased by a third person for an intending passenger whom the carrier refused to transport because of her illness and need of medical attention, her administrator is entitled, in an action on contract against the carrier, to show, if he can, that his intestate was the person to whom the money paid for the ticket was due. (Mass.) *Connors v. Cunard Steamship Co.*, 662.

Connecting Carriers.

23. CONNECTING CARRIERS—Liability to Passenger.—A complaint which alleges that the plaintiff purchased from the defendant carrier a ticket for transportation to a certain point and return, and that while en route he purchased another ticket for transportation over another line from the first terminus to another point and return; that he made the purchase from a person whom he believed to be a representative of the first carrier, but averring no facts warranting such belief; and that by reason of the negligence of the latter carrier he was not returned to the first terminus in time to connect with the first carrier, states no cause of action. (Md.) *Mills v. Baltimore, C. & A. Ry. Co.*, 599.

24. CONNECTING CARRIERS—Liability of One for Acts of Other.—In the absence of a partnership or other contract between connecting lines, or a special contract with the shipper or consignee, each of a succession of connecting carriers is relieved of further

failure to observe them. (Me.) Colbath v. Bangor & Aroostook R. R. Co., 569.

8. **CARRIER—Notice of Arrival of Goods.—**A Transfer Company, in the habit of hauling goods for a consignee and others, is his agent only as to goods actually hauled, and notice to it of the arrival of goods is not notice to him. (N. C.) Hockfield v. Southern Ry. Co., 945.

9. **CARRIER—Storage Charges on Goods Wrongfully Withheld.—**A carrier cannot counterclaim for warehouse charges on goods which it has wrongfully withheld and refused to deliver. (N. C.) Hockfield v. Southern Ry. Co., 945.

Of Livestock.

10. **CARRIER OF LIVESTOCK—Nature and Extent of Liability.** A common carrier is liable for the safety of livestock committed to it for transportation, unless lost or destroyed by the act of God or the public enemy, or as a result of the inherent vice or propensities of the animals. (Ky.) Louisville & Nashville R. R. Co. v. Stiles, 491.

11. **CARRIER OF LIVESTOCK—Duty to Feed and Rest Animals.** At common law it was the duty of carrier of livestock for long distances to feed, water and rest as a reasonable necessity required; and practically the federal statute on this subject only makes certain when and where the common-law duty of the carrier for the preservation and comfort of the stock shall be exercised. (Ky.) Louisville & Nashville R. R. Co. v. Stiles, 491.

12. **CARRIER OF LIVESTOCK—Liability While Animals Unloaded for Rest.—**The temporary unloading and placing of livestock in a yard for feed, water and rest, as required by the federal statute, does not reduce, for the time being, the liability of the carrier as an insurer of their safety. (Ky.) Louisville & Nashville R. R. Co. v. Stiles, 491.

Of Passengers.

13. **RAILROAD—Duty and Liability to Postal Clerk on Train.—**A railroad carrying mail under contract with the United States government owes the same measure of care to a postal clerk riding on its train in the performance of his duties as it does to an ordinary passenger for hire. (Ill.) Barker v. Chicago P. & S. L. Ry. Co., 382.

14. **CARRIER—Evidence That Person is Passenger.—**Evidence that the conductor on an electric car took the fare of a person on the front platform or vestibule without objection to his riding there fairly tends to prove him a passenger, although there is a rule, of which he testifies he was ignorant, posted in the front vestibule where there was no light, forbidding passengers to ride there. (Ill.) Coburn v. Moline & Watertown Ry. Co., 377.

15. **CARRIER—Companion of Passenger Giving Motorman Liquor.** The fact the companion of a passenger on an electric car gives the motorman a drink of whisky, which to some extent causes him to run the car in a reckless fashion, does not affect the passenger's right to recover for injuries sustained from the car leaving the track. (Ill.) Coburn v. Moline & Watertown Ry. Co., 377.

16. **CARRIER—Liability to Intoxicated Passenger.—**The fact that a passenger on an electric car is intoxicated at the time he is injured by the car leaving the track does not bar his right to recover therefor if he otherwise has a cause of action. (Ill.) Coburn v. Moline & Watertown Ry. Co., 377.

17. **CARRIER—Negligence of Passenger Riding on Front Platform.—**An instruction that a passenger is not entitled to recover for injuries received from the car leaving the track if the jury believe

CHARITIES.

1. **CHARITY—What Constitutes.**—A Charity, in a legal sense, may be defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, or relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. (Ill.) Estate of Graves, 302.

2. **CHARITY—Name of Purpose.**—In Determining Whether a Gift is a charity it is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. (Ill.) Estate of Graves, 302.

3. **CHARITY—Identification of Donor's Name With Gift.**—A gift is not rendered less charitable by the fact that the name of the donor is, in some manner, by inscription or otherwise, identified with and perpetuated by the gift. (Ill.) Estate of Graves, 302.

4. **CHARITY—Motives of Donor.**—In Determining Whether a Gift is charitable courts do not look to the motives of the donor, but rather to the nature of the gift and the objects which will be attained by it. (Ill.) Estate of Graves, 302.

5. **CHARITY—Gift for Statue and Drinking Fountain for Horses.**—A bequest of money to erect in a public park a drinking fountain for horses, in connection with a statue of a certain horse, the statue to bear the donor's name and the name of the horse, with the record of speed the horse once made, is a charity. (Ill.) Estate of Graves, 302.

6. **CHARITY—Policy of Law to Uphold—Inheritance Tax.**—It is the policy of the law to uphold charitable bequests and give effect to them whenever possible, and the fact that they are exempt from the operation of the inheritance tax statute is no reason for departing from this rule of construction. (Ill.) Estate of Graves, 302.

CHECKS.

See Banks and Banking.

CHILDREN.

See Master and Servant, 14-17; Parent and Child.

CITY ATTORNEY.

See Attorney and Client, 2; Judicial Sale, 7-10.

CIVIL RIGHTS.

See Constitutional Law.

CLAIMANTS UNDER COMMON SOURCE OF TITLE.

See Estoppel, 8-10.

CLERK OF COURT.

See Executions, 1.

COCAINE ORDINANCE.

See Municipal Corporations, 9.

COEXECUTORS.

See Executors and Administrators, 8-12.

obligation by safe carriage over its own line and prompt delivery to the succeeding carrier. (Me.) *Colbath v. Bangor & Aroostook S. R. Co.*, 569.

25. CONNECTING CARRIERS—Presumption of Negligence.—When goods are delivered to an initial carrier in good condition, but are delivered by the terminal carrier in a damaged condition, it is presumed that they were injured on the line of the latter, upon whom is imposed the burden of exoneration. This presumption arises even though the goods are contained in a package locked, sealed or otherwise closed, and although they are delivered to the terminal carrier in a sealed car. (Me.) *Colbath v. Bangor & Aroostook R. R. Co.*, 569.

25a. CONNECTING CARRIERS—Apportionment of Damages.—In an action for injury to freight, brought against the last of a succession of carriers, where from the evidence it is impossible to say that no part of the injury occurred after delivery to the defendant, it is liable for the entire damages, and there will be no apportionment between it and preceding carriers. (Me.) *Colbath v. Bangor & Aroostook R. R. Co.*, 569.

Scenic Railway.

26. SCENIC RAILWAY—Duty and Liability to Passengers.—A company operating a scenic railway at an amusement resort is held to the same degree of responsibility to passengers as a common carrier. It owes the duty to exercise the highest degree of care and caution for their safety, and to do all that human foresight and vigilance can do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents. (Ill.) *O'Callaghan v. Dellwood Park Co.*, 331.

27. SCENIC RAILWAY—Presumption of Negligence from Accident.—Where a car operated by a scenic railway company suddenly stops and throws a passenger from his seat therein, a presumption of negligence arises. (Ill.) *O'Callaghan v. Dellwood Park Co.*, 331.

28. SCENIC RAILWAY—Presumption of Negligence from Accident.—Evidence tending to show that a passenger on a scenic railway, while in the exercise of due care, was injured by apparatus wholly under the control of the carrier and furnished and managed by it, and that the accident was of such a character that it would not ordinarily occur if due care was used in the management of the railway, is *prima facie* proof of negligence. (Ill.) *O'Callaghan v. Dellwood Park Co.*, 331.

See Railroads.

CERTIFIED CHECK.

See Banks and Banking, 4-6.

CHAMPERTY.

1. CHAMPERTY.—A Conveyance of Land in the Adverse Possession of a third person is not void as being within the champerty act, but only voidable at the instance of the parties in adverse possession; and if one who has previously sold land to another seeks to recover it, he cannot maintain his action upon the ground that the sale was champertous. (Ky.) *Meade v. Ratliff*, 467.

2. CHAMPERTY.—Where a Deed Conveys Land Held Adversely, the parties may rescind it and place themselves in statu quo, although it was made in good faith and for a valuable consideration. The statutory provision that "neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon" has no application to such a case. (Ky.) *Meade v. Ratliff*, 467.

visions of said act, or any duty imposed upon those whose duty it is to enforce the livestock laws of the state. (Idaho) *State v. Bannfield Livestock Co.*, 263.

See Carriers, 1.

COMMUNITY PROPERTY.

See Husband and Wife, 4.

COMPROMISE.

COMPROMISE AND SETTLEMENT—What Included—Debt Barred by Statute.—Where a contract provides for a settlement of mutual debts of the parties, it does not include debts not enforceable because barred by limitation. (Ark.) *Parker v. Carter*, 60.

CONDITIONAL SALE.

See Sales.

CONDITIONS.

See Wills, 20-24.

Note.

Confession, judgments of against married women, 940, 941.

CONFIDENCE GAME.

1. **CONFIDENCE GAME—Dealings in Form of Business Transaction.**—The facts that the dealings between the parties assume the form of a business transaction and its breach involves a breach of contract do not relieve of criminality the party who entered into it as a mere incident to a false and fraudulent scheme to obtain money or property from the other party; it is a confidence game, notwithstanding its contractual form. (Ill.) *People v. Weil*, 357.

2. **CONFIDENCE GAME—What Constitutes.**—One Who Represents to a stranger that he is a friend of an acquaintance of the latter and states that he is in the employ of a local company and has just lost his pocket-book, and upon these representations, which are false, obtains money, and leaves an I O U and a worthless watch as security and promises to return the money the next day, is guilty of a confidence game. (Ill.) *People v. Weil*, 357.

Note.

Confidence Game, admissibility of evidence of other similar offenses on prosecution for, 367.

antiquity of the offense, 363.

bill of particulars, necessity for lies within discretion of court, 366.

conflicting decisions on, in Missouri, 365.

constitutionality of statute fixing form of indictment for, 364.

definitions of, 364.

description of offense of, 365, 366.

distinction between and false representation, and puffing statements, 368.

essence of the crime is the reliance on false pretense, 364, 365.

extraterritorial force of statute, 368.

illustrations of the "gold brick" class of swindles, 368.

illustrations showing what amounts to, 366-368.

indictment for and its sufficiency, 364, 365.

misnomer of party defrauded in, effect of, 365.

statutory enactments, foundation of modern, 363.

sufficiency of indictment if offense is substantially set forth, 365.

COLLATERAL SECURITY.

See Pledge.

COLOR OR RACE OF LITIGANTS.

See Constitutional Law, 4.

COMMERCE.

1. INTERSTATE COMMERCE.—Where an Interstate Shipment is Missent, rebilling the goods from one point in a state to another point therein is an intrastate matter. (N. C.) *Hockfield v. Southern Ry. Co.*, 945.

2. INTERSTATE COMMERCE—Penalty for Failure to Deliver Goods.—A penalty imposed by statute upon a carrier for failure to deliver goods after their transportation has been fully completed is not a burden on interstate commerce. (N. C.) *Hockfield v. Southern Ry. Co.*, 945.

3. INTERSTATE COMMERCE.—A State Police Regulation, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the federal jurisdiction, or strictly a regulation of interstate commerce. (N. Y.) *Musco v. United Surety Co.*, 851.

4. INTERSTATE COMMERCE.—A Statute Requiring Persons Engaged in selling steamship tickets, and in conjunction therewith receiving deposits of money to transmit to foreign countries, to give a bond for the faithful discharge of their duties, is not unconstitutional as conflicting with the commerce clause of the federal constitution. (N. Y.) *Musco v. United Surety Co.*, 851.

5. INTERSTATE COMMERCE—State Inspection Laws and Taxes. The federal constitution reserves to the states the power to pass inspection laws and to lay imposts and duties upon imports or exports necessary for executing and carrying into effect such inspection laws. (Idaho) *State v. Butterfield Livestock Co.*, 263.

6. INTERSTATE COMMERCE—State Inspection Laws and Taxes. A state, however, cannot, under the guise of exercising its police power, enact inspection laws which burden foreign or interstate commerce or impose upon property or products brought into a state from another state burdens or taxes more onerous than are imposed upon like property or products of the state enacting such legislation. (Idaho) *State v. Butterfield Livestock Co.*, 263.

7. INTERSTATE COMMERCE—License Fee on Sheep Entering State.—A statute with the title, "An act to provide for the payment of a grazing license fee on sheep entering the state of Idaho from other states and territories, and providing a penalty for the violation thereof," which in the body of the act requires all persons, who bring or cause to be brought sheep from any other state or territory within the state of Idaho, to pay a grazing fee of five cents per head, is not an inspection law but is a discriminatory tax against property of another state, and an undue interference with interstate commerce and is unconstitutional and void. (Idaho) *State v. Butterfield Livestock Co.*, 263.

8. INTERSTATE COMMERCE—License Fee on Sheep Entering State.—Such statute cannot be construed into an inspection law by reason of the fact that the fund realized from the payment of the grazing fee is paid into the livestock sanitary fund, out of which the expenses and costs are paid for the enforcement of the laws of the state regulating the sanitary and healthful condition of livestock, where no like fee is required to be paid upon livestock produced within the state and no inspection required under the pro-

Curative Statutes.

10. **CONSTITUTIONAL LAW—Conveyances—Curative Statute.**—When a deed or other conveyance is invalid by reason of the failure of the parties thereto to conform to some formality imposed by a statute, the legislature, which imposed the formality, may by a subsequent act cure the defect, and give the deed the effect intended at the time of execution. (Ark.) *Pelt v. Payne*, 45.

Waiver of Constitutional Rights.

11. **CONSTITUTIONAL QUESTION—Waiver.**—By Prosecuting an Appeal to the appellate court the appellant waives the right to question the constitutionality of the law under which the action is brought. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

12. **CONSTITUTIONAL PROVISIONS.**—An Individual may Waive constitutional provisions for his benefit, when no question of public policy or public morals is involved. (N. Y.) *Musco v. United Surety Co.*, 851.

13. **CONSTITUTIONAL PROVISIONS—Waiver by Principal and Surety.**—Where one gives the statutory bond required of persons engaged in receiving deposits for transmission to foreign countries, and enters upon the transaction of such business, neither he nor his sureties will be permitted, in an action on their undertaking, to question the constitutionality of the statute requiring the bond. (N. Y.) *Musco v. United Surety Co.*, 851.

See License, 3-8; Master and Servant, 14-17; Municipal Corporations; Officers; Statutes; Taxation.

CONTEMPT.

1. **CONTEMPT—Violation of Injunction After Notice.**—Actual notice of the issuance of an injunction, without formal service of the writ upon him, is sufficient to put a defendant in contempt of the court by violating the terms of the writ, if the court possesses jurisdiction of the cause. (Ark.) *Pitcock v. State*, 88.

2. **CONTEMPT—Violation of Injunction Erroneously Issued.**—If a court has jurisdiction of the parties and subject matter of the cause of action in which the injunction is issued, the fact that it is erroneously and improvidently issued does not excuse disobedience on the part of those who are bound by its terms. (Ark.) *Pitcock v. State*, 88.

3. **CONTEMPT—Violation of Injunction Where a Court has No Jurisdiction.**—A judgment of contempt for violating an injunction which the court had no power to grant, in that the state was the real party in interest, will be quashed on appeal and the proceeding against the petitioner dismissed. (Ark.) *Pitcock v. State*, 88.

CONTINUANCE.

CONTINUANCE—Grounds of Application—Due Diligence.—A motion for continuance on the grounds of absence of the regular attorney of the party and ignorance by the present attorney of who and where the witnesses are is properly overruled for not showing the efforts to get the witnesses. (Ark.) *El Dorado & Bastrop Ry. Co. v. Knox*, 17.

CONTRACTOR.

See Railroads, 3-5.

CONTRACTS.*In General.*

1. **CONTRACT—Meaning of Words Used.**—Where There is No Ambiguity in a contract and the writing speaks for itself, its

Confidence Game, three-card monte, 364.

variance between indictment for and proof of, 365, 366.

where the confidence game is disguised as a business transaction, 368.

CONSOLIDATION OF CITIES.

See **Municipal Corporations**, 16-18.

CONSTITUTIONAL LAW.

In General.

1. **CONSTITUTIONAL LAW**.—Liberty is not Unrestricted License to act according to one's own will. It is only freedom from constraint under conditions essential to equal enjoyment of the same right by others. (Md.) *Downs v. Swann*, 586.

2. **CONSTITUTIONAL LAW**.—A Statute Requiring Persons Engaged in selling steamship tickets, and in connection therewith receiving deposits of money to transmit to foreign countries, to give a bond for the faithful discharge of their duties, is constitutional. (N. Y.) *Musco v. United Surety Co.*, 851.

3. **POLICE POWER**.—Delegation to Subordinate Boards.—The state may delegate police power to subordinate boards and commissions, and the reasonable and just exercise by them of the delegated power will be upheld. (Md.) *Downs v. Swann*, 586.

4. **CONSTITUTIONAL LAW**.—Race or Color of Litigants.—Due Process and Equal Protection.—Where the plaintiffs did not allege or base their proceeding on the fact that the defendants were colored persons, and the judge in charging the jury made no reference to the racial or social status of either the plaintiffs or the defendants, but submitted the issues as to the rights of the parties without reference to race or color, and the evidence authorized the finding against the defendants regardless of any consideration of their color, it cannot be held that such finding was in conflict with that provision of the constitution of the United States which declares, "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

Constitutionality of Statutes.

5. **CONSTITUTIONAL LAW**.—The Presumption in Favor of the validity of a statute should prevail unless the lack of constitutional authority is clearly demonstrated. (Md.) *Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.*, 636.

6. **CONSTITUTIONAL LAW**.—The Presumption in Favor of the Constitutionality of a statute is so binding, under the decisions of the courts, that the public and individuals are bound to treat it as valid. Hence they are compelled, by judicial construction, to assume toward a legislative enactment precisely the same attitude, whether it is constitutional or unconstitutional. (Me.) *State v. Pooler*, 543.

7. **CONSTITUTIONAL LAW**.—Presumption in Favor of Statute. All acts of the legislature are presumed constitutional, and the presumption is one of great strength. (Me.) *State v. Pooler*, 543.

8. **CONSTITUTIONAL LAW**.—Acts of the Legislature are to be regarded as valid until otherwise declared by the courts. Until they are judicially condemned it is the right and duty of the public and individuals to act upon and obey them. (Me.) *State v. Pooler*, 43.

9. **CONSTITUTIONAL LAW**.—An Unconstitutional Statute is *ot Vold ab initio* so as to afford no protection for acts done under its sanction. (Me.) *State v. Pooler*, 543.

to do all that he has agreed to do, does not prevent the application of the doctrine. (Mass.) *Handy v. Bliss*, 673.

9. BUILDING CONTRACT—Satisfaction of the Owner—Quantum Meruit.—The owner should not be permitted to escape payment for a building on account of an idiosyncrasy, under a contract that the work shall be done "to the entire satisfaction and approval of the owner." If the contract is not performed by reason of his failure to be satisfied with that which ought to satisfy him, there can be no recovery upon a quantum meruit. (Mass.) *Handy v. Bliss*, 673.

10. BUILDING CONTRACT—Architect as Arbitrator.—Where a building contract makes the architect an arbitrator between the parties to determine practical questions of construction that are under the plans and specifications in the execution of the work, his decision upon these matters, made in good faith, is binding. As the jury should be so instructed in reference to the builder's claim for extra work, about which there was a dispute between the parties as to whether the labor and materials charged for were included in the specifications. (Mass.) *Handy v. Bliss*, 673.

11. BUILDING CONTRACT—Payment as Acceptance of Work.—A provision in a building contract that no payment shall be construed as an acceptance of defective work or improper materials does not mean that payment without objection may not be considered in connection with other evidence of acceptance, but only that it does not of itself constitute an acceptance. (Mass.) *Handy v. Bliss*, 673.

See Divorce, 12.

Note.

Building Contracts, acceptance of work, owner, when cannot refuse. 682.

action to recover upon where there has been a substantial performance only, 693-696.

cost of remedying defects, when a test of substantial performance, 691-693.

deductions from the contract price, when should be the difference between the value of the building as completed and its value as it ought to have been completed, 686.

deductions to be made when the contract has been specifically, but not wholly, performed, 684, 685.

deviations, cost of correcting, when shows that there has not been a specific performance, 691.

deviations from strict performance of should be allowed with caution, 687.

deviations which are fatal to recovery upon, 687-691.

equitable rules applicable to when substantially performed, 682, 681.

express exclude implied, 679.

good faith, absence of on the part of the contractor precludes his recovery though he has substantially performed, 683.

good faith on the part of the contractor, when entitles him to recover upon, 681, 682.

quantum meruit, amount recoverable upon, 685.

quantum meruit, recovery upon cannot exceed the purchase price. 694.

quantum meruit, recovery upon, when allowable, 680, 681.

substantial performance of, burden of proof of, 695, 696.

substantial performance of, character of action maintainable upon. 678, 693-696.

substantial performance of, costs of completing the contract, when a test of, 691.

substantial performance of, damages or deductions allowable after, 682.

guage must be construed according to the usual and ordinary meaning of the words used. (Mich.) *Rosen v. Rosen*, 712.

2. **CONTRACT, Express, not Created by Mere Notice from One Party to Another.**—The fact that the owner of a well notifies the county or its officers not to take water therefrom, and that if the notice is disregarded he will demand fifty dollars for each day on which water is so taken, does not, on the subsequent taking of water, result in an express contract to pay therefor at the rate specified. (Cal.) *Wright v. County of Sonoma*, 140.

3. **CONTRACT, Quantum Meruit, When not Recoverable in a Suit upon.**—If the plaintiff sues to recover fifty dollars for each day water was taken from his well, he cannot recover on a quantum meruit, there being nothing in the complaint or evidence tending to show that the plaintiff sought to recover the reasonable value of the water. (Cal.) *Wright v. County of Sonoma*, 140.

Signing by Parties.

4. **CONTRACTS not Signed by One Party.**—A Written Contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. (Ark.) *Parker v. Carter*, 60.

5. **CONTRACT—Signing by Illiterate Person Without Reading.**—Where an illiterate person, unable to read, signs a written instrument in ignorance of its character or contents, believing it to be an instrument of a different nature, and is induced to do so by the misrepresentations of the other party, whose good faith he has no ground to reasonably suspect, as to the nature or contents of such writing, he is not bound thereby, although he does not request the opposite party or anyone else to read the paper to him before he signs it. (Ga.) *Grimsley v. Singletary*, 196.

Building Contracts.

6. **BUILDING CONTRACT—Substantial Performance—Quantum Meruit.**—To entitle a building contractor to recover on a quantum meruit, there must be an honest intention to perform the contract and an attempt to perform it. There must be such an approximation to complete performance that the owner obtains substantially what is called for by the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner except at great expense or with great risk to the building. Notwithstanding such omission, there may be a substantial performance of the contract. (Mass.) *Handy v. Bliss*, 673.

7. **BUILDING CONTRACT—Satisfaction of Owner—Quantum Meruit.**—The doctrine of substantial performance, which permits a building contractor to recover on a quantum meruit, applies where the contract is to be performed "to the entire satisfaction and approval of the owner," according to the usual meaning of this expression as applied to such contracts, namely, to his satisfaction so far as he is acting reasonably in considering the work in connection with the contract. (Mass.) *Handy v. Bliss*, 673.

8. **BUILDING CONTRACT—Substantial Performance—Quantum Meruit.**—The doctrine of substantial performance which permits a building contractor to recover on a quantum meruit, does not apply where the builder does not intend to perform the contract. But an intentional omission to do certain things called for by the contract, if he believes that they are not called for, and intends in good faith

though they acted in good faith and although the purchasing company agreed to assume all debts of the selling corporation. (N. Y.) *Darcy v. Brooklyn and New York Ferry Co.*, 827.

4. **CORPORATION, When Charged With Notice of a Vendor's Lien.**—If the vendee of lands owing part of the purchase price conveys them to a corporation of which he is president and sole beneficial stockholder, in consideration of the issuing of the whole capital stock to himself and dummy directors and stockholders, the corporation is chargeable with notice of the vendor's lien. (Cal.) *Finch v. Finnell*, 143.

Doctrine of Ultra Vires.

5. **CORPORATION—Ultra Vires, Who cannot Plead After Insolvency of Company.**—When a corporation enters into a contract authorized by its corporate grant or the statute, the doctrine of ultra vires cannot be raised by the person with whom it has dealt, as a means of avoiding his obligation, after the corporation has become insolvent. (Idaho) *Meholin v. Carlson*, 286.

6. **CORPORATION—Ultra Vires not Permitted to Work Injustice.** The doctrine of ultra vires should not be applied when it would defeat the ends of justice or work a legal wrong. (Idaho) *Meholin v. Carlson*, 286.

7. **CORPORATION—Ultra Vires, Basis of Plea.**—The defense of ultra vires is never sustained out of regard for a defendant, but where an imperative rule of public policy requires it. (Idaho) *Meholin v. Carlson*, 286.

8. **CORPORATION—Ultra Vires, Necessity of Pleading.**—The question of ultra vires must be pleaded, and cannot for the first time be raised in the appellate court. (Idaho) *Meholin v. Carlson*, 286.

Inspection of Books.

9. **CORPORATION—Inspection of Books, Right of Stockholder to Make.**—The New York statute gives a stockholder the absolute right to inspect the books of the corporation during business hours. It imposes on the corporation and the custodian of the books the absolute duty to permit such inspection, without any disclosure by the stockholder of his purpose. (N. Y.) *Henry v. Babcock & Wilcox Co.*, 835.

10. **CORPORATION—Inspection of Books—Making Memoranda.**—The right of a stockholder to inspect the stock-books of the corporation includes the right to copy the names of the shareholders together with their addresses and the number of shares held by each. (N. Y.) *Henry v. Babcock & Wilcox Co.*, 835.

Stockholders' Meeting, Mandamus to Call.

11. **CORPORATION—Mandamus to Call Stockholders' Meeting.**—Mandamus will lie to compel a resident of this state, the secretary of a domestic corporation, to call a stockholders' meeting pursuant to the by-law of the corporation. Whether such writ can be allowed where the corporation is foreign, *quære*. (Minn.) *State v. De Groat*, 764.

12. **FOREIGN CORPORATION—Mandamus to Call Stockholders' Meeting.**—Judgment for a peremptory mandamus should not be granted, upon the relation of a foreign holding corporation, to compel the secretary of another holding and foreign corporation to call a meeting of its stockholders for the purpose of taking action necessary to bring about a change in the articles of incorporation of the other foreign corporations. (Minn.) *State v. De Groat*, 764.

Subscriptions to Stock.

13. **CORPORATE STOCK—Unpaid Subscription, Secret Lien and Liability to Pay.**—Where an agreement was entered into by the stockholder to pay for shares of stock, and the stockholder failed to do so, the corporation has a secret lien on the shares for the amount unpaid. (Minn.) *State v. De Groat*, 764.

- Building Contracts**, substantial performance of, defects and variations which preclude a recovery notwithstanding, 686, 687.
- substantial performance of, delay in the completion of the work, when not fatal to the claim of, 693.
- substantial performance of, entitles the contractor to recover after the allowance of damages which will give the owner substantially what he contracted for, 691.
- substantial performance of, entitles the contractor to the contract price less the sum required to complete the contract price, 684.
- substantial performance of is a question of fact, 695.
- substantial performance of is essential to any recovery upon, 679.
- substantial performance of is not inconsistent with defects, 687.
- substantial performance of, measure of recovery upon, 678, 679, 681, 684.
- substantial performance of, measure of recovery upon is the same whether the action is upon contract or upon a quantum meruit, 694.
- substantial performance of, rule applicable to right of recovery upon, 678, 680.
- specific performance of, what amounts to, 686.
- specific performance of, what precludes a recovery on the ground that it does not exist, 691, 693.
- specific performance of, when entitles contractor to recover upon, 679, 680.
- time of completing the work, whether a test of substantial performance, 693.
- unimportant deviations and omissions, effect of, 679, 680.
- willful deviations by the contractor precludes a recovery by him, 683, 684.

CONVERSION.

See Actions.

CORPORATIONS.

In General.

1. **CORPORATION—Manager Taking Lease in Own Name.**—Where the managing director of a corporation, instead of obtaining a renewal of its lease as requested and as is possible, takes a new lease in his own name, but afterward, on request, assigns it to the corporation, which assignment is invalid because not assented to by the lessor, he is answerable to the corporation for the excess of rent it is compelled to pay in order to obtain another lease of the property, together with the reasonable costs and expenses of obtaining it. (Md.) McGaw v. Acker etc. Co., 592.

2. **CORPORATION—Diversion of Corporate Funds.**—Where a stockholder transfers his shares to another stockholder, and receives herefor a certificate of deposit issued to the latter upon the execution of a note to the bank by the corporation, the first stockholder having no knowledge of the manner in which the certificate was obtained, and the corporation then being solvent, the transaction does not amount to a diversion of stock injurious to creditors, but is no more than a retirement of outstanding stock. (Iowa) Commercial Nat. Bank v. Gilinsky, 406.

3. **CORPORATION—Sale of Assets—Liability of Directors to Creditors.**—It is a "violation of their duties," under subdivision 2 of section 1781 of the Code of Civil Procedure, for the directors of a corporation to set over all its assets to a purchasing corporation without giving an opportunity to creditors to present and enforce their claims, and renders the directors liable for the amount of debts that have accrued against their company before the transfer, al-

22. CORPORATION—Note Received in Payment of Stock Subscription.—Under the provisions of section 9, article 2, of the constitution of Idaho, no corporation is permitted to issue stock or bonds except for labor done, services performed or money or property actually received. Held, that the promissory note received in payment for corporate stock is personal property, was a thing in action or evidence of debt, and was a valid consideration given for the stock purchased by the appellant, and was an asset of the bank that might be collected for the purpose of discharging its debts. (*Idaho*) *Meholin v. Carlson*, 286.

Exemption of Stockholders from Liability.

23. CORPORATION—Notice of Exemption of Stockholders from Liability.—The use of the word "suits" instead of "debts," in a publication of a notice of incorporation that "the private property of the stockholders is exempt from corporate debts," is not fatal to the validity of the notice. (*Iowa*) *Commercial Nat. Bank v. Gilinsky*, 406.

24. CORPORATION—Affidavit of Publication of Stockholders' Exemption.—The statutory requirement that an affidavit of publication of notice that stockholders are exempt from the debts of the corporation shall be filed with the Secretary of State is not mandatory. (*Iowa*) *Commercial Nat. Bank v. Gilinsky*, 406.

Stockholders' Liability After Forfeiture of Franchise.

25. CORPORATION—Stockholders' Liability After Forfeiture of Franchise.—The forfeiture of a corporate franchise does not itself create of the stockholders a partnership, nor does the transaction of business in the name of the corporation thereafter create a liability against stockholders other than those who participated therein. To constitute a partnership there must be an agreement, express or implied, to that effect. (*Iowa*) *Commercial Nat. Bank v. Gilinsky*, 406.

26. CORPORATION—Stockholders' Liability After Forfeiture of Franchise.—A stockholder who does not participate in the management of a corporation after the forfeiture of its charter franchise than to act as a purchasing agent is not liable personally on debts renewed by it after the forfeiture. (*Iowa*) *Commercial Nat. Bank v. Gilinsky*, 406.

Dissolution of Corporation, and Its Effect.

27. CORPORATION—Status After Dissolution.—Upon the dissolution of a corporation, no matter how effected, the corporation is regarded as still existing for the purpose of settling its affairs. (*Ill.*) *Commercial Loan & Trust Co. v. Mallers*, 306.

28. CORPORATION—Prosecution of Suit After Dissolution.—Where a corporation commences a suit while a going concern, it may prosecute the same to judgment for the purpose of collecting its assets and settling its affairs, although it goes into voluntary liquidation pending the litigation. (*Ill.*) *Commercial Loan & Trust Co. v. Mallers*, 306.

29. BANKING CORPORATION—Time to Enforce Demands After Dissolution.—The Illinois statute giving corporations "organized under this law" two years in which to collect their debts and dispose of their property does not apply to banking corporations. They, after dissolution, may enforce collection of claims for the purpose of settling up their affairs until the indebtedness becomes barred by the general statute of limitations. (*Ill.*) *Commercial Loan & Trust Co. v. Mallers*, 306.

Foreign Corporations.

30. FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.—Courts will not exercise visitatorial powers over foreign corporations, or interfere with the management of their internal affairs. (Minn.) *State v. De Groat*, 764.

See Judgment, 12.

Note.

Corporations, Dissolved, acting in the name of, 310.
 actions pending, abatement of, 311.
 actions pending, effect of dissolution on, 311.
 authorizing continued use of name for purposes of winding up, 313.
 borrowing of money by, 311.
 by whom the rights of can be exercised and actions maintained, 310.
 commencing actions or suits depending on authority to that end, 311.
 continuation of powers of for limited period, 313.
 contracts, making and carrying out, 310.
 difference between English and American law on the subject, 309.
 different effect of actions on death of individual and of corporation, 312.
 effect of statutes keeping alive for specific purposes, 310.
 effect on choses in action assigned to, as to suing in name of corporation, 311.
 effect on issue of patent after dissolution, 310.
 effect on pending actions and suits, 311.
 equitable supervision of the rights of creditors of, 313.
 equity, powers and property of, equity rules respecting, 309.
 exclusiveness of statutory remedies declared in North Carolina only, 313.
 execution against, proceedings under, 312.
 execution cannot be issued by, 312.
 execution may be issued by winding-up trustees, 312.
 execution may issue on judgment assigned prior to dissolution by, 312.
 executory contracts with dissolved corporations terminate with the dissolution, 311.
 general rule that they can exercise no rights and maintain no proceedings, 310.
 general statement of effect of dissolution, 309.
 how may acquire title and rights, 310.
 if dissolution occurs between execution and levy of writ, it does not affect proceedings, 312.
 inroads of statutory on common law in preventing abatement and further prosecution of actions against, 315.
 laws preventing from becoming absolutely defunct, 313.
 legislation on the subject in the different states, 314, 315.
 new business of, 310.
 remedies against, statutory, whether exclusive, 313.
 right to act in the name of, 310.
 rule as to powers of in the United States, 309.
 special legislation in Alabama for corporation whose charter was forfeited, 313.
 statutory extensions of functions of, 312.
 transfers of stock of, 312.
 winding up by making directors trustees, 315.
 winding-up purposes, statutory enactments permitting, 315.

COSTS.

1. **COSTS, Statutory Control of.**—The right to recover costs is purely statutory, and, in the absence of statute, no costs can be recovered by either party. (Cal.) *Williams v. Atchison etc. Ry. Co.* 117.

2. **COSTS in Action of Claim and Delivery—Amount Paid Surety Company.**—The amount paid to a surety company in an action of claim and delivery for furnishing the plaintiff's bond is not taxable in his favor as part of his costs in the event of his recovery. (Cal.) *Williams v. Atchison etc. Ry. Co.*, 117.

3. **COSTS—When Recoverable in Action for Damages.**—The general rule is that costs and expenses of litigation, other than the usual court costs, are not recoverable in an action for damages, even in a subsequent action. But where the wrongful act of the defendant has involved the plaintiff in litigation with others, & placed him in such relations with others as make it necessary to incur expense to protect his interest, such costs and expenses should be treated as the legal consequences of the original wrongful act (Md.) *McGaw v. Acker etc. Co.*, 592.

4. **COSTS—Attorney Fees and Expense of Litigation.**—Where one is about to lose possession of premises by the wrongful act of another, and is obliged to employ professional aid and incur expense to retain possession of the premises to which, as between himself and the defendant, he is entitled, the necessary expense incurred to regain the possession is an element of the injury. (Md.) *McGaw v. Acker etc. Co.*, 592.

See Fines.

COTENANCY.

See Tenancy in Common.

COURTS.*Jurisdiction.*

1. **COURT—Jurisdiction as Depending on Amount of Fine.**—The word "fine," in a constitution limiting the jurisdiction of the supreme court when a fine is imposed to cases where the amount does not exceed three hundred dollars, is used in the restricted sense of pecuniary penalty. Hence, the costs of a prosecution for violating the law regulating the sale of liquors, and the forfeiture of the privilege of conducting a barroom, form no part of the fine in determining the jurisdiction of an appeal. (La.) *State v. Price*, 523.

Stare Decisis.

2. **APPEAL AND ERROR—Stare Decisis.**—Decisions which become rules of property should never be overruled, whether they are right or wrong. (Ark.) *Pitcock v. State*, 88.

3. **APPEAL AND ERROR—Stare Decisis.**—Decisions where a rule of property is involved and where the dignity and sovereignty of the state is concerned should, if incorrect, be overruled as speedily as possible by the appeal court. (Ark.) *Pitcock v. State*, 88.

Note.

Creditors' Bill, sureties, right of to maintain, 567.

CRIMINAL LAW.*In General.*

1. **CRIMINAL LAW.**—Defects in the Process, as where the warrant of arrest is unsigned and the deputation to the special officer is unwritten, if the accused appears or is brought before a court in

Foreign Corporations.

30. **FOREIGN CORPORATION—Jurisdiction Over Internal Affairs.**—Courts will not exercise visitatorial powers over foreign corporations, or interfere with the management of their internal affairs. (Minn.) *State v. De Groat*, 764.

See Judgment, 12.

Note.

Corporations, Dissolved, acting in the name of, 310.

actions pending, abatement of, 311.

actions pending, effect of dissolution on, 311.

authorizing continued use of name for purposes of winding up, 313.

borrowing of money by, 311.

by whom the rights of can be exercised and actions maintained, 310.

commencing actions or suits depending on authority to that end, 311.

continuation of powers of for limited period, 313.

contracts, making and carrying out, 310.

difference between English and American law on the subject, 309.

different effect of actions on death of individual and of corporation, 312.

effect of statutes keeping alive for specific purposes, 310.

effect on choses in action assigned to, as to suing in name of corporation, 311.

effect on issue of patent after dissolution, 310.

effect on pending actions and suits, 311.

equitable supervision of the rights of creditors of, 313.

equity, powers and property of, equity rules respecting, 309.

exclusiveness of statutory remedies declared in North Carolina only, 313.

execution against, proceedings under, 312.

execution cannot be issued by, 312.

execution may be issued by winding-up trustees, 312.

execution may issue on judgment assigned prior to dissolution by, 312.

executory contracts with dissolved corporations terminate with the dissolution, 311.

general rule that they can exercise no rights and maintain no proceedings, 310.

general statement of effect of dissolution, 309.

how may acquire title and rights, 310.

if dissolution occurs between execution and levy of writ, it does not affect proceedings, 312.

inroads of statutory on common law in preventing abatement and further prosecution of actions against, 315.

laws preventing from becoming absolutely defunct, 313.

legislation on the subject in the different states, 314, 315.

new business of, 310.

remedies against, statutory, whether exclusive, 313.

right to act in the name of, 310.

rule as to powers of in the United States, 309.

special legislation in Alabama for corporation whose charter was forfeited, 313.

statutory extensions of functions of, 312.

transfers of stock of, 312.

winding up by making directors trustees, 315.

winding-up purposes, statutory enactments permitting, 315.

indictment. An exercise of this discretion will not be reviewed on appeal, unless the defendant has been taken by surprise, and the burden is upon him to show surprise. (Ill.) *People v. Weil*, 357.

12. **CRIMINAL LAW**—**Witness not Indorsed on the Indictment**. Where the state's attorney notifies the attorney for the accused in the latter's presence that witnesses whose names are not indorsed on the back of the indictment will be called at the trial, the court does not err in permitting such witnesses to testify. (Ill.) *People v. Weil*, 357.

Misconduct of Prosecutor.

13. **CRIMINAL TRIAL**—**Misconduct of Prosecutor in Denouncing Witness**.—For a prosecuting attorney to state that the prosecutrix whose testimony on the stand is contrary to what she has told him out of court, has been tampered with and bought, is prejudicial error (Wash.) *State v. Montgomery*, 1119.

14. **CRIMINAL TRIAL**—**Misconduct of Prosecutor in Examining Witness**.—It is prejudicial error for a prosecuting attorney, when the prosecuting witness denies the charge against the accused, to examine her on the details of the alleged crime as stated by her to him out of court, which statements she admits having made but declares that they are false and were made under duress. (Wash.) *State v. Montgomery*, 1119.

15. **APPEAL**—**Improper Remarks of Counsel, Exception to**.—The accused cannot assign as error improper remarks of the state's attorney in his argument to the jury, unless he objects to them when made and preserves an exception to the ruling of the court or to its refusal to rule. (Ill.) *People v. Weil*, 357.

16. **APPEAL**—**Improper Remarks of Counsel, Exception to**.—The statement by counsel for the accused "I except to the statements of the state's attorney," or words to that effect, without any ruling of the court or any exception to the failure of the court to rule upon the objection, does not preserve for review in the supreme court an exception to the remarks. (Ill.) *People v. Weil*, 357.

Former Jeopardy.

17. **CRIMINAL LAW**.—**The Plea of Former Conviction** is not treated in many respects as one involving the substantial question of guilt or innocence, but as approaching more nearly the determination of a civil issue, and by consent it may be entertained and determined at the same time with a plea of not guilty, and when so agreed upon may be heard and decided by the court. (N. C.) *State v. Cale*, 957.

18. **CRIMINAL LAW**—**Former Jeopardy—Collusive Conviction**.—A conviction is not void and unavailable on a plea of former jeopardy, because alleged to be collusive and not adversary, where the defendant informed the magistrate that he had had a fight for which he must suffer, and requested the trial to be set for a time convenient to himself and employes, and the affidavit was made at the instance of the justice by a third person designated as a state's witness, witnesses were summoned and examined, the assaulted person and his relations were notified to attend, but did not appear, although the case was delayed a while for their coming, and the defendant was adjudged guilty and fined one dollar. (N. C.) *State v. Cale*, 957.

See Confidence Game.

CROPS.

See Exemptions; Landlord and Tenant, 4.

ing jurisdiction, in no way affect the judgment rendered, whatever may be the rights of the defendant against the officers. (N. C.) *State v. Cale*, 957.

2. CRIMINAL LAW—Right of Defendant to Bill of Particulars.

Whether or not the state's attorney should be required to furnish a bill of particulars under a count charging a confidence game rests in the discretion of the trial court. (Ill.) *People v. Weil*, 357.

3. CRIMINAL LAW—Election Between Offenses.—The right to

require the state's attorney to elect for which offense he will ask the jury to convict, when more than one offense is charged in different counts of an indictment, is confined to offenses actually distinct from each other and not arising out of the same transaction. (Ill.) *People v. Weil*, 357.

4. CRIMINAL LAW—Evidence of Other Offenses.—In a prosecution for a confidence game it is proper to prove that the accused had

obtained money of other persons by the same confidence scheme by which he obtained money of the prosecuting witness, in order to show guilty knowledge. (Ill.) *People v. Weil*, 357.

5. CRIMINAL LAW.—The Right to a Discharge Under the "Two-term Rule" is essentially a habeas corpus proceeding under section

54 of the act of March 31, 1860. The proceeding is separate from the trial of the cause, and is not reviewable on an appeal from a conviction therein. (Pa.) *Commonwealth v. Fisher*, 1027.

6. CRIMINAL LAW.—A Verdict of Guilty on the Second Count of an indictment is equivalent to a verdict of not guilty on the first

count, and eliminates that count from the case so that error cannot be assigned upon any ruling in reference to it. (Ill.) *People v. Weil*, 357.

Photographing Prisoner.

7. CRIMINAL LAW—Right to Photograph Prisoner.—It is no

violation of constitutional rights for police authorities to measure and photograph, according to the Bertillon system, a person arrested for felony but not yet tried. But they may not place the photograph in the rogues' gallery or distribute copies of it before conviction, unless he becomes a fugitive. (Md.) *Downs v. Swann*, 586.

Accused as Witness Against Himself.

8. CONSTITUTIONAL LAW—Criminal Evidence—"Witness

Against Himself."—A statute taxing stock transfers which authorizes the controller to secure evidence from a person's private books and papers of violations, if any, of the statute, which might be made the basis of criminal proceedings against him thereunder or of an action for penalties, violates the constitutional prohibition against compelling an individual "in any criminal case to be a witness against himself." (N. Y.) *People v. Beardon*, 871.

Coercing Witness.

9. CRIMINAL TRIAL—Coercing Witness.—A Prosecuting Attor-

ney may not threaten and intimidate witnesses, and place testimony obtained by duress before the jury, against one accused of crime. (Wash.) *State v. Montgomery*, 1119.

10. CRIMINAL TRIAL.—The Practice of Extorting Testimony

from witnesses by confinement, threats or duress is to be condemned. (Wash.) *State v. Montgomery*, 1119.

Witness not Indorsed on Indictment.

11. CRIMINAL LAW—Witnesses not Indorsed on the Indictment.

It is within the discretion of the court in a criminal trial to allow a witness to be called whose name is not indorsed on the back of the

tures, the loss of rent, and compensation for her personal inconvenience and discomfort. (Ky.) *Kentucky Heating Co. v. Hood*, 45.

4. DAMAGES—Exemplary Damages for Cutting Gas-pipe.—Where the employée of one gas company, without any reasonable or satisfactory excuse for their conduct, cut the pipes of another company and throw out a meter so that a householder is deprived of gas for herself and tenants, she may recover exemplary damages from their company for the wrong. (Ky.) *Kentucky Heating Co. v. Hood*, 457.

5. DAMAGES—Measure of for Personal Injuries.—Where a lady sixty years old is run over by an automobile, has her thigh bone fractured in two places, suffers excruciatingly for months, will hobble with a stick for the rest of her life, and has been put to large expense, a verdict of three thousand two hundred and fifty dollars, approved by the trial judge, will not be disturbed on appeal. (La.) *Navailles v. Dielmann*, 508.

See Animals; Assault; Master and Servant; Sales.

DEATH.

INSANE ASYLUM—Liability of Discharged Inmate.—Persons in charge of a state hospital for the insane, who discharge and release an inmate, are not answerable, even though the discharge is negligently made, for a homicide committed by him six months afterward. The discharge is not the proximate cause of the homicide. (N. C.) *Bollinger v. Rader*, 999.

Note.

Declarations of Former Owners of Land. See Evidence.

DEED-POLL.

See Limitation of Actions, 2.

DEEDS.

Delivery of Deed.

1. DEED to be Delivered After Death, When Transfers Title Leaving a Life Estate in the Grantor.—A transfer of title in fee, subject to a life estate in the grantor, is effected by a deed delivered by him to a third person, with instructions for its delivery to the grantee at the grantor's death, provided the delivery is absolute and the instrument is placed beyond the power of the grantor to recall or control in any event. (Cal.) *Moore v. Trott*, 131.

2. DELIVERY OF DEED to a Depositary, Effect of.—The depositary to whom a conveyance is delivered by the grantor, to be delivered to the grantee after the former's death, becomes the agent and fiduciary of both parties. If the prescribed condition is performed, he is obliged to deliver the deed to the grantee. If it is not performed, he must return it to the grantor. (Cal.) *Moore v. Trott*, 131.

3. DEEDS, Belief of the Grantor in the Delivery of.—The fact that a grantor dies believing a conveyance signed by him had been delivered does not give it validity, where the delivery was not sufficient, because he had not parted with the power to control or recall the instrument. (Cal.) *Moore v. Trott*, 131.

4. DEEDS—Delivery, Test of.—The test of an effective delivery is the absolute relinquishment of the right of recall by the grantor in his instructions to the party charged with the duty of making the delivery. (Cal.) *Moore v. Trott*, 131.

5. DEED, Delivery of—Instructions in Writing, Controlling Influence of.—Where a deed is by the grantor given to a third person

CURATIVE STATUTE.

See Constitutional Law, 10; Homestead, 4.

CURTESY.

1. **CURTESY—Trust in Lieu of—Rights of Creditors.**—Upon the death of a wife the title to a one-third interest in her estate does not vest eo instante in her surviving husband subject to the claims of his creditors. The right which vests in him is the right of choice between what the law offers him and benefits which the will bestows; and if he chooses the latter, which is exempt from the demands of his creditors, they have no recourse. (Iowa) *Robertson v. Schard*, 430.

2. **CURTESY—Right to Rents—Change in Law.**—The right of a husband to the usufruct, or rents and profits, of his wife's land, is contingent upon the birth of issue. It is a mere expectancy or possibility of which the legislature may deprive him at any time before the event occurs upon the happening of which the interest will become vested. (N. C.) *Richardson v. Richardson*, 948.

3. **CURTESY—Change in Law Curtailing Estate.**—Where a marriage was contracted before, but no children were born until after, the adoption of a constitutional provision giving married women the power, among other things, of disposing of their property by will, the wife may by will deprive the husband of any interest in her estate as tenant by the curtesy and bar his right to rents after her death under a lease executed by them. (N. C.) *Richardson v. Richardson*, 948.

4. **CURTESY—Change in Law Curtailing Estate.**—At the common law the husband, upon marriage, was seised in right of his wife of a freehold interest in her lands during their joint lives, and either as tenant by marital right or as tenant by the curtesy initiate he was entitled to the rents and profits, and might lease or convey his estate, and it might be sold under execution against him. But a radical change has been effected by the constitution and statutes of North Carolina. (N. C.) *Richardson v. Richardson*, 948.

DAMAGES.

1. **DAMAGES—Measure of for Commission of Tort.**—A person who commits a tort is liable for all the damages that naturally flow from and are the result of his wrongful act, although he may not at the time have given any thought to or have anticipated that injurious consequences would follow. The rule applicable to breach of contract, that only such damages can be recovered as are actually sustained, or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into, does not apply to actions sounding in tort. (Ky.) *Kentucky Heating Co. v. Hood*, 457.

2. **DAMAGES—Measure of Recovery for Personal Injuries.**—Where a railroad fireman, of sound health and thirty-three years of age, has his head split open, his arm fractured, thereby losing the use of it, and has his spine permanently injured, causing a sort of creeping paralysis, and receives many other serious injuries, all of which render him unable to perform manual labor, a recovery by him of eleven thousand dollars is not excessive. (Ky.) *Cincinnati etc. Ry. Co. v. Curd*, 444.

3. **DAMAGES—Measure of for Cutting Gas-pipe and Removing Meter.**—Where the employes of one gas company remove the pipes and meter of another company so as to deprive a householder of heat and light, in consequence of which she loses her tenants, she may recover from the first company the cost of replacing the fix-

13. DEED—After-acquired Title—Estoppel.—A conveyance before the grantor has acquired the title operates as an agreement to convey, which, when the title has been subsequently acquired, may be enforced in chancery; but the conveyance does not vest title of land by estoppel. (Pa.) *Jordan v. Chambers*, 1081.

14. DEED—After-acquired Title—Estoppel.—Where one conveys with a general warranty land which he does not own at the time, but afterward acquires the ownership of it, the principle of estoppel is that such acquisition inures to the benefit of the grantee because the grantor is estopped from denying that he had the title in question. (Pa.) *Jordan v. Chambers*, 1081.

15. DEED—After-acquired Title—Estoppel.—The estoppel of a grantor, who subsequently acquires title for what he has previously undertaken to sell, inures only to the benefit of his grantee. Those next privies or parties to the original conveyance can take no advantage of the estoppel arising from it. (Pa.) *Jordan v. Chambers*, 1081.

16. DEED—After-acquired Title by Adverse Possession.—When the adverse occupant of land conveys the coal thereunder at a time when he has no title, but he or his successor afterward completes title by adverse possession, he holds it in trust for the grantees, and may be compelled to execute them a conveyance. But if his successor, after the expiration of the statutory period requisite to vest him with title, and after he has taken a deed for one-third of the coal from one of the three grantees, brings ejectment against the holder of the record title, he may recover the whole fee. The outstanding equitable title to two-thirds of the coal is of no avail to the record owner as against the holder of the legal title to the surface and the coal. (Pa.) *Jordan v. Chambers*, 1081.

See *Boundaries*; *Estoppel*, 6-10; *Evidence*; *Homestead*; *Husband and Wife*; *Vendor and Vendee*.

DEEDS, EVIDENCE OF LOST.

See *Evidence*.

DE FACTO OFFICER.

See *Officers*, 1-5.

DEFINITIONS.

See *Words and Phrases*.

DEPOSITIONS.

DEPOSITIONS—Instruction as to Weight and Credibility.—It is error to refuse an instruction that the jury should give the same fair consideration to the testimony in depositions as they would to the testimony if given by witnesses in open court. But the failure to give such instruction is harmless, if the evidence in the depositions does not materially change the facts brought out by oral testimony. (Ill.) *Coburn v. Moline & Watertown Ry. Co.*, 377.

DEPOT COMPANY.

See *Railroads*, 9-12.

DESCENT AND DISTRIBUTION.

1. ADVANCEMENTS, Parol Declarations to Evidence or Establish.—Under the Illinois statute an advancement cannot be evidenced by parol declarations or statements, nor can any material or essential part of the proof necessary to establish an advancement be supplied by parol testimony. (Ill.) *Elliott v. Western Coal Co.*, 393.

2. ADVANCEMENTS.—An Advancement is a Question of Intention. Not every gift from a parent to a child is regarded as an advancement.

with written instructions concerning its delivery, the effect of the transaction depends upon the construction of the writing, and it is purely a question of law whether there has been a delivery or not. (Cal.) Moore v. Trott, 131.

6. DEED—Instructions Respecting Delivery, When Prevented from Becoming Operative on the Grantor's Death.—If a conveyance is signed and acknowledged, and sent to the depository with a statement in writing that it is to be delivered in case the grantor does not return from the hospital, where he is going to have an operation performed, that it is to be placed in the depository's safe, and in case the grantor should die to be immediately handed to the grantees, and the grantor, after being operated upon, returns to his own home and subsequently dies without resuming possession of the conveyance, it is not effective for want of unconditional delivery. (Cal.) Moore v. Trott, 131.

7. DELIVERY OF DEED not Aided by Declarations of the Grantor to Third Persons.—Where a conveyance is deposited by the grantor, with written instructions respecting the disposition to be made of it by the depository, anything said by the grantor to third persons expressive of his intentions and wishes cannot modify the reciprocal rights and duties of the depository and grantee as fixed by the written instructions. (Cal.) Moore v. Trott, 131.

8. DEEDS, Presumption of Delivery of, When cannot Prevail Against Evidence of Instructions.—The fact that a conveyance is found in the possession of the grantee does not give rise to a presumption of its delivery, where the evidence shows that such conveyance, though signed by the grantor, was given to a depository with instructions respecting it, which, as a matter of law, show that the grantor did not part with the right to recall it in his lifetime. (Cal.) Moore v. Trott, 131.

Description of Land.

9. DEED—Sufficiency of Description of Land.—A deed conveying "all of that part of a tract of land called 'King's Hill' situate in Gunpowder Neck in Hartford county, known as the landing on King's creek," contains by reference a sufficient description, if the location can be proved, and is admissible in evidence in an action of ejectment. (Md.) Cadwalader v. Price, 603.

Covenant for Support.

10. DEED—Lien of Covenant to Support.—A covenant in a deed which charges the grantee with the support of a third person as part of the consideration creates a lien on the land for such support. (Ky.) Webster v. Cadwallader, 470.

11. DEED—Agreement to Support Third Person.—Under a deed with a covenant that as a part of the consideration the grantee will support a third person "in the event that from disease or other cause he should become an invalid and unable to provide for himself," the obligation to support does not come into existence and become a charge on the property until the necessity for the support arises. (Ky.) Webster v. Cadwallader, 470.

After-acquired Title.

12. DEED—After-acquired Title by Adverse Possession.—Where one in the adverse possession of land undertakes to convey the coal underneath when he has no title, but afterward he completes the adverse holding so as to acquire title thereby, he is estopped from denying the grantee's equitable ownership in the coal, and may be compelled to convey to him. (Pa.) Jordan v. Chambers, 1081.

DISTRICT ATTORNEY.

1. **DISTRICT ATTORNEY—Duty to be Fair and Impartial.**—A prosecuting attorney represents the public interest, which is not promoted by the conviction of the innocent. It is his duty "to treat the accused with judicial fairness; to inflict injury at the expense of justice is no part of the purpose for which he is chosen." (*Went State v. Montgomery*, 1119.)

2. **CRIMINAL TRIAL—Attorney Acting for County Attorney.**—The court has power to recognize an unofficial member of the bar to conduct a criminal case for the state in place of the official prosecutor, and the accused has no legal ground for objection. (*Me. State v. Bartlett*, 542.)

See Criminal Law, 13-16.

DIVORCE.*In General.*

1. **DIVORCE—Refusal Because of Prior Divorces of Plaintiff.**—The application of a woman for a divorce will not be denied because she has previously been divorced twice and on the second occasion for her own fault. (*Mich.*) *Orton v. Orton*, 716.

2. **DIVORCE—Allegation of Desertion, When Sufficient.**—An allegation that on or about a date specified the defendant, disregarding his marital vows, willfully and without cause deserted and abandoned the plaintiff against her will and without her consent is sufficient. It will be inferred that the desertion continued from the date named to the filing of the complaint. (*Cal.*) *Grierson v. Grierson*, 137.

3. **DIVORCE—Desertion Resulting from Cruelty not Committed for That Purpose.**—A husband's acts of cruelty may amount to desertion, where they drive his wife from home, though that is not shown to have been his intention in committing them. (*Cal.*) *Grierson v. Grierson*, 137.

4. **DIVORCE—Cruelty Connected With Intemperance.**—In a suit for divorce on the ground of extreme cruelty, the plaintiff may allege instances of voluntary intoxication in connection with other matters as constituting acts of cruelty, and in so doing does not plead two separate causes for divorce. (*Cal.*) *Grierson v. Grierson*, 137.

5. **DIVORCE—Cruelty—Corroboration of Evidence of.**—Where a wife testifies on the trial of her suit for divorce that her husband frequently spoke harshly to her, and that she believed her life to be in danger, she is corroborated by the testimony of another witness to the same effect, though he further states that he had never personally seen the husband in a mood to hurt anyone. (*Cal.*) *Grierson v. Grierson*, 137.

6. **DIVORCE—Finding With Respect to the Defendant's Temperament, When Unnecessary.**—It is not material that the court did not find upon the allegation that the defendant was a highly nervous and excitable man, for a finding in accord with the allegation cannot excuse him for not treating his wife decently. (*Cal.*) *Grierson v. Grierson*, 137.

Nonresident Defendant.

7. **DIVORCE—Want of Affidavit Authorizing the Service of Summons by Publication.**—If the statutes of a state authorize the service of a summons by publication when it appears by affidavit that the defendant resides out of the state, and that a cause of action exists against him, the affidavit of the plaintiff's attorney that he is informed and verily believes that the plaintiff has a good cause

vancement, but it must appear that the gift was so intended before the child's part will be charged with it. (Ill.) *Elliott v. Western Coal Co.*, 398.

3. **ADVANCEMENTS.—The Mere Fact That a Parent has Given Property to one child and not to another, or more to one than another, is not sufficient to charge the favored child in the distribution of the parent's estate.** (Ill.) *Elliott v. Western Coal Co.*, 398.

4. **ADVANCEMENTS.—Whether Gift can be Changed into Advancement.—A gift of land by a parent to his child becomes complete when the deed is delivered, and it is not in his power years afterward, except by a legally executed will, to change the gift into an advancement.** (Ill.) *Elliott v. Western Coal Co.*, 398.

5. **ADVANCEMENTS.—The Intention Which will Characterize a gift as an advancement is the intention of the donor at the time of making the gift, expressed in the manner required by the statute.** (Ill.) *Elliott v. Western Coal Co.*, 398.

6. **ADVANCEMENTS.—Subsequent Declarations of Donor.—A gift by a parent to a child cannot be shown to be an advancement by the written statement of the donor made years after the gift.** (Ill.) *Elliott v. Western Coal Co.*, 398.

DEVISES.

See Wills.

DISMISSAL AND NONSUIT.

NONSUIT.—Where a Defendant Voluntarily Proceeds With the Trial and introduces evidence after the denial of his motion for nonsuit, the correctness of the denial is to be determined in the light of all the evidence, and not by the state of the evidence at the time of the motion. (Wash.) *Conner v. Seattle R. & S. Ry. Co.*, 1110.

DISORDERLY HOUSE.

1. **DISORDERLY HOUSE.—Any Place in Which Illegal Practices are habitually carried on is a disorderly house.** (N. J. L.) *State v. Martin*, 814.

2. **DISORDERLY HOUSE.—A Place Where Practices Interdicted by statute are habitually carried on is a disorderly house.** (N. J. L.) *State v. Martin*, 814.

3. **DISORDERLY HOUSE.—Conducting Usurious Business.—One who maintains a place of business in which the law against usury is habitually violated is guilty of keeping a disorderly house.** (N. J. L.) *State v. Martin*, 814.

Note.

Disorderly House, criticism of certain decisions respecting, 819.

definitions of, 820, 822.

disturbance of the peace is not essential to, 821.

gaming-houses, 820.

house where usurious business is conducted, 823.

includes every house to which people resort for purposes injurious to public morals, health or safety, 820.

includes every place where inmates behave so as to make it a nuisance, 820.

instances of, 825.

is one where lewd, dissolute or drunken persons resort, 820.

liquor, includes every house in which is unlawfully sold, 825.

mere assemblage of persons for some unlawful act, whether constitutes, 821, 822.

prostitution, house of, 820.

tests of, 820, 824.

14. DIVORCE—Effect of Interlocutory Judgment.—An interlocutory judgment in an action for divorce does not dissolve the marriage relation, but contemplates that the final judgment shall accomplish that result. (N. Y.) *Crandall's Estate*, 830.

15. DIVORCE—Theory of Interlocutory Decree.—By leaving the granting of the final judgment in divorce within the power of the court for three months after the entry of the interlocutory judgment it is intended to prevent fraudulent and collusive judgments and speedy prearranged remarriages. (N. Y.) *Crandall's Estate*, 830.

16. DIVORCE.—The Final Judgment in Divorce Does not Follow the interlocutory judgment as of course and automatically, and is as a mere matter of form. (N. Y.) *Crandall's Estate*, 830.

Death of Plaintiff.

17. DIVORCE—Effect of Death of Plaintiff.—An action for divorce is primarily an action of a personal nature, which, in the absence of statutory provisions, abates with the death of the party bringing it. (N. Y.) *Crandall's Estate*, 830.

18. DIVORCE—Death of Plaintiff Before Final Decree.—Where an application was made for the entry of final judgment in an action of divorce within the time prescribed by statute after entry of the interlocutory judgment, and no satisfactory excuse for the failure is made, a final decree cannot be entered after the death of the plaintiff to take effect as of a date prior thereto. (N. Y.) *Crandall's Estate*, 830.

DOGS.

See Animals; Railroads, 13-16.

DOWER.

1. DOWER—Separate Suits for Assignment.—A widow entitled to dower in different tracts of land may file a bill for assignment in a part of such lands, and afterward have dower assigned in the remainder in a separate proceeding. She is not obliged to include all the lands in one suit. (Ill.) *Mettler v. Warner*, 388.

2. DOWER.—A Widow's Right to Dower Accrues Immediately upon the Death of her husband, and she is entitled to the same even though it may require a sale of real estate contrary to directions in the will. (Ill.) *Mettler v. Warner*, 388.

3. DOWER.—The Rights of Devisees must Give Way to the right of the widow to have her dower assigned. (Ill.) *Mettler v. Warner*, 388.

4. DOWER.—The Postponement of the Period of Distribution to devisees does not have the effect of postponing the widow's right to dower. (Ill.) *Mettler v. Warner*, 388.

EASEMENT.

1. WAY OF NECESSITY—When Exists from Landlocked Tract. Where two tracts of land, now owned by different persons, were originally entered as one parcel by their remote grantor, and one tract borders on a highway while the other is landlocked, the owner of the latter has a way of necessity over the former to the highway. (Mich.) *Moore v. White*, 735.

2. WAY OF NECESSITY—Offer to Sell Different Route.—When persons are entitled to a way of necessity over the land of another, an offer by the latter to sell them a right of way over other lands, to which route they have no claim, does not affect their right to the easement. (Mich.) *Moore v. White*, 735.

of action, and that the defendant is a nonresident of the state, and her last known place of residence was at Boston, Georgia, is insufficient to give the court jurisdiction, a decree founded thereon is void. (Cal.) *Estate of Hancock*, 177.

8. DIVORCE in Another State—Want of Jurisdiction, When Sufficiently Shown.—Where a copy of the record of a suit of divorce is offered and received in evidence, and is certified or admitted to be a true, perfect and complete copy of all records, papers and files in the cause, and the affidavit contained therein upon which the order for the publication of summons was based appears to be wholly insufficient, the jurisdiction of the court is thereby disproved. (Cal.) *Estate of Hancock*, 177.

Property Rights.

9. DIVORCE, Division of Community Property upon.—The trial court, in a proceeding for divorce, has a discretion, subject to the revision of the appellate court, respecting the amount of community property which will be awarded the wife. (Cal.) *Pereira v. Pereira*, 107.

10. APPEAL AND ERROR—Divorce—Division of Community Property, When cannot be Reviewed.—Where an appeal is taken by the husband from that part of the decree of divorce dividing the community property, the appellate court cannot make a more favorable division to the wife, she not having appealed, but if a new trial is granted to him, then the trial court, upon such trial, may make such apportionment of the community property as may then appear to be just. (Cal.) *Pereira v. Pereira*, 107.

11. DIVORCE—Property Rights, Fixing in the Appellate Court.—Where, in a suit for divorce, the court, in determining the amount of community and separate property, did not allow enough for the increase of the separate property after the marriage, and it appears that such property was employed in business, and there was no evidence respecting the amount of profits due thereto, the appellate court may, at the request of the wife, assume that the profits so realized were the sum which that amount of capital would have earned at legal interest, and after deducting this sum from the community and adding it to the separate property, divide the former between the spouses in the same proportion in which it was apportioned by the trial court. (Cal.) *Pereira v. Pereira*, 107.

Contract Against Public Policy.

12. HUSBAND AND WIFE—Contract Limiting the Sum to be Paid in the Event of His Giving Cause for Divorce.—A contract between a husband and wife whereby she agrees to dismiss a pending suit for divorce and to condone the cause thereof, and that, in the event of his subsequently giving her a cause for divorce and her prosecuting and maintaining a suit therefor, he will pay, and she will accept, a specified sum in full satisfaction of her property rights, is against public policy, and will not be enforced against her. (Cal.) *Pereira v. Pereira*, 107.

Interlocutory and Final Decrees.

13. DIVORCE—Property Rights, Fixing of by the Interlocutory Decree.—Under the amendment of the Civil Code of California by which the power of the court to grant a final decree of divorce is postponed until one year after the granting of the interlocutory decree, the property rights of the spouses and their right to the custody of their children may be fixed by the interlocutory as well as the final decree, and this course is preferable. (Cal.) *Pereira v. Pereira*, 107.

EMANCIPATION.

See Parent and Child, 6-9.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENTIRETIES.

See Husband and Wife, 5-8.

EQUITABLE MORTGAGE.

See Deeds, 10, 11.

EQUITY.

1. **EQUITY**—Trial—Findings of Master.—In an equity suit the findings of fact by the master appointed for that purpose are entitled to the same conclusiveness as the verdict of a jury or the court sitting as a jury. (Ark.) *Griffin v. Anderson-Tully Co.*, 73.

2. **EQUITY**—Stale Claim not Barred by Limitation.—A claim may be stale, so that a court of equity will not enforce it under the facts shown, although it is not barred by the statute of limitation. (Ky.) *East Jellico Coal Co. v. Hays*, 436.

3. **EQUITY**—Laches—Limitation of Actions.—The doctrine of laches will not bar an action brought within the period of limitation unless there is some controlling equity. (Wash.) *Roger v. Washburn*, 1105.

ESTOPPEL.*In General.*

1. **ESTOPPEL**—Common-law and Equitable.—At the common law estoppel was founded on deeds and records of courts, but in equity estoppel is in pais. (Wash.) *Carruthers v. Whitney*, 1114.

2. **ESTOPPEL**—The Idea of Equitable Estoppel is, that where a person wrongfully or negligently, by his acts or representations, causes another who has a right to rely upon them to change his condition to the worse, the person making such representations shall not be allowed to plead their falsity for his own advantage. (Wash.) *Carruthers v. Whitney*, 1114.

3. **ESTOPPEL**, Notice and Knowledge Essential to.—The question of whether the defendants are estopped from denying the existence of a contract does not arise if the pleadings and evidence fail to establish that when the defendants did the acts by which they are claimed to be estopped they knew of the existence and terms of the contract in question. (Cal.) *Seymour v. Oelrichs*, 154.

4. **AN ESTOPPEL** by Judgment must be Pledged specially and be available. (La.) *Hinton v. Roane*, 526.

5. **ESTOPPEL**—One Who Puts It Within the Apparent Power of another to commit a fraud should suffer the loss rather than a stranger who has innocently and in good faith acted upon the apparent power. (N. C.) *Campbell v. Huffines*, 987.

Against Grantee.

6. **ESTOPPEL**—Whether Operative Against Grantee.—An estoppel in pais, on account of representations made by the owner of land which induced another person to extend credit and accept a mortgage on the land from a third person, is not operative against a subsequent grantee of the owner of the land who was a bona fide purchaser for value. (Ga.) *Thornton v. Ferguson*, 226.

3. WAY OF NECESSITY—Manner of Enforcement.—The owner of a landlocked tract, who is entitled to a way of necessity over adjoining land, is not required to apply under the statute for the condemnation of a private road. (Mich.) *Moore v. White*, 735.

4. WAY OF NECESSITY—Manner of Location.—The owner of the servient estate has the right to locate a way of necessity, but in case he refuses, the owner of the dominant estate, acting reasonably, may do so. (Mich.) *Moore v. White*, 735.

5. WAY OF NECESSITY—Rights and Duties of Parties.—One who claims a way of necessity may make it passable and is required to keep it in repair and provide gates at the ends. The owner of the fee is not prevented from using the way by passing to and from it, but such use must not in any way impair the use of the way by the owner. (Mich.) *Moore v. White*, 735.

See *Frauds*, Statute of, 3; *License*, 1, 2.

EJECTMENT.

1. EJECTMENT—Evidence.—Where a Deed is Apparently Offered as Conveying title and rejected as invalid, if the person claiming under it desires to have it admitted as color of title in connection with evidence of possession thereafter to be offered, he should so tender it or call the attention of the court to the purpose of its offering as color of title. (Ga.) *Weeks v. Hosch Lumber Co.*, 213.

2. EJECTMENT—Evidence.—Where in an Action of Ejectment the defendant offered in evidence certain deeds, which were properly rejected when and as they were offered, and afterward he offered evidence to show possession, but no color of title, and it alone was not sufficient to show prescription, and its admission could not have altered the result, ruling it out will not require a reversal. (Ga.) *Weeks v. Hosch Lumber Co.*, 213.

3. EJECTMENT.—Although Evidence may have been Admissible to Show Adverse Possession at the time of the making of an administrator's deed to a purchaser of land, yet where the same result of the case was inevitable, regardless of whether such evidence was admitted or not, its rejection will not cause a reversal. (Ga.) *Weeks v. Hosch Lumber Co.*, 213.

4. EJECTMENT—Adverse Possession—Survey.—Where the defendant in ejectment claims title by adverse possession to a part of the land, the proper practice is to have a survey made under warrant issued by the court. (Md.) *Cadwalader v. Price*, 603.

5. EJECTMENT—Equities of Defendant.—Under the Ordinary allegations in an action to recover land, and a general denial on the part of the defendant, facts indicating an equity in favor of the defendant cannot be entertained. (N. C.) *Windley v. Swain*, 923.

3. EJECTMENT—Conclusiveness of Judgment as Between Defendants.—Where the original parties in ejectment both claimed from the holder of the record title, but other persons claiming the land by adverse possession are added as defendants, a judgment for the defendants, while conclusive against the plaintiffs, is not conclusive as between those defendants claiming by the record title and those claiming by adverse possession. (Pa.) *Jordan v. Chambers*, 1081.

See *Executors and Administrators*, 7.

te.
igit, practical abolition of remedy by, 36.

ELECTION.

See *Criminal Law*, 3; *Wills*, 16, 17.

5. **EVIDENCE.**—A Party cannot Complain of Incompetent Evidence brought out on the redirect examination of a witness, to complain incompetent testimony elicited on cross-examination. (Ky. Louisville & Nashville R. R. Co. v. Stiles, 491.)

Opinion of Physician.

6. **EVIDENCE.**—The Opinion of a Physician is not Competent evidence in a personal injury case where it is based upon self-serving statements by the patient, not made in the course of treatment, but with the view of enabling the physician to testify in reference to the physical condition of the patient. (Ill.) Coburn v. Moline & Watertown Ry. Co., 377.

X-ray Photographs.

7. **EVIDENCE.**—An X-ray Photograph of a Wound, made in the direction of a physician and in his presence, and testified by him to be a correct representation of the condition of the body at the time when taken, is admissible in a prosecution for an assault with an intent to murder, over an objection that it should be identified by the electrician who made it. (Iowa) State v. Matheson, 426.

8. **EVIDENCE.**—X-ray Photograph.—While Neither the Electrician who took an X-ray photograph of a wound nor the physician who was present can testify that a spot indicated on the radiograph is a bullet, it is competent for either of them to testify that the spot is such as a bullet imbedded in the body would produce. (Iowa) State v. Matheson, 426.

Reports and Records.

9. **EVIDENCE.**—A Car Conductor's Report of an Accident, made immediately thereafter in due course of his employment, is, so far as favorable to the railway company, merely a self-serving document, and hence not admissible in an action against it by an injured passenger. (Wash.) Conner v. Seattle etc. Ry. Co., 1110.

10. **EVIDENCE.**—Car Report Record or "Borner Record."—In order to identify cars destroyed by a mob, in an action against a city to recover therefor, a car report known as the "Borner Record," which shows the arrival and movement of cars, is admissible, although the original reports from which the record was made have been destroyed. (Ill.) Pittsburg etc. Ry. Co. v. Chicago, 316.

11. **EVIDENCE.**—"Record of Car Equipment."—In Determining the Value of Cars destroyed by mobs, historical records, known as the "record of car equipment," showing the time when and the place where the cars were built, the character of their construction, and to what extent they have been repaired or rebuilt, are admissible. (Ill.) Pittsburg etc. Ry. Co. v. Chicago, 316.

Best and Secondary—Lost Instrument.

12. **EVIDENCE.**—In Determining What is the Best Evidence the Nature of the case will admit of, and what is secondary evidence regard must be had, to some extent, to the nature and character of the business to which the evidence relates and the method of its conduct. (Ill.) Pittsburg etc. Ry. Co. v. Chicago, 316.

13. **LOST INSTRUMENT.**—Evidence to Establish.—To establish a lost instrument on behalf of the party asserting rights under it, the evidence must be clear, positive, and of such a character as to leave no reasonable doubt as to the terms and conditions of the instrument. It is not enough that a witness is able to state his understanding of the legal effect, if he cannot give the substance of the contents of the instrument. (Wash.) Scurry v. City of Seattle, 1092.

See Boundaries; Criminal Law.

7. ESTOPPEL—Whether Operative Against Grantee.—There was no evidence to impeach the bona fides of the grant under which the claimant asserted title; and it was erroneous to so instruct the jury as to authorize a finding that the property was subject on the theory of an estoppel operative against the claimant. (Ga.) *Thornton v. Ferguson*, 226.

Claimants Under Common Source of Title.

8. ESTOPPEL—Claimants Under Common Source of Title.—The general rule which precludes parties litigant from questioning the title under which they both claim is not in strictness an estoppel, but a rule of justice and convenience adopted by the courts to relieve parties from the necessity of going back of the common source and deducing title from the state. (N. C.) *Sample v. John L. Roper Lumber Co.*, 902.

9. ESTOPPEL—Claimants Under Common Source of Title.—The rule that prevents parties litigant from questioning the title under which they both claim is subject to the exception that a defendant may show an outstanding title superior to the common source, and that he has acquired it. (N. C.) *Sample v. John L. Roper Lumber Co.*, 902.

10. ESTOPPEL—Claimants Under Common Source of Title.—One who has purchased standing timber and has taken a deed therefor in recognition at the time of the grantor's claim to the fee may show, in an action against him by the grantor for wrongful cutting of timber, that there was an outstanding superior title which he has acquired. (N. C.) *Sample v. John L. Roper Lumber Co.*, 902.

See *Frauds, Statute of*, 11-14.

Note.

Estoppel, equitable, fraud is the basis of, 173.

equitable, what is, 172, 173.

fraud in encouraging an act to be done, 177.

EVIDENCE.

In General.

1. EVIDENCE—Silence as Assent.—The silence of a defendant when a statement, damaging to him, is made in his presence, can only be used in evidence against him when it is shown that he heard the remark and the circumstances in proof naturally called for a reply. (Ark.) *Maloney v. State*, 83.

2. EVIDENCE—Absent Witness—Former Trial.—Before testimony of an absent witness given on former trial can be heard, it must be first shown that such witness is dead, beyond the jurisdiction of the court, or upon diligent inquiry cannot be found. (Ark.) *Maloney v. State*, 83.

3. EVIDENCE—When Paragraphs of an Answer Put in Evidence by the Plaintiff are complete in themselves, it is not error to exclude distinct averments in his own interest made in another part of the answer by the defendant. (N. C.) *Hockfield v. Southern Ry. Co.*, 45.

4. EVIDENCE—Statements of Person Since Deceased.—Where property was levied upon to satisfy a mortgage execution against the administrator of a deceased person, and was claimed by a third person, who did not hold under the defendant in execution, it was not erroneous to allow the plaintiff in execution, while testifying in his own behalf, to give evidence as to sayings of the mortgagor while in life, over the objection that the plaintiff was incompetent to testify. (Ga.) *Thornton v. Ferguson*, 226.

EXECUTIONS.

1. **EXECUTION—Disqualification of Clerk to Issue.**—Where the clerk of a superior court was the administrator upon the estate of a deceased person, and as such was the defendant in a suit to foreclose a mortgage pending in the superior court, an execution issued by him as clerk against himself as administrator, based on the judgment of foreclosure, was not void because of disqualification to issue the execution. (Ga.) *Thornton v. Ferguson*, 226.

2. **EXECUTION—Sufficiency of Levy in Mortgage Foreclosure.**—Where in a suit to foreclose a mortgage upon land, against two defendants, a judgment was obtained against only one of them, and the execution commanded the sale of the property mortgaged, and the sheriff, while making the levy, omitted to recite that the land was levied upon as the property of the defendant named in the execution, the levy was not for that reason void, or inadmissible upon the trial of a claim case between the plaintiff in execution and a third person. (Ga.) *Thornton v. Ferguson*, 226.

3. **EXECUTIONS—Vacating Satisfaction—Nugatory Purchase.**—Where property sold as the judgment debtor's and purchased at a sheriff's sale by the judgment creditor is not in fact the judgment debtor's property, and the execution has been returned satisfied, the satisfaction will be vacated. (Ark.) *Sturdivant v. Ward*, 32.

Note.

Execution. See Judgment.

Execution Sale, caveat emptor, rule of, when not applied to purchases at, 38.

failure of title at, when does not entitle the purchaser to relief, 39.

of property to which the defendant had no title, purchasers under, when entitled to relief, 38.

purchaser at, when entitled to relief for failure of title, 36, 37-40.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATION—Certificate to Transcript of Record in Court of Ordinary.**—Where, in a certificate to a transcript of a record in the court of ordinary, the ordinary described himself as "ordinary and ex officio clerk of said court of ordinary of said county," and signed the certificate in the same manner, this was a sufficient statement that the ordinary and the clerk were the same person to admit the transcript in evidence. (Ga.) *Weeks v. Hosch Lumber Co.*, 23.

2. **ADMINISTRATRIX—Estoppel to Claim Land Individually.**—An administratrix who states in her inventory and petition for the sale of certain land that it belongs to the estate, and makes no statements of like effect to creditors of the decedent and to purchasers at the sale, will be estopped, after her conveyance under order of court, from claiming any individual title or interest in the property. (Wash.) *Carruthers v. Whitney*, 1114.

Letters Testamentary or of Administration.

3. **WILLS.**—**Letters Testamentary Relate Back to the Date of the testator's death, after the will is probated, and validate acts done by the executor in the line of his duty before he qualified.** (Ill.) *Mason v. Warner*, 388.

4. **ADMINISTRATION—Collateral Attack on Letters.**—The question whether the probate court was wrong in finding as a fact that the decedent before her death was an inhabitant of, or resident of, the county, is not open to contest in an action by the administrator.

Note.

- Deeds, lost, evidence, oral to establish by a witness who has only heard them read, 1096.**
- lost, evidence, oral to establish by a witness who is unable to recollect the substantial parts of, 1096.
- lost, evidence, oral to establish by a witness who speaks from hearsay only, 1096.
- lost, evidence, oral to establish must be clear, positive and satisfactory, 1095.
- lost, evidence, oral to establish must show the substantial parts, 1096.
- lost, evidence, oral to establish, preponderance of is sufficient, 1095.
- lost, evidence, oral to establish, value of the instrument as affecting, 1095.
- lost, evidence, oral to establish, whether should leave no reasonable doubt, 1095.
- lost, evidence, oral to establish, where they have been lost or are withheld by the adverse party, 1095.

- Evidence, declarations of former owners of land are not competent to destroy vested rights, 612.**
- declarations of former owners of land after making a sale or after the inception of a lien, 617.
- declarations of former owners of land as against a purchaser for value, 613, 614.
- declarations of former owners of land, confusion of decisions respecting, 611.
- declarations of former owners of land, in disparagement of title made before former owner has parted with possession, 611.
- declarations of former owners of land, limitations upon admissibility of, 615, 616-618, 620.
- declarations of former owners of land made after they have parted with title or possession, 616-618, 623, 624.
- declarations of former owners of land must be by persons now deceased, 621, 625.
- declarations of former owners of land must be made ante litem motam, 620.
- declarations of former owners of land must not be self-serving, 620.
- declarations of former owners of land, purposes for which admissible, 612.
- declarations of former owners of land, title restricted to matters provable by parol, 614.
- declarations of former owners of land to contradict title of record, 615, 616.
- declarations of former owners of land to show character and nature of possession, 615.
- declarations of former owners of land to show knowledge of the existence of a mortgage, 612.
- declarations of former owners of land to show sale of the property by them, 613.
- declarations of former owners of land to show that an apparent deed was a mortgage, 618.
- declarations of former owners of land to show the date of the delivery of a deed, 616.
- declarations of former owners of land to show title or interest of another in the property, 612, 613.
- declarations of former owners of land, whether admissible if the owners are still living, 625.

See Deeds, Lost.

3. **EXEMPTION—Crops on Farm.**—Where a Man and His Family live on land belonging in indivision to his wife and her coheirs and his children cultivate part of the land under an agreement whereby they have the surplus of the cotton after the supply has been paid, and he has the other products for the support of the family, the corn, hay and cane raised on the land belong to him, and are "on a farm," within the meaning of the exemption law. (La.) *Hinton v. Roane*, 526.

4. **EXEMPTION—Crop on Land not Owned by Debtor.**—The law does not require that the farm on which crops are grown shall belong to the person claiming their exemption. (La.) *Hinton v. Roane*, 526.

5. **EXEMPTION—Sugar-cane not Grown as a Money Crop.**—Article 645 of the Code of Practice, providing against the seizure of "the corn, fodder, hay, provisions, and other supplies necessary for carrying on the plantation to which they are attached, for the current year," merely prohibits seizing the articles therein named "separately from the land." Sugar-cane, though not grown as a money crop, but converted into syrup for consumption by the family, may be seized under execution. (La.) *Hinton v. Roane*, 526.

See Homestead.

EXPATRIATION.

See Aliens.

EX-SHERIFF.

See Sheriffs, 2.

FAMILY EXPENSES.

See Husband and Wife, 1.

FELLOW-SERVANTS.

See Master and Servant, 8-12.

FIDUCIARY RELATIONS.

1. **FIDUCIARY RELATIONS—What are, and Their Effect.**—A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person. In such case he is not allowed to derive any profit or advantage from the relations between them, except upon proof of full knowledge and consent of such other. (Ill.) *Dick v. Albers*, 369.

2. **FIDUCIARY RELATIONS—Technical and Informal Relations.**—A fiduciary relation exists in all cases where there is a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. The rule embraces both technical and fiduciary relations, and those informal relations exist wherever one man trusts in and relies on another. The origin of the confidence is immaterial. (Ill.) *Dick v. Albers*, 369.

FINES.

1. **FINE—Costs as Part of Penalty.**—Although costs follow sentence, they are no part of the fine actually imposed. (La.) *State v. Price*, 523.

2. **FINE—Forfeiture of License as Part of Penalty.**—The forfeiture of the right to conduct a barroom forms no part of the fine but does form part of the penalty imposed for breach of the Gay Shattuck law. (La.) *State v. Price*, 523.

against a carrier for rejecting the decedent, in her lifetime, as a passenger. (Mass.) *Connors v. Cunard Steamship Co.*, 662.

5. ADMINISTRATION.—The Probate Court has Jurisdiction to grant administration of the estate of a person who at the time of her decease was an inhabitant or resident in the county, without proof that she left estate to be administered within the county. (Mass.) *Connors v. Cunard Steamship Co.*, 662.

Power to Sell or Maintain Ejectment.

6. EXECUTORS AND TRUSTEES—Delegation of Power to Sell. A power of sale vested by will in executors and trustees is a personal trust which they cannot delegate to an agent, although they may employ an agent to find a purchaser. (Ill.) *Coleman v. Connolly*, 347.

7. EXECUTORS.—Ejectment may be Maintained by an executor. (Mich.) *Moody v. Macomber*, 755.

Coexecutors.

8. EXECUTORS—Authority of One of Several to Execute Deed. A special trust as to the sale and conveyance of land, conferred by a will on three executors, cannot be executed by one of them selling and making a deed. Such a deed could not be upheld by parol evidence tending to show that the other two executors took no active part in administering the estate, and that the executor making the sale and conveyance was the managing executor. (Ga.) *Weeks v. Hosch Lumber Co.*, 213.

9. COEXECUTORS—Power of One of Several to Execute Power.—To entitle one of a number of executors to execute a power of sale, it must be shown that the others not only failed to qualify but refused to do so. (Ill.) *Coleman v. Connolly*, 347.

10. COEXECUTORS—Execution of Power of Sale.—A power to sell, conferred by a testator upon his two daughters as trustees and executrices, must be presumed to have been conferred by reason of confidence reposed in them by him, and can be executed only by both of them acting jointly. (Ill.) *Coleman v. Connolly*, 347.

11. COEXECUTORS—Authority of One to Execute Power of Sale.—Where a testator appoints two of his daughters as executrices and trustees with power to sell land, and provides that in case of the death of one the survivor may act alone until a third daughter becomes of age, "who shall qualify after she reaches her majority," the power of the survivor to act alone ceases when the third daughter becomes of age, for the latter then becomes a cotrustee. (Ill.) *Coleman v. Connolly*, 347.

12. COEXECUTORS—Power to Authorize Agent to Sell Land.—If an executrix had power to authorize an agent to sell land, but the contract of sale is not made until another person qualifies as coexecutrix who refuses to recognize the agreement, the agent's authority terminates. (Ill.) *Coleman v. Connolly*, 347.

See Judgment, 13, 14.

EXEMPTIONS.

1. EXEMPTION.—The Expression "Current Year" in a statute exempting the corn, fodder, provisions, and other supplies necessary for carrying on the plantation to which they are attached, for the current year, means from harvest to harvest, and not a calendar year. (La.) *Hinton v. Roane*, 526.

2. EXEMPTION.—A Crop That Still Hangs by the Roots is within a statute exempting the corn, fodder, hay, provisions, and other supplies necessary to carry on the plantation for the current year. (La.) *Hinton v. Roane*, 526.

offered, or that the attempt to defraud should be successful. (Ark.) *Maloney v. State*, 83.

3. **FORGERY—Fictitious Name.—To Constitute Forgery**, the name alleged to be forged need not be that of any person in existence; it may be wholly fictitious. (Ark.) *Maloney v. State*, 83.

4. **FORGERY—Fictitious Name—Inference.**—When the jury find upon evidence that the name alleged to be forged was of a fictitious person, the inference arises that the person who uttered and published as true, the instrument bearing the name, either forged it or knew it to be forged. (Ark.) *Maloney v. State*, 83.

5. **FORGERY—Fictitious Name—Evidence.**—It is competent for the proper officer of a bank to prove that no person bearing the name on a document alleged to be forged kept or had an account with or was a customer of such bank. (Ark.) *Maloney v. State*, 83.

6. **FORGERY—Fictitious Name—Evidence.**—It is not competent for the cashier of a bank which succeeded to the business of another bank on which a check alleged to be forged was drawn to prove that no person bearing the name on such check kept or had an account with or was a customer of the latter bank. (Ark.) *Maloney v. State*, 83.

7. **FORGERY—Indictment must Set Forth Exact Copy of Instrument.**—The common law requires an indictment for forgery to set forth an exact copy of the instrument. To allege its substance only, is not sufficient. (Ill.) *People v. Tilden*, 341.

FORMER JEOPARDY.

See Criminal Law, 17, 18.

FRATERNAL ASSOCIATION.

See Benefit Association.

FRAUDS, STATUTE OF.

In General.

1. **FRAUDS, STATUTE OF.**—A contract for personal services which cannot be performed within one year is within the statute of frauds. (Cal.) *Seymour v. Oelrichs*, 154.

2. **FRAUDS, STATUTE OF—Authority of Agent.**—In California the authority to execute a contract required by its statutes to be in writing must also be evidenced by a writing signed by the party to be charged. (Cal.) *Seymour v. Oelrichs*, 154.

3. **STATUTE OF FRAUDS.**—A Verbal Contract for an Easement over the real estate of another, unexecuted and unaccompanied by any other circumstances, is contrary to the statute of frauds and does not convey any interest in the land. (Minn.) *Munsch v. Stehr*, 785.

4. **FRAUDS, STATUTE OF.**—The Mere Part Performance of a Contract for Personal Services, which by its terms cannot be performed within a year, does not render it enforceable when not in writing. (Cal.) *Seymour v. Oelrichs*, 154.

5. **STATUTE OF FRAUDS, Presenting by Demurrer.**—Wherever it appears on the face of a complaint that the agreement sued upon is within the statute of frauds and fails to comply with its requirements, the defendant may take advantage of the defect by demurrer. (Cal.) *Harper v. Goldschmidt*, 124.

Signing Contract.

6. **STATUTE OF FRAUDS—Party to be Charged, Who is.**—The party to be charged, within the meaning of the statute of frauds

3. **FINE**—Meaning of Term.—The Word "Fine," in its ordinary acceptation, has the distinct meaning of a pecuniary penalty. (La.) *State v. Price*, 523.

See Courts, 1.

FIRE.

See Vendor and Vendee, 3.

FISH.

See Municipal Corporations, 10-12.

FIXTURES.

1. **FIXTURES**.—The Mortgagee of Real Estate does not have a lien on subsequently annexed chattels superior to the rights of the conditional vendor or mortgagee of the chattels at or before the time of their annexation. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

2. **FIXTURES**.—Notice to the Mortgagee of the Real Estate of the annexation of chattels covered by a mortgage or conditional sale is not determinative of his superior right nor important in fixing the rights of the prospective mortgagees. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

3. **FIXTURES**.—One Who Purchases Machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the chattels shall retain their character as personalty, regardless of the manner in which they may be annexed to the freehold. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

4. **FIXTURES**.—After Chattels have Become Fixed to real estate their character as part of the realty cannot be changed by a convention of the owner of the realty with a stranger so as to conclude the rights of prior mortgagees or creditors or subsequent purchasers for value. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

5. **FIXTURES**.—The Adjustment of the Rights of the Mortgagee of real estate and the mortgagee of chattels subsequently annexed to the realty, where it is contended that the enforcement of the chattel mortgage with consequent removal of the chattels will impair the security of the real estate mortgage, is determined by equitable principles, which in some cases may require the postponement of the chattel mortgage. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

6. **FIXTURES**.—The Delay in Recording a Mortgage of Machinery annexed to real estate upon which there is a prior mortgage does not affect the priority of liens as between the two mortgagees. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

7. **FIXTURES**.—Notice to the Conditional Vendor or Mortgagee of chattels of the existence of a mortgage on the real estate to which they are to be annexed is not important in determining the rights of the respective mortgagees. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

FORGERY.

1. **FORGERY**—Uttering—Definition.—Uttering a forged writing consists in offering to another a forged instrument with a knowledge of the falsity of the writing and with intent to defraud. (Ark.) *Maloney v. State*, 83.

2. **FORGERY**—Uttering—Nonessentials.—To constitute the offense of uttering, it is not necessary that the forged writing should have been actually received as genuine by the person to whom it is

son from asserting the statute, yet if he is thereby induced to change his position in a substantial respect, and so that such position cannot be restored, estoppel arises to preclude such assertion. (Cal.) *Seymour v. Oelrichs*, 154.

Note.

Frauds, Statute of, assisting to consummate a fraud, 174.

change of position in consequence of acts or words of the other party, 176.

change of position which will create estoppel to plead, 175, 176.

conduct which will estop a party from pleading, 175.

equitable estoppel against pleading, grounds of, 174, 176.

equitable estoppel, prejudice to the party asserting, necessity for, 177.

estoppel, equitable, against pleading or asserting, 173, 174.

estoppel, equitable, fraud is the basis of, 173.

estoppel, equitable, pleading, necessity of, 173.

estoppel, equitable, pleas of, replies to, 173.

part performance of contract for personal services, 174.

pleading to take advantage of a confidence reposed, 174, 175.

FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCE—Suspicious Consideration—Presumption.—Where a father conveyed land which he had mortgaged to his sons, retaining the deed and recording it after his mortgage proceeded to sell the land, and as to the consideration set out in the deed declares his indifference whether it is paid or not, these circumstances make out a prima facie case of fraud. (Ark.) *Morgan v. Kendrick*, 78.

Note.

Fraudulent Conveyances, sureties' right to maintain as against persons claiming under their principal, 567.

GAMING.

See Lottery.

GARNISHMENT.

1. **GARNISHMENT—School District.—The Funds of a School District cannot be garnished in an action at law.** (Ark.) *Plummer v. School Dist. No. 1 of Marianna*, 28.

2. **GARNISHMENT—School District—Equitable Relief.**—The creditors of a contractor for a school building are entitled in equity to have applicable funds in a school district's control subjected to their claims, and their liens by equitable garnishment take priority as in proceedings at law. (Ark.) *Plummer v. School Dist. No. 1 of Marianna*, 28.

3. **GARNISHMENT.—The Equitable Doctrine of Setoff may be applied by a court of equity in garnishment proceedings in all cases where the plaintiff presents no superior right.** (Minn.) *Wunderlich v. Merchants' Nat. Bank*, 788.

4. **GARNISHMENT.—A Lien Acquired by Garnishment is, in the absence of some special and superior right in plaintiff, subject to all equities existing between the garnishee and the defendants.** (Minn.) *Wunderlich v. Merchants' Nat. Bank*, 788.

5. **GARNISHMENT—Setoff by Bank Against Depositor.**—A bank summoned as garnishee in an action against one of its depositors may set off against the depositor's general account unmaturing notes held by it at the time of the service of the garnishee summons, when

is the party against whom the contract is sought to be enforced, whether vendor or vendee. (Cal.) *Harper v. Goldschmidt*, 124.

7. STATUTE OF FRAUDS—Specific Performance Against Vendee.—Where the statute of frauds requires the contract or some memorandum thereof to be made by the party to be charged or his agent, a contract for the sale of land, signed by the vendor only, cannot be enforced against the vendee, unless his conduct has amounted to such performance or part performance as to relieve the contract from the necessity of his signature. (Cal.) *Harper v. Goldschmidt*, 124.

8. SPECIFIC PERFORMANCE Against Vendee Who Paid Part of the Purchase Price, and received a receipt therefor, but did not sign it nor any contract or memorandum, cannot be enforced because of the statute of frauds. In such case there is no part performance of the contract to take it out of the statute. (Cal.) *Harper v. Goldschmidt*, 124.

Sufficiency of Memorandum.

9. FRAUDS, STATUTE OF.—A memorandum to satisfy the statute of frauds must contain the essential terms of a contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties. (Cal.) *Seymour v. Oelrichs*, 154.

10. FRAUDS, STATUTE OF—Memorandum, When Insufficient.—Where the plaintiff claims to have been employed by the defendants for the term of ten years, letters and telegrams merely showing that he had been employed as their superintendent of buildings, expressing a hope that everything was pleasant at the office and agreeing to keep him in office at the former salary, do not constitute memoranda to take the contract out of the statute of frauds, because they wholly fail to disclose the terms of the contract or the rate of compensation. (Cal.) *Seymour v. Oelrichs*, 154.

Estoppel to Assert Statute.

11. FRAUDS, STATUTE OF, Estoppel Against Asserting.—Equity may hold a person estopped to assert the statute of frauds where such assertion must amount to practicing a fraud. This rule is not limited to any particular class of contracts. (Cal.) *Seymour v. Oelrichs*, 154.

12. FRAUDS, STATUTE OF—Contract for Personal Services, Estoppel to Assert Statute Against.—If one holding a permanent position, and who will become entitled to a life pension if he continues therein, resigns such position on an agreement for employment with another for the term of ten years, at a specified salary, and enters upon such employment, and thereafter cannot be restored by his employers to the position resigned by him, this is such a change of position on his part in reliance on the contract of employment as estops his employers from denying the validity of the contract on the ground that it was within the statute of frauds, and not in writing. (Cal.) *Seymour v. Oelrichs*, 154.

13. FRAUDS, STATUTE OF—Estoppel, Fraud, Character of Necessary to Support.—To constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct, the actual intent to mislead is not essential. There need not be a corrupt motive or evil design, but the circumstances must be such as to render it unconscionable to deny facts which the party by his silence or representation has caused the other party to believe in and act upon, and the denial of which must operate as a fraud upon him. (Cal.) *Seymour v. Oelrichs*, 154.

14. FRAUDS, STATUTE OF—Failure to Reduce Contract to Writing as Agreed.—Though the failure to reduce to writing a contract as agreed does not ordinarily constitute such fraud as to estop a per-

4. **GUARDIAN'S SALE**.—Irregularities in the Sale of a *Land* by order of court should be corrected in the case in which they occurred. They cannot be considered in a collateral proceeding. (Pa.) *Patchin v. Seward Coal Co.*, 1013.

HACK-STANDS.

See Railroads, 1.

HIGHWAY.

HIGHWAYS—Gas-pipes as Additional Servitude.—The laying of gas-mains in a country highway by a corporation desiring to conduct natural gas from its plant to a city, there to be sold for heating and illuminating, is an additional servitude for which abutting owners are entitled to compensation. (Ky.) *Paine's Guardian v. Cal's Oil & Gas Co.*, 475.

See Automobiles.

HOMESTEAD.

In General.

1. **HOMESTEAD**—Condition of Debtor, of What Date Considered.—The condition of the debtor, upon which the claim of homestead is based, is considered as of the date of the seizure, or the date when the claim is made. (La.) *Harrelson v. Webb*, 529.

2. **HOMESTEAD**.—Land Held by a Husband and Wife as Joint Tenants may be made a homestead by her declaration claiming it as such, executed in the mode prescribed by law. (Cal.) *Swan v. Widen*, 118.

3. **HOMESTEAD**—Property Held in Indivision.—The homestead right is not affected by the fact that the property is held in a division, and the widow in community, the head of the family, may be the homesteader of the fractional part which belonged to her husband, and the proceeds of the sale of this fractional part are owned by the mother and children, and are to be administered as disposed of as any other property owned by the mother and children. (La.) *Harrelson v. Webb*, 529.

Sale or Conveyance.

4. **HOMESTEAD**—Sale—Curative Statutes.—The act of April 12, 1893, has the effect of curing all instruments affecting homestead made defective by the act of March 18, 1887, for want of execution by the wife of the grantor. (Ark.) *Pelt v. Payne*, 45.

5. **HOMESTEAD**.—A Conveyance Made by a Husband Alone of Land Held by Him and His Wife as Joint Tenants, but which has been dedicated by her as a homestead, is void. (Cal.) *Swan v. Widen*, 118.

Right of Widow.

6. **HOMESTEAD**—Widow as Head of Family.—After the death of the husband, the mother is the "head of the family," and, if the husband had a homestead, it passes to his wife, as the widow may be the head of the family. (La.) *Harrelson v. Webb*, 529.

7. **HOMESTEAD**—Effect of Marriage of Widow.—The widow does not lose her homestead by marrying an impecunious man, unable to earn his own livelihood, for there may be more necessity than ever for a homestead. Nor does this second marriage destroy the rights of the decedent's family in his homestead. (La.) *Harrelson v. Webb*, 529.

8. **HOMESTEAD**—Widow of Second Marriage.—Under a constitutional provision that "if the owner of a homestead die, leaving a

it appears that the depositor is insolvent. (Minn.) *Wunderlich v. Merchants' Nat. Bank*, 788.

6. GARNISHMENT—Setoff by Bank Against Depositor.—It need not be shown that the depositor had at the time of the service of the summons been formally adjudged an insolvent in insolvency or bankruptcy proceedings. Insolvency, in fact, is all that is necessary to entitle the garnishee to the remedy. (Minn.) *Wunderlich v. Merchants' Nat. Bank*, 788.

7. GARNISHMENT—Notice of Seizure—Title and Number of Cause.—Where, in an attempted garnishment, under *feri facias*, the plaintiff resorts to an independent proceeding, bearing a different title and number from the suit in which the judgment was rendered and the *feri facias* issued, a notice of seizure, bearing such title and number, and containing the recital, "by virtue of a writ of *feri facias* to me directed, in the above-entitled suit," means nothing, and plaintiff takes nothing by it. (La.) *Bank of Monroe v. Ouachita Valley Bank*, 518.

8. GARNISHMENT—Citation to Officer of Corporation.—A citation in garnishment addressed to "A B individually and as president," and to "C D individually and as cashier," is not effective as against the unnamed corporation in which A B and C D may hold positions. Citation in such case may be served upon the officer of the corporation designated to receive it; but it must be addressed to the corporation. (La.) *Bank of Monroe v. Ouachita Valley Bank*, 518.

9. GARNISHMENT—Injunction Against Proceedings.—Where, in a garnishment proceeding under a separate title and number from the action against the debtor, an injunction *pendente lite* is issued to restrain the party sought to be made garnishee from parting with the property sought to be seized, and the plaintiff takes nothing by the attempted garnishment, the whole proceeding collapses, and, with the injunction, is properly dismissed. (La.) *Bank of Monroe v. Ouachita Valley Bank*, 518.

GAS COMPANY.

See Damages, 3, 4; Highways.

GOODWILL.

See Partnership, 7-10.

GUARDIAN'S SALE.

1. GUARDIAN'S SALE.—The Existence of Jurisdictional Facts, in proceedings by the committee of a lunatic to sell his land by order of court must be determined by an inspection of the record. The facts set out in the petition determine the jurisdiction of the court. (Pa.) *Patchin v. Seward Coal Co.*, 1013.

2. GUARDIAN'S SALE—Notice—Land in Another County.—Where an order of court gives the committee of a lunatic authority to sell land within the county, and also authority to apply to the court in another county for an order to sell land therein, notice to the next of kin should be given in both courts, not merely in the latter one. (Pa.) *Patchin v. Seward Coal Co.*, 1013.

3. GUARDIAN'S SALE—Jurisdiction—Parol to Impair Record.—Where the record shows no lack of notice or other jurisdictional facts, in proceedings by the committee of a lunatic to sell his land by order of court, parol evidence is not admissible in ejectment by his heirs to impair the effect of the record. (Pa.) *Patchin v. Seward Coal Co.*, 1013.

Manslaughter in the first degree, 728.

in the second degree, 728.

killing by negligence, 728.

killing, cooling time, question of, what to be considered in determining, 733.

killing, whether must be both unlawful and intentional, 731.

malice, absence of, 728, 729.

malice, absence of is essential to the crime of, 728, 730.

malice, implied, 729.

malice, when inferable, 729.

passion, what is, 731.

provocation must be reasonable, 732.

provocation, necessity for, 733.

provocation to reduce a killing to, 730, 732.

HUSBAND AND WIFE.*In General.*

1. **HUSBAND AND WIFE—Liability for Family Expense.**—It is proper to charge a wife, as for a family expense, with the purchase price of a base-burner, clothes-wringer, heating stove, coal and can, and a buggy for family use, under a statute providing that the expenses of the family are chargeable upon property of both or either of the spouses. (Iowa) *McDaniels v. McClure*, 424.

2. **HUSBAND AND WIFE.**—A Lease of Land by a Husband and Wife, executed with no privity examination of the latter, is void as to her, and passes no interest to him in the rents and profits of the land. (N. C.) *Richardson v. Richardson*, 948.

3. **A MARRIED WOMAN may Maintain an Action Without Joining Her Husband** for damages to her land occasioned by the improper construction of a railroad. (N. C.) *Willis v. White*, 906.

Community Property.

4. **HUSBAND AND WIFE—Separate and Community Property—Profits Realized from an Established Business and the Capital Employed Therein.**—If, at the time of his marriage, the husband has an established business and a definite amount of capital employed therein, and he subsequently continues to do business, realizing large profits, it will be presumed that some of the resulting profits were due to the capital, and constitute his separate property, and that this amount is at least equal to the usual interest on a long and well-secured investment. The balance may be regarded as community property. (Cal.) *Pereira v. Pereira*, 107.

Tenancy by Entireties.

5. **A TENANCY by the Entireties was a Modification of a Joint Tenancy**, and arose where an estate was conveyed to a husband and wife under circumstances which would have created a joint tenancy if the conveyance had been made to two persons other than a husband and wife. (Cal.) *Swan v. Walden*, 118.

6. **A TENANCY by the Entireties Could not, at the Common Law be Destroyed by a conveyance to either of the spouses.** (Cal.) *Swan v. Walden*, 118.

7. **TENANCY by the Entireties Does not Exist Under the Law of California** specifying the modes of ownership of property by several persons. (Cal.) *Swan v. Walden*, 118.

8. **TENANCY by the Entireties, When not Created by a Conveyance to a Husband and Wife.**—A conveyance to a husband and wife "as joint tenants with fee to the survivor" does not create a tenancy by the entireties. (Cal.) *Swan v. Walden*, 118.

widow, but no children, the same" shall inure to her benefit, the widow of a second marriage of a man who dies without children by her is not entitled to a homestead if he leaves children, though they are adults, by his first wife. (N. C.) *Simmons v. Respass*, 961.

See Judgment, 14.

HOMICIDE.

1. **HOMICIDE—Instruction Inflaming Jury.**—An instruction in a homicide case in the following language is objectionable as tending to inflame the minds of the jury: "This awful deed was committed in the broad light of day in the open streets of the city of Ypsilanti, in bold and wicked defiance of all human and divine law. . . . So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible or brutal death can scarcely be conceived. It shocked the senses of the entire community. There remains but little that you or I can do. We cannot restore life to this stricken woman; but we may do our share toward the guarding and protecting of human life hereafter." (Mich.) *People v. Poole*, 722.

2. **MANSLAUGHTER—Instruction on Irresistible Impulse.**—An instruction improperly defines the condition of mind that reduces a homicide to manslaughter which states: "If from the evidence in this case you find that he was in a state of such excitement that his reason was dethroned, that he was driven along by an uncontrollable and irresistible impulse so that he was no longer morally or legally accountable for his conduct, so that he did not realize his crime or what he was doing or where he was, and had gone some distance from this scene before he was able to recover himself and his senses." (Mich.) *People v. Poole*, 722.

3. **MANSLAUGHTER—Reason Disturbed by Passion.**—In order to reduce a homicide to manslaughter, the reason need not be entirely dethroned or overpowered by passion, so as to destroy intelligent volition. But reason should, at the time of the act, be disturbed or obstructed by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation, and from passion rather than judgment. (Mich.) *People v. Poole*, 722.

4. **ASSAULT TO MURDER—Instruction on Reasonable Doubt.**—In a prosecution for assault with intent to murder, in which the sole issue of fact is whether the discharge of the revolver was accidental, the jury should be instructed that the prosecution must overcome evidence tending to show an accidental shooting by proof beyond a reasonable doubt that it was intentional. (Iowa) *State v. Matheson*, 426.

Note.

Manslaughter, by killing in the heat of passion, but with a dangerous weapon, 728.

by killing in the heat of passion, but in a cruel manner, 728.

by killing without design to produce death, 728.

by one committing a trespass, but not intending to commit any crime, 728.

by one engaged in committing a misdemeanor, 728.

classification of, 728.

definitions of, 727, 728.

differences between and murder, 727, 729.

heat of passion, causes of, whether material, 730, 731.

heat of passion, what is within the meaning of the law of, 730, 731.

- Married Woman, judgments against by confession.** 940, 941.
 judgments against by default or consent. 941, 942.
 judgments against, coverture appearing by the record, whether are void, 936.
 judgments against, decisions declaring them to be void, 939.
 judgments against for debts contracted while unmarried, 939, 940.
 judgments against for deficiency on the foreclosure of a mortgage, 934.
 judgments against for tort committed before coverture. 933, 935.
 judgments against for tort committed during coverture. 935.
 judgments against in actions commenced while unmarried, 940.
 judgments against may be personal, 933.
 judgments against, modification of the common law respecting, 930.
 judgments against, on antenuptial contracts, 933.
 judgments against, personal, when may be rendered, 933, 934.
 judgments against, presumptions for or against the validity of, 936.
 judgments against, record of, whether must show a transaction for which she was liable, 935.
 judgments against respecting separate estate are valid, 939.
 judgments against upon contract she is not capable of making, 929.
 judgments against upon note signed by herself and husband, 934.
 judgments against, validity of, the general American rule, 929.
 judgments against, when not void at the common law, 933.
 judgments against, where husband is not joined as a party, 933.
 judgments against, where husband died during the pendency of the action, 940.
 judgments against, where statutes have modified common-law obligations of, 941, 943.
 judgments against, where the fact of coverture does not appear on the record, 936.
 judgments against, where the fact of coverture has not been pleaded, 937-939.
 judgments against, whether and when void, 928-935.
 judgments against, whether may be held void for presumed coercion of husband, 935.
 legal existence of, suspension of in that of the husband, 923.
 status of at the common law, 931.
 statutes affecting rights of, 928.
 whether within the jurisdiction of the courts at the common law, 928, 935.

ILLEGITIMATES.

See Bastardy.

INDICTMENT.

INDICTMENT.—The Signature of the Attorney for the State to an indictment is not required by law. (Me.) *State v. Pooler*, 56.

INDORSEMENT WITHOUT RECOURSE.

See Bills and Notes.

INFANTS.

See Children; Parent and Child.

INHERITANCE TAX.

See Charity, 6.

Deed by Her to His Creditors.

9. HUSBAND AND WIFE—Deed by Her to His Creditors to Pay His Debts.—Where a wife executes a deed conveying her property for the purpose of extinguishing her husband's debt, in pursuance of a plan or scheme participated in by the grantee in the deed, such a deed is void, and the wife may maintain ejectment against her grantee or anyone else claiming under her grantee with notice of the consideration moving the wife to make the deed to her property, without the institution of equitable proceedings to cancel the deed. (Ga.) *Bond v. Sullivan*, 199.

10. HUSBAND AND WIFE—Deed by Her to Pay His Debts and Encumbrances on the Property.—If a part of the consideration of the deed in question in this case was the lifting of certain encumbrances upon the property, it was a valid charge thereon; and if the remainder of the consideration was to be appropriated to the extinguishment of the debt of the grantor's husband, the deed itself, being one entire transaction, cannot be upheld, because of the impossibility of separating that which is legal from that which is illegal; and the most that could be done in such a case in favor of the grantee in the deed is to hold and decree that he be subrogated to the rights of the encumbrancers whose debts he paid off and discharged. (Ga.) *Bond v. Sullivan*, 199.

11. HUSBAND AND WIFE—Deed by Her to Agent of His Creditors.—If the purchaser be not the actual creditor, but the agent of one who participates with him in the scheme for the effectuation of which the deed was executed, the sale is equally void and the deed of no effect; and the possession of the property having been surrendered to the grantee, the wife may subsequently maintain ejectment against the grantee or those holding under him with notice of the defect in the consideration. (Ga.) *Bond v. Sullivan*, 199.

12. HUSBAND AND WIFE—Deed by Her to His Creditors.—The Verdict of the Jury, and the judgment of the court below to whom was submitted all questions of fact except as to the right of the plaintiff to recover the land sued for, are unauthorized by the evidence. (Ga.) *Bond v. Sullivan*, 199.

Judgment Against—Married Woman.

13. JUDGMENT—When Binds Married Woman.—Where title to land is in the name of the husband, and a judgment for the purchase money is recovered against him, and, in an action by his wife to establish the interest of herself and children in the property, a consent decree is given which recognizes the validity of the judgment against the husband and declares it to be in full force and effect, a sale of the land under such judgment passes a good title, there being no evidence that any separate estate of the wife has ever been invested in the property. (N. C.) *Windley v. Swain*, 923.

14. JUDGMENT—When Regarded as Entirety.—A Married Woman will not be permitted to assert her claim to property under one clause of an entire judgment and repudiate a lien upon the property declared and established by another clause. (N. C.) *Windley v. Swain*, 923.

See *Homestead*; *Wills*, 16, 17.

Note.

Married Woman, contract of is void at the common law, 928, 931.
contracts of, judgments based upon, whether are void, 931, 932.
coverture, failure to plead, whether estops from denying validity of the judgment, 937-939.
criminal liability of, 935.
equity, right of to sue in, 928.

Limitation of Action on Adjustment.

6. **INSURANCE—Limitation of Action on Adjustment.**—Where a loss under an insurance policy is adjusted, and the insuring company agrees to pay a fixed sum on or before a day certain, a complaint alleging those facts bases the action upon the adjustment, and the limitation of time for bringing action contained in the policy does not apply. (Minn.) *Strampe v. Minnesota Farmers' Mut. Ins. Co.*, 781.

Conflict of Laws—Foreign Company.

7. **INSURANCE—Place Where Made.**—Where an Application for insurance is received from a corporation without the state by an insurance association in Pennsylvania, and a policy is there issued and mailed to the applicant, the contract is made in Pennsylvania. (N. Y.) *Stone v. Penn Yan K. P. & B. Ry.*, 879.

8. **INSURANCE—Foreign Company—Compliance With Law.**—Where a corporation in this state contracts for insurance with a foreign association at its domicile, the association not doing or soliciting insurance business in this state, an enforcement of the contract by the receiver of the association cannot here be resisted on the ground that it has not complied with the insurance laws of this state. (N. Y.) *Stone v. Penn Yan K. P. & B. Ry.*, 879.

9. **INSURANCE—Policy in State Where Company Unauthorized to Act.**—An insurance policy, issued by an insurance company of this state upon property in a state in which the company is unauthorized to transact business, is not, in the absence of an express statute, void as to the insured. An action may be maintained in the courts of this state to recover for a loss under the policy. (Minn.) *Strampe v. Minnesota Farmers' Mut. Ins. Co.*, 781.

10. **INSURANCE—Conflict of Laws—Full Faith and Credit.**—Although the courts of the state where the loss occurred might refuse to entertain the suit, the courts of this state, in rendering judgment against the insurer, do not fail to give full faith and credit to the public acts, records and judicial proceedings of another state. (Minn.) *Strampe v. Minnesota Farmers' Mut. Ins. Co.*, 781.

INTEREST.

See Usury.

INTERLOCUTORY DECREE.

See Divorce, 13-16; Judgment, 7.

INTERSTATE COMMERCE.

See Commerce.

JUDGMENT.*Entry—Sunday.*

1. **JUDGMENT.**—The Entry of a Judgment by the Clerk is a ministerial, and not a judicial act. (Iowa) *Puckett v. Guertner*, 402.

2. **JUDGMENT.**—The Entry of Judgment by the Clerk on Sunday does not render the judgment void. (Iowa) *Puckett v. Guertner*, 402.

Merger of Original Demand.

3. **JUDGMENT—Merger of Original Demand.**—An entry of judgment against one of two joint makers of a note is not a bar to a subsequent action on the note against the other maker who was not out the state at the time of the first suit and did not make an appearance.

INJUNCTION.

1. **INJUNCTION Against Damming Stream for Logging Purposes.** An injunction is the proper remedy to prevent one person from entering upon the land of another, through which a non-navigable stream flows, in order to erect dams to increase the volume of water for floating logs. (Idaho) *La Veine v. Stack-Gibbs Lumber Co.*, 253.

2. **CONTRACTS—Specific Performance — Injunction.**—Wherever a contract is one of the class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if that is the only practical mode of enforcement which its terms permit. (Ark.) *Pitcock v. State*, 88.

See Contempt; Garnishment, 9.

INSANE ASYLUM.

See Death.

INSANE PERSON.

See Guardian's Sale.

INSPECTION LAWS.

See Commerce, 5-8.

INSTRUCTIONS.

See Appeal and Error; Trial, 4-16.

INSURANCE.*In General.*

1. **INSURANCE.—A Partial Payment of Back Dues on a lapsed policy will not work a reinstatement of the insured, under a stipulation for reinstatement on the payment of "all back dues."** (N. C.) *Melvin v. Piedmont Mut. Life Ins. Co.*, 943.

2. **INSURANCE.—Where an Insured, in Arrears six weeks, pays four weeks' back dues, and dies two days later, no recovery can be had on his policy, which provides that "on a failure to pay the weekly premiums for five weeks, all claims on the company are by such arrears forfeited," and that a reinstatement shall occur on the payment of "all back dues," but only after sixty days from paying the back dues and on condition that the insured shall be in good health when they are paid and for five weeks thereafter.** (N. C.) *Melvin v. Piedmont Mut. Life Ins. Co.*, 943.

3. **LIFE INSURANCE—When Becomes Operative—Incontestable Clause.**—Where a policy of life insurance provides that it shall be incontestable after it has been in force two years "from the date hereof," the time runs from the date of the policy, and not from the date of its subsequent delivery. (Ill.) *Monahan v. Fidelity Life Ins. Co.*, 337.

4. **LIFE INSURANCE — Incontestable Clause — Default in Premium.**—Where a life insurance company accepts an overdue premium, a new contract is not thereby made between the parties, but the old policy remains in force without any interruption in the running of time required to make it incontestable. (Ill.) *Monahan v. Fidelity Life Ins. Co.*, 337.

5. **LIFE INSURANCE—Interpretation Favorable to Insured.**—It language of a life insurance policy is uncertain or ambiguous it is to be construed in favor of the insured and more strongly against the insurance company. (Ill.) *Monahan v. Fidelity Life Ins. Co.*, 337.

Judgment of Sister State.

13. **THE JUDGMENT** of a Court of Record of another state ~~eff~~fers in its conclusive effect from the judgment of a court of record of this state, in that it is always open to the person against ~~wh~~ the judgment is sought to be used to show by evidence other ~~th~~an the judgment or record, and even in opposition to its recitals, that the court was without jurisdiction of the cause of action or of the party, and if such lack of jurisdiction is shown, the judgment is a nullity. (Cal.) *Estate of Hancock*, 177.

Note.

Judgment, elegit, practical abolition of, 36.

execution upon, apparent satisfaction of when no actual satisfaction has taken place, 36.

execution upon, satisfaction by elegit, when may be set aside, 36.

execution upon, satisfaction of, power of courts to vacate, 37.

execution upon, satisfaction of, void proceedings to set aside, 36.

execution upon, to what entitled, 35.

revivor of by scire facias for failure of title, 38.

satisfaction of, equitable remedy to vacate, 38, 39.

against married women. See Husband and Wife.

JUDICIAL SALE.*In General.*

1. **JUDICIAL SALE—Failure of Title—Caveat Emptor.**—A bidder at a sheriff's sale cannot refuse to pay his bid and take the property, on the ground that the sale will convey no title. (Pa.) *Dickson v. McCartney*, 1078.

2. **JUDICIAL SALE—Failure of Title—Remedy of Bidder.**—If a bidder, between the time of his bid and the date of a resale, discovers facts relating to the title which causes him to reject it, and he has good reason for not making payment, his remedy is to apply to the proper court to have the sale set aside. (Pa.) *Dickson v. McCartney*, 1078.

3. **JUDICIAL SALE.—While Mere Inadequacy of Price**, unless so gross as to shock the conscience, is not enough to warrant setting aside a judicial sale, still where there is a great inadequacy, ~~and~~ circumstances indicating unfairness are sufficient to justify vacating the sale. Each case must stand upon its own peculiar facts. (Wash.) *Roger v. Whitham*, 1105.

4. **JUDICIAL SALE.—Inadequacy of Price** is not in itself a sufficient reason for disturbing a sheriff's sale. (Pa.) *Yost v. Cory*, 1069.

5. **JUDICIAL SALE—Inadequacy of Price—Misdescription.**—When there is not merely inadequacy of price at a sheriff's sale, but a misdescription of the property sold, plainly misleading bidders, it is the duty of the court to set the sale aside. (Pa.) *Yost v. Cory*, 1069.

6. **JUDICIAL SALE—Necessity of Tendering Deed.**—It is not necessary for the sheriff at execution sale to tender a deed to the purchaser in order to hold him to his bid. (Pa.) *Dickson v. McCartney*, 1078.

Misconduct of City Attorney—Purchase by Him.

7. **JUDICIAL SALE—Duty of City Attorney.**—A city attorney in foreclosing an assessment lien, owes a duty both to the municipality and to the owner of the property, a violation of which renders the sale voidable at the suit of the party injured. (Wash.) *Roger v. Whitham*, 1105.

ence therein. (Wash.) *Bradley Engineering & Mfg. Co. v. Heyburn*, 1127.

Amendment of Record.

4. **JUDGMENT—Power of Court to Amend a Correction.**—Under section 243 of the Iowa code a court has express authority to amend a correction of the record, in order to make it speak the true date of the entry of the judgment, the first correction having been erroneous. (Iowa) *Puckett v. Guenther*, 402.

Death of Party.

5. **JUDGMENT—Interlocutory Decree—Death of Party.**—Section 63 of the Code of Civil Procedure, providing that "if either party to an action dies after . . . an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties," applies only to actions which do not abate on death. (N. Y.) *Crandall's Estate*, 830.

Validity—Setting Aside.

6. **JUDGMENT—Motion to Set Aside, When Properly Denied.**—Under the facts in this case the court did not err in denying the motion to set aside and vacate the judgment attacked. (Ga.) *Adkins v. Bryant*, 211.

7. **THE JUDGMENT of a Court of Record is Presumed to have been Authorized by Law.** (Cal.) *Estate of Hancock*, 177.

8. **JUDGMENT—Want of Jurisdictional Foundation.**—When the pleadings show on their face that the court is wholly without jurisdiction of the subject matter set forth therein, any preliminary order made or final judgment rendered is void. (Ark.) *Pitcock v. State*, 18.

Res Judicata.

9. **JUDGMENT—Conclusiveness.**—A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action, so long as the judgment in the first suit remains unmodified. (Ark.) *Morgan v. Kendrick*, 78.

10. **JUDGMENT—Res Judicata—Capacity of Corporation to Sue.**—A judgment in favor of a plaintiff corporation is res judicata of questions which were or could have been interposed by the defendant, including the capacity of the plaintiff to maintain the suit. (Ill.) *Commercial Loan & Trust Co. v. Mallers*, 306.

11. **RES JUDICATA—Effect of an Order Appointing Alleged Surviving Wife Administratrix.**—An order of court appointing an alleged surviving wife administratrix does not establish that she was such surviving wife, where there is nothing to show that she based her claim to letters on that ground, or that any issue was ever tendered or presented to the court on that question. (Cal.) *Estate of Hancock*, 177.

12. **RES JUDICATA—Homestead, Order Setting Aside Where There is No Contest.**—An order setting apart a homestead to the alleged surviving wife and children of a decedent, where there is no appearance or contest nor any controversy on the question of widowhood, may be considered as having a conclusive effect as to the property set apart, but not as a judicial determination of widowhood in all future proceedings in the estate. (Cal.) *Estate of Hancock*, 177.

Placing Advertisements on Buildings.

5. **LESSEE—Right to Place Advertising Signs on Walls**—The lease of a building, or of one story thereof, conveys to the lessee the absolute dominion over the leased premises, including the outer as well as the inner walls. Hence he can put any advertising sign thereon which does no injury to the freehold, and the landlord retains no right to permit the signs or advertisements of other persons to be there placed. (Mich.) *Forbes v. Gorman*, 718.

6. **LESSEE—Assignment of Right to Place Signs on Walls**—A privilege given the lessee, in a lease of the basement and first floor of a building for business purposes, to maintain signs on the top of the building if they do not interfere with the rights of other tenants in the building, is personal to the lessee to advertise his business and cannot be conferred by him on another for the purpose of advertising a different business. (Mich.) *Forbes v. Gorman*, 718.

See Husband and Wife, 2; Railroads, 2.

Note.

Landlord and Tenant, demise, covenant implied by, when broken, 921.
duty of the former to put the latter in possession, American rule respecting, 917, 920.

duty of the former to put the latter in possession, English rule respecting, 916, 917.

holding over by tenant, landlord, when liable to the new tenant because of, 922.

landlord failing to put tenant in possession, whether may recover rent, 922.

liability of the former if he had no power to devise, 920, 921.

liability of the former if a stranger obtains possession after the commencement of the lease, 917.

liability of the former under a covenant to put his tenant in possession, 919.

liability of the former where he has a right of possession, 920.

liability of the former where the tenant in possession refuses to surrender to another tenant, 917, 918.

liability of the former who knows that he will not be able to put his tenant in possession, 917.

quiet enjoyment, covenant of does not apply against acts of stranger to the title, 921.

reasons for the English rule requiring the former to put the latter in possession, 919.

rent being payable before the commencement of the term implies a liability on the part of the landlord if he does not put the tenant in possession, 922.

rents, loss of for failure to put tenant in possession, 922.

stranger, acts of are not impliedly covenanted against by the lease, 921.

tenant holding over, whether liable to a new tenant, 920.

LEGACIES.

See Wills.

LETTERS OF ADMINISTRATION.

See Executors and Administrators, 3-5.

LIBEL AND SLANDER.

1. **SLANDER—Pleading Privilege or Justification**—When the defendant in an action for slander justifies or pleads that the words were privileged, he must admit that he spoke them, or words of

8. JUDICIAL SALE—Duty of City Attorney.—A city attorney, in foreclosing an assessment lien, owes the duty of making reasonable efforts to obtain the best price for the property and to locate and notify the owner. (Wash.) *Roger v. Whitham*, 1105.

9. JUDICIAL SALE—Misconduct of City Attorney.—If a city attorney, in foreclosing an assessment lien, does not exercise diligence in locating and notifying the owner of the property, and bids in the property himself through a third person at an inadequate price, the sale may be avoided at the suit of the owner. (Wash.) *Roger v. Whitham*, 1105.

10. JUDICIAL SALE.—While an Attorney may Purchase at a judicial sale, the fact that he is the attorney directing the sale becomes a challenging circumstance. Such sales are not favored, and, with slight attending circumstances, are enough to prompt the discretion of the chancellor. (Wash.) *Roger v. Whitham*, 1105.

11. JUDICIAL SALE—Purchase by City Attorney.—Where a city attorney, in foreclosing an assessment lien, undertakes to enlarge his compensation or fatten the emoluments of his office by speculations nourished in the hope of personal gain, as where he purchases through a third person for an inadequate price, the sale may be avoided. (Wash.) *Roger v. Whitham*, 1105.

See Executions, 2, 3; Partition, 6, 7; Sheriffs, 2.

JURY.

JURY—Waiver of Applies Only to First Trial.—A waiver of a jury binds the parties as to the first trial only. When the case is remanded by the appellate court, both parties are restored to their original right of trial by jury. (Ill.) *Rigdon v. More*, 323.

See Appeal and Error, 19; Trial.

LACHES.

See Equity, 2, 3.

LANDLORD AND TENANT.

Delivery of Possession to Lessee.

1. LESSOR—Delivery of Possession to Lessees.—A lessor impliedly covenants to give his lessees possession at the beginning of the term, and, notwithstanding his good faith, becomes liable to them for actual damages if a prior tenant wrongfully holds over. (N. C.) *Sloan v. Hart*, 911.

2. LESSOR—Delivery of Possession to Lessees.—For a breach of the implied covenant of a lessor to put his lessees in possession at the beginning of the term, the entire damages are to be recovered in a single action, and one recovery will bar any future action. (N. C.) *Sloan v. Hart*, 911.

3. LESSOR—Delivery of Possession to Lessees.—The measure of damages for a lessor's breach of his implied covenant to give his lessees possession at the beginning of the term is the difference between the rent agreed upon and the market value of the term, plus any special damages alleged and proved. By rental value is meant, not the probable profits that might accrue to the lessee, but the value, as ascertained by proof of what the premises would rent for. (N. C.) *Sloan v. Hart*, 911.

Title of Lessor to Crops.

4. LEASE ON SHARES—Title of Lessor to Crops.—A landlord acquires no title in the grain raised by the tenant until the division and delivery thereof by the tenant to him, when under the lease the tenant is to deliver a share of the crop as rental. (Idaho) *Eaves v. Sheppard*, 256.

6. **LICENSE—Distinction Between Permanent and Temporary Merchants.**—Permanent merchants are those who have a permanent place of business, and transient merchants are transitory or temporary traders who have no intention of locating permanently. (Minn.) *State v. Parr*, 759.

7. **LICENSE—Discrimination Between Merchants.**—While a statute imposing a license may properly make a distinction between transient and permanent merchants, it should not discriminate between the latter. (Minn.) *State v. Parr*, 759.

8. **LICENSE—Discrimination According to Locality.**—A statute imposing a license on merchants, which makes an arbitrary division of the state into counties so that merchants in one county may have a great advantage over those of another county, according to location cannot be upheld. (Minn.) *State v. Parr*, 759.

9. **LICENSE—Exemption of Venders Who Produce Articles.**—A statute provides improper classification which, in imposing a license upon certain venders, exempts those who sell articles of their own make or production. (Minn.) *State v. Parr*, 759.

See Commerce, 5-8; Fines.

LIENS.

See Livery-stable Keepers; Maritime Liens; Mechanics' Liens; Vendor and Vendee, 11-24.

LIFE TENANT.

See Adverse Possession, 4, 5.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS.**—A Continuous Trespass, within the meaning of the statute requiring an action therefor to be brought within a certain time from the original trespass, refers to trespasses caused by structures permanent in their nature, and does not refer to separate trespasses day by day for cutting timber. (N. C.) *Sample v. John L. Roper Lumber Co.*, 902.

2. **CONTRACTS—Statute of Limitations—Effect on Deed-poll.**—A deed-poll, accepted by the grantee, is the contract of the parties and the grantee's promise therein set out is governed by the provisions of the limitation regarding written instruments. (Ark.) *Parker v. Carter*, 60.

3. **ATTORNEY'S FEES—Statute of Limitation.**—Recovery of an attorney's fees may be barred by the statute after three years. (Ark.) *Parker v. Carter*, 60.

Acknowledgment on Payment.

4. **LIMITATION OF ACTIONS—Payment by Cotenant.**—When a cotenant occupies the common property for twenty-two years succeeding the maturity of a mortgage thereon, reaping the fruits therefrom with the knowledge and acquiescence of his brother and sister, his cotenants, his payment of interest on the mortgage may be deemed to be with the implied authority and consent of his co-owners, thus preventing the running of the statute of limitations in their favor. (N. Y.) *Clute v. Clute*, 891.

5. **LIMITATION OF ACTIONS—Mortgage—Payment on Account.**—The effect of Kirby's Digest, section 5399, as to strangers to the transaction, is that when the debt secured by a mortgage is apparently barred by limitation, and no payment which would save the limitation is indorsed on the margin of the record of the mortgage, it becomes an unrecorded mortgage, and constitutes no lien.

similar import that would of themselves be actionable. But it is not necessary that he should admit speaking the precise words; it is sufficient if he admits their substance or so much of them as will sustain an action. (Ky.) *Edwards v. Kevil*, 463.

2. **SLANDER—Pleading Privileged Communication.**—In an action for slander, when the defendant pleads that the words spoken were privileged, he may deny that they were spoken maliciously and set out the exact language used by him, although it may not be identical with that charged in the petition; but it must be so nearly similar to it, and admit enough of the language charged, to maintain an action. (Ky.) *Edwards v. Kevil*, 463.

3. **SLANDER—Privileged Communication Regarding Incendiary.** A statement that a certain person was the incendiary, made confidentially and in good faith by one whose property has been destroyed by fire to a friend whose property also has been burned, in an effort to obtain advice and assistance, is a privileged communication. (Ky.) *Edwards v. Kevil*, 463.

4. **SLANDER—Privileged Communication Regarding Incendiary.** In an action for slander in charging the plaintiff with burning certain houses, where evidence is introduced that he made statements indicating a desire or intention to burn the buildings, it is immaterial, so far as concerns the defense of privilege, whether or not he actually made such statements, provided they were communicated to the defendant as coming from him, were believed, and they were such as a reasonably prudent man would believe; and the plaintiff's testimony that he did not make the statements was properly excluded. (Ky.) *Edwards v. Kevil*, 463.

LICENSE.

To Enter Land.

1. **LICENSE TO ENTER LAND—Estoppel to Revoke.**—Where an entry is made under a license, and the conduct of the licensor is such that it would be a fraud on the licensee to permit the licensor to revoke it, the doctrine of equitable estoppel applies. (Minn.) *Munsch v. Stelter*, 785.

2. **LICENSE TO CONSTRUCT DITCH—Estoppel to Revoke.**—When, pursuant to a verbal contract, the owners co-operate in the construction of a ditch for the purpose of draining their lands, the equitable doctrine of estoppel will prevent one of them from damming up the ditch to the detriment of the other. (Minn.) *Munsch v. Stelter*, 785.

To Peddlers and Merchants.

3. **LICENSE—Peddlers and Merchants—Class Legislation.**—Chapter 248, Laws of 1909, entitled "An act to tax the occupation of and to license hawkers, peddlers and transient merchants, and defining said occupations," is unconstitutional as a police regulation, being class legislation, and is prohibited by sections 33 and 34, article 4, of the constitution. (Minn.) *State v. Parr*, 759.

4. **LICENSE—Peddlers—Inequality of Classification.**—The act is also unconstitutional as a tax measure, in that the tax imposed on the occupation of peddling does not fall equally and apply uniformly on all members of the class, as required by the amendment to article 9 of the constitution. (Minn.) *State v. Parr*, 759.

5. **LICENSE—Definition of Peddler.**—The Minnesota act of 1909, imposing a license on peddlers and merchants, declares a person to be a hawker or peddler who travels from house to house for the purpose of selling by sample or for future delivery. An actual sale is not necessary. (Minn.) *State v. Parr*, 759.

the jury the question as to whether the owner of the horse agreed to give to the persons claiming to be livery-stablemen a lien upon the horse. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

7. **LIVERY-STABLE KEEPER**—Agreement for Lien—Instructions.—This error was not cured by writing off a portion of the verdict, nor by stating to the jury, in a later portion of the charge, that unless the evidence showed that there was an express agreement for a lien, they would not consider the court's instruction on that subject. This again left it to the jury to determine whether there was an express agreement. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

LIVESTOCK CARRIER.

See Carriers, 10-12.

LOGS AND LOGGING.

See Timber.

Note.

Lost Deeds. See Evidence.

LOST INSTRUMENT.

See Evidence, 13.

LOTTERY.

1. **LOTTERY**—What Constitutes.—Where an Owner of Land subdivided it into lots or parcels, and offered them for sale at public outcry, announcing that after the sale a drawing would be had at which each purchaser would be entitled to draw, and the lucky person would receive, in addition to his purchase, a certain lot which was not to be put up at the sale, this was a scheme in the nature of a lottery. (Ga.) *Whitley v. McConnell*, 223.

2. **LOTTERY**—Enforcement of Scheme by Courts.—A court having equitable jurisdiction will decline to enforce any such scheme by decreeing specific performance of the agreement as to the drawing. (Ga.) *Whitley v. McConnell*, 223.

3. **LOTTERY**—Enforcement of Scheme by Courts.—Nor will the court decree that a conveyance of such prize lot be made to one who purchased another lot, or adjudge that he recover possession of the additional lot, on the ground that the seller, who reserved the right to start the lots or make the first bid on them, failed to obtain another bid on the second lot offered for sale, and thereupon withdrew it and stopped the sale. (Ga.) *Whitley v. McConnell*, 223.

4. **LOTTERY**—Definition.—A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize. (Ark.) *Burks v. Harris*, 67.

5. **LOTTERY**—Sale of Lands—Allocation by Purchasers by Lot—Privilege of Vendor.—Where a number of parties join together and purchase lands, even with the intention of dividing it in an unlawful method, if the vendor is not a party to the scheme he is entitled to recover the agreed price, the unlawful scheme for the division being part of the original contract of sale. (Ark.) *Burks v. Harris*, 67.

6. **LOTTERY**—Sale of Lands—Allocation by Purchasers by Lot—Privilege of Vendor.—The test to determine whether a plaintiff is entitled to recover in an action for the price of land sold in unlawful lots to divers purchasers who are to make their selection by lot is the plaintiff's ability to establish his case without any aid from an illegal transaction; if his claim or right to recover depends on a

upon the mortgaged property as against such strangers, notwithstanding they have actual knowledge of the execution of such mortgage. (Ark.) *Morgan v. Kendrick*, 78.

6. STATUTE OF LIMITATIONS—Written Acknowledgment—Essentials.—In order that a written acknowledgment shall be sufficient to remove the bar of the statute, it must import an unqualified acknowledgment of the debt as one that is due and binding. (Ark.) *Parker v. Carter*, 60.

See Adverse Possession; Equity, 2, 3; Insurance, 6; Mortgages, 15; Pleading, 8.

Note.

Limitation of Actions, in suits by sureties to be reimbursed for payments made on the debt of their principal, 559.

payment by sureties of debts barred by the statute of limitations, 564, 565.

LIVERY-STABLE KEEPER.

1. LIVERY-STABLE KEEPER—Statutory Lien on Animals.—In this state livery-stable keepers have a statutory lien on stock placed in their care for keeping. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

2. LIVERY-STABLE KEEPER—Services for Which may Claim Lien.—Such a lien includes not only the actual feeding of the horse placed with the livery-stable keeper, but also such charges as are directly connected with his keeping by the stableman, and as are naturally in the line of a livery-stable keeper's business. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

3. LIVERY-STABLE KEEPER—Who is, so as to be Entitled to Lien.—It is not necessary for a person to exercise all the different functions sometimes performed by a livery-stable keeper and mentioned in the various definitions of that term, in order to be a livery-stable keeper within the meaning of the lien law. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

4. LIVERY-STABLE KEEPER—Lien for Expenses in Keeping Horses at Races.—Expenses of transporting a horse by railroad to places where races are to be conducted, in or out of the state, of entering him in such races, and like expenses, are not such charges as would furnish the basis for a livery-stable keeper's lien under the statute. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

5. LIVERY-STABLE KEEPER—Lien for Keeping Horse at Various Places—Expense at Races.—If a horse were left with a livery-stableman to be boarded or kept at an agreed price, and the stable-keeper had two or more stables in this state for the accommodation of stock, and by agreement with the owner the horse was kept at one or the other of such stables, the fact that he was not kept at one of the stables rather than another would not defeat his lien; but if a horse was delivered to a livery-stable keeper, and, under contract with the owner, was sent for racing purposes to distant points where it was kept, not in a stable of the liveryman, but in that of other persons, although the liveryman may have paid such stable charges under the contract, this would not give him a statutory lien upon the horse therefor. (Ga.) *Elliott v. Hodgson & Jackson*, 206.

6. LIVERY-STABLE KEEPER—Agreement for Lien.—Where proceedings were begun to foreclose a statutory lien in favor of a livery-stableman upon a horse, and equitable proceedings were commenced for the purpose of enjoining such foreclosure and recovering possession of the horse, and the whole case turned upon whether a livery-stable keeper's lien existed, and the amount thereof, and there was neither pleading nor evidence to show the assertion and effort to enforce any lien existing by contract, it was error to submit to

as far as practicable, for doing his work. (N. C.) *Noble v. John L. Roper Lumber Co.*, 974.

4. **MASTER AND SERVANT—Order to Use Dangerous Method**—Where the only safe way for an employé in a planing-mill to remove a shiver is first to stop his machine, but the foreman forbids him to stop it and directs him to remove the shiver while the machine is running, which the employé does and is injured, the employer is liable. (N. C.) *Noble v. John L. Roper Lumber Co.*, 974.

5. **MASTER AND SERVANT—Order to Do Dangerous Work**—It is the duty of an employé to refuse to do something obviously dangerous which a reasonably prudent man under similar circumstances would not do. (N. C.) *Noble v. John L. Roper Lumber Co.*, 974.

Liability for Acts of Loaned Employé.

6. **EMPLOYER—Liability for Acts of Loaned Employé**—The general master of a servant may lend him, with his consent, to another person, for services in the business of the latter, and while he is engaged in the business of the other and in all respects subject to his direction and control, he becomes a servant of the new master, who becomes liable for the negligence of the servant. (Mass.) *Shepard v. Jacobs*, 648.

7. **EMPLOYER—Liability for Acts of Loaned Employé**—In determining whether, in a particular act, a loaned servant is the servant of his original master or of the person to whom he has been furnished the general test is whether the act is done in business of which the person is in control as a proprietor, so that he can at any time stop or continue it and determine the way in which it shall be done, or merely in reference to the result to be reached, but in reference to the method of reaching the result. (Mass.) *Shepard v. Jacobs*, 648.

Fellow-servants and Vice-principal.

8. **RAILROADS—Whether Conductor is Fellow-servant or Vice-principal**—If a freight train is recklessly run on to a siding, and wrecks a car standing there, causing a heavy casting to be thrown from such car on to the main track, where, fifteen minutes later, it causes the wreck and injures one of the crew of a passenger train, the crews of the freight train and passenger train ceased to be fellow-servants when the freight train wrecked the standing car, the conductor of the freight train, under the rules of his company, then becoming a vice-principal charged with the duty, first, of protecting oncoming trains, and next, ascertaining the extent of the wreck and removing the obstructions, and his negligence in omitting to do so is the negligence of his principal and the proximate cause of the wreck of the passenger train and injury to the member of its crew for which the principal, the railroad company, is responsible. (Ky.) *Cincinnati etc. Ry. Co. v. Curd*, 444.

9. **RAILROADS—Injury to Employé—Evidence of Rules**—In an action against a railway company by a fireman on a passenger train injured by the collision of his train with a wreck caused a few minutes earlier by a freight train, the freight conductor having been negligent in not warning approaching trains, a rule of the company requiring conductors, in case of accident, to take charge of necessary work and take precautions against further accidents is properly admitted in evidence. (Ky.) *Cincinnati etc. Ry. Co. v. Curd*, 444.

10. **MASTER AND SERVANT—Fellow-servant—Negligence**—A master is not bound, under the doctrine of respondeat superior, to indemnify one servant for an injury caused by the negligence of another servant in the same common employment unless the negligent servant is the vice-principal of the master. (Ark.) *McGregory v. Ultima Thule etc. Ry. Co.*, 24.

transaction which is *malum in se* or prohibited by statute, and that transaction must necessarily be proved to make out his case, there can be no recovery. (Ark.) *Burks v. Harris*, 67.

7. **LOTTERY AND LOT.**—A Broad Distinction exists between a division of property by lot and by lottery. A partition of property into parts as nearly equal as possible, where owned by joint owners, may be made, and a determination had by lot as to which part shall go to each joint owner severally, without coming within the prohibition of the statute. (Ark.) *Burks v. Harris*, 67.

MANDAMUS.

See Corporations, 11, 12.

MANSLAUGHTER.

See Homicide.

MARITIME LIEN.

1. **MARITIME LIEN**—Work on Engine Designed for Vessel.—One who, with notice of the circumstances, repairs an engine belonging to one person and installs it in a boat belonging to another person, with the view of a possible sale of the engine to the owner of the boat, which never takes place because the engine proves unsatisfactory and is removed, is not entitled to a lien on the boat or engine for "work done or material furnished" for the "construction, repair or equipment" of a boat. (Wash.) *Thompson v. Allen*, 1124.

2. **MARITIME LIEN.**—The Foreclosure of a Lien under the Washington code for work done or materials furnished in the construction or equipment of a boat is an ordinary civil action of foreclosure on the equity side of the court, which makes the action substantially of the same nature as the foreclosure of mechanics' liens. (Wash.) *Thompson v. Allen*, 1124.

3. **MARITIME LIEN.**—There can be No Personal Judgment in an Action to foreclose a lien under the Washington code for work done or materials furnished in the construction or equipment of a boat, for the sum which the court may find due when the right for the lien fails, in the absence of any waiver. (Wash.) *Thompson v. Allen*, 1124.

MARKETS.

See Municipal Corporations, 10-12.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

Employer's Liability.

1. **MASTER AND SERVANT.**—The Maxim of *Respondent Superior* is founded on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which another may sustain from it. (Ill.) *Barker v. Chicago P. & S. L. Ry. Co.*, 382.

2. **MASTER AND SERVANT**—Safe Appliances.—The failure of an employer to furnish an appliance in a planing-mill to remove shivers when they obstruct a guide is not negligence if there is no such appliance in general use. (N. C.) *Noble v. John L. Roper Lumber Co.*, 974.

3. **MASTER AND SERVANT**—Safe Method of Work.—It is the duty of an employer to furnish his employé a reasonably safe method,

the contract price for the entire period, less such earnings from other employment as he may have engaged in after his discharge, and also what he may have earned by reasonable exertion and diligence during the balance of the term. (Cal.) *Seymour v. Oelrichs*, 154.

MECHANIC'S LIEN.

MECHANIC'S LIEN.—A Public School Building is not subject to a statutory lien for materials furnished for its construction, in the absence of an expression in the statute indicating a contrary legislative intention. (N. C.) *Morganton Hardware Co. v. Morganton Graded School*, 953.

MERGER.

See Judgment, 3.

MISCONDUCT OF ATTORNEY.

See Criminal Law, 13-16; Trial, 3.

MISCONDUCT OF JURY.

See Trial, 7-10.

MOBS.

See Municipal Corporations, 13-15.

MORTGAGE.

In General.

1. **MORTGAGE—Equitable—What Interest to be Encumbered.**—Where one owning nearly the whole stock of a corporation and in possession of the plant undertakes to mortgage such plant to secure advances made on the stock, the transaction constitutes an equitable mortgage enforceable by the court. (Ark.) *Thompson v. Grace*, 2.

2. **MORTGAGE—To What After-acquired Property Attached.**—A mortgage intended to cover after-acquired property can attach to such property only in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them although they may be junior to it in point of time. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

3. **MORTGAGE—Allowance for Extinguishing Tax Deed.**—A mortgagee who sells under a power in a mortgage which contains a covenant that the premises are free from encumbrances may retain from the proceeds of the sale a sum paid for extinguishing a valid tax deed. (Mass.) *Charland v. Home for Aged Women*, 694.

4. **MORTGAGE—Payment.**—Where a Grantee, Who has Assumed a mortgage on the property, pays the mortgage debt in full, and, instead of a discharge, an assignment of the mortgage, running to his daughter, he recording the assignment and retaining possession thereof, and she paying nothing therefor, the note and mortgage are extinguished. (Mass.) *Lydon v. Campbell*, 702.

Unrecorded Mortgages.

5. **MORTGAGES—Unrecorded—Effect.**—An unrecorded mortgage is good and binding between the parties, and constitutes a valid lien on the property except as to the legal rights of third parties. (Ark.) *Morgan v. Kendrick*, 78.

6. **MORTGAGES—Unrecorded—Effect of Subsequent Conveyance by Mortgagor.**—The conveyance by a mortgagor to a third party with the fraudulent purpose of defeating the mortgage, and without a

11. MASTER AND SERVANT — Fellow-servant — Negligence—Proximate Cause.—Where there is no causal relation between an alleged act of negligence and the injury complained of, the former cannot constitute a basis of recovery. (Ark.) *McGrory v. Ultima Thule etc. Ry. Co.*, 24.

12. MASTER AND SERVANT—Fellow-servant—Negligence.—A master is not responsible to a vice-principal for the negligence of another of his servants subordinate to and under the control of the vice-principal. (Ark.) *McGrory v. Ultima Thule etc. Ry. Co.*, 24.

13. MASTER AND SERVANT — Vice-principal — Negligence.—The master discharges his full duty to his vice-principal by exercising ordinary care in selecting competent subordinate servants. (Ark.) *McGrory v. Ultima Thule etc. Ry. Co.*, 24.

Employment of Children—Statute Forbidding.

14. CONSTITUTIONAL LAW—Employment of Children—Classification.—A statute forbidding the employment of children under fourteen years of age in mills and factories other than canneries is constitutional. Courts will not hold the classification arbitrary or unreasonable. (Md.) *Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.*, 636.

15. EMPLOYMENT OF CHILDREN—Theatrical Exhibition.—A statute providing that "no child under the age of fourteen years shall . . . be employed at work . . . after 7 o'clock in the evening," applies to a child who takes a speaking part in a play, although he receives no compensation other than the training which results from his participation in the performance. (Mass.) *Commonwealth v. Griffith*, 645.

16. EMPLOYMENT OF CHILDREN—Interpretation of Statute.—Where a statute provides that "no child under the age of fourteen years shall be employed at work performed for wages or other compensation, to whomsoever payable, during the hours when the public schools of the city or town in which he resides are in session or be employed at work before 6 o'clock in the morning or after 7 o'clock in the evening," the last clause is an absolute provision of general application, is not confined to employment in a factory, workshop or mercantile establishment, but is applicable to work in a theatrical exhibition, and is not inconsistent with the first prohibition in the section. (Mass.) *Commonwealth v. Griffith*, 645.

17. EMPLOYMENT OF CHILDREN—Nonresident Parent and Child.—The Massachusetts statute forbidding the employment of children under fourteen years of age applies to the employment of a child to work in that state under an employment contracted for in another state by persons residing there. (Mass.) *Commonwealth v. Griffith*, 645.

Termination or Breach of Contract of Employment.

18. MASTER AND SERVANT.—A Servant Wrongfully Discharged after serving a few days under a contract for one year may recover damages for the entire year, less what he might have earned upon reasonable effort. (N. C.) *Currier v. Ritter Lumber Co.*, 955.

19. MASTER AND SERVANT.—A Contract for Personal Service may be Terminated at the will of either party, when no time is fixed and no stipulated period of payment is made. (N. C.) *Currier v. Ritter Lumber Co.*, 955.

20. DAMAGES, Measure of for the Breach by an Employer of a Contract for Personal Services for a Definite Term.—Where an employé having a contract to be paid for personal services for a specified term is discharged without cause, the damages recoverable by him are not restricted to the time of the trial, but are prima facie

persons who hold unrecorded conveyances or contracts with said grantee of the mortgagor, so as to conclude such persons by the judgment of foreclosure. (Idaho) *Harding v. Harker*, 259.

Foreclosure—Limitations.

15. **MORTGAGE FORECLOSURE—Limitation of Actions.**—When a foreclosure sale is voidable at the election of the remainderman, the purchaser being her guardian in socage and the life tenant, she is not bound to assert her rights during his lifetime, and her action against his grantees within less than twenty years after their entry is timely brought. (N. Y.) *Jefferson v. Bangs*, 856.

Foreclosure—Writ of Assistance.

16. **MORTGAGE FORECLOSURE.**—The Writ of Assistance is the appropriate remedy to place in possession the purchaser at a foreclosure sale, and may be issued against any and all persons concluded by such judgment. (Idaho) *Harding v. Harker*, 259.

See Adverse Possession, 5; Deeds, 10, 11; Fixtures; Executions, 1. Limitation of Actions, 5; Wills, 18, 19.

MUNICIPAL CORPORATIONS.

Powers of Municipality.

1. **MUNICIPAL CORPORATION.**—Courts Have Power to Interfere in cases of abuse of discretionary powers by municipal councils. (La.) *State v. Shreveport*, 496.

Police Power.

2. **MUNICIPAL CORPORATION—Police Power Delegated by State.**—When the legislature grants a city power to pass ordinances relating to specific police powers, and further grants "all the power commonly known as the police power, to the same extent as the state has or could exercise said power within said limits," the city is authorized to enact an ordinance penalizing the sale of cocaine and kindred substance except upon specific conditions. (Md.) *Rossberg v. State*, 626.

3. **MUNICIPAL CORPORATION—Police Power Delegated by State.**—The legislature may, either expressly or by implication, delegate to municipal corporations authority to exercise the police power within their boundaries. (Md.) *Rossberg v. State*, 626.

Ordinance and Statute on Same Subject.

4. **MUNICIPAL CORPORATION—Concurrent Power With State to Punish Offenses.**—Municipal authorities may be given concurrent power with the state to punish certain classes of offenses, and the one which first obtains jurisdiction of the person of the accused to punish to the full extent of its power. (Md.) *Rossberg v. State*, 626.

5. **MUNICIPAL CORPORATION—Forbidding Act Covered by Statute.**—A municipal ordinance is not made invalid by the mere fact that it and the state law provide in terms for distinct provisions for the same act. (Md.) *Rossberg v. State*, 626.

6. **MUNICIPAL CORPORATION—Ordinance Inconsistent With Statute.**—Further and additional penalties for an act may be imposed by a municipal ordinance, without creating inconsistency between it and a law of the state. (Md.) *Rossberg v. State*, 626.

7. **MUNICIPAL CORPORATION—Ordinance Conflicting With Statute.**—An ordinance may prescribe different regulations than a statute for the nefarious sale of drugs, without conflicting with the statute. (Md.) *Rossberg v. State*, 626.

8. **MUNICIPAL CORPORATION—Ordinance Inconsistent With Statute.**—An ordinance forbidding the sale of cocaine and

actual and bona fide consideration, would not relieve the property of the lien of a valid mortgage, although unrecorded. (Ark.) *Morgan v. Kendrick*, 78.

Foreclosure.

7. **MORTGAGE—Foreclosure—Parties.**—The immediate parties to a mortgage of the greater part of the stock of a corporation are the only necessary parties to a foreclosure suit. The interests of the minority stockholders and the corporation itself do not call for their inclusion. (Ark.) *Thompson v. Grace*, 52.

8. **MORTGAGE FORECLOSURE—Service on Administrator.**—A foreclosure by advertisement is not void for failure to serve personal representatives of the deceased mortgagor, if there are none. (N. Y.) *Jefferson v. Bangs*, 856.

9. **MORTGAGE FORECLOSURE—The Omission in a Notice of foreclosure of a real estate mortgage of the letters "A. M.,"** following the hour set for the sale of the property, held, in view of the fact that the statutes require all such sales to take place "between 9 o'clock A. M. and the setting of the sun," not fatal to the validity of the foreclosure. The notice sufficiently indicates the hour of the sale to be 10 o'clock in the forenoon. (Minn.) *Slater v. Taylor*, 793.

10. **MORTGAGE FORECLOSURE—Purchase by a Guardian in Socage.**—Where the assignee of a mortgage is the life tenant, and also the guardian in socage of his daughter who is the devisee of the fee, his purchase at foreclosure is not void, but voidable at her election. (N. Y.) *Jefferson v. Bangs*, 856.

11. **MORTGAGE—Application of Proceeds of Foreclosure.**—A holder for value of notes secured by mortgage may apply the proceeds of foreclosure to the payment of any one or all of the notes, without regard to equities existing between the persons liable as joint makers. (Wash.) *Bradley Engineering & Mfg. Co. v. Heyburn*, 1127.

Foreclosure—Unrecorded Deeds.

12. **MORTGAGE FORECLOSURE—Unrecorded Conveyance—Parties.**—Under the provisions of section 4520, Revised Codes, "No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made party to the action. (Idaho) *Harding v. Harker*, 559.

13. **MORTGAGE FORECLOSURE—Unrecorded Conveyance—Parties.**—Under this statute, it is presumed that the mortgagor will represent the interests of the grantee of an unrecorded conveyance in a suit to foreclose a mortgage on the premises conveyed; and the same presumption would arise where the grantee is made a party, but he would represent the interests of a person holding an unrecorded conveyance from such grantee. (Idaho) *Harding v. Harker*, 559.

14. **MORTGAGE FORECLOSURE—Conclusiveness Against Grantees Under Unrecorded Deed.**—Under this statute, where the court acquires jurisdiction of the mortgagor in an action to foreclose a mortgage, the court also acquires jurisdiction of all persons who hold unrecorded conveyances or contracts from the mortgagor, so as to conclude such persons by the judgment entered in the foreclosure proceeding; and in like manner, where the court acquires jurisdiction of a grantee of a mortgage, the court also acquires jurisdiction of all

sponsible for its own indebtedness at the time of consolidation and providing for the payment thereof by taxation limited to the property located within the limits of the municipality contracting the same. (Pa.) *Pennsylvania Co. v. Pittsburg*, 1063.

17. MUNICIPALITIES—Consolidation—Subjects of Taxation.—The act consolidating Pittsburg and Allegheny does not confer on the consolidated city power to create any new subjects of taxation within the old limits of each of the constituent cities, or within the limits of the consolidated city treated as a single municipality. (Pa.) *Pennsylvania Co. v. Pittsburg*, 1063.

18. MUNICIPALITIES—Consolidation—Subjects of Taxation.—Properties of a railway company in the city of Allegheny, not subject to taxation at the time of the annexation of that city to Pittsburg, are not, by the act of consolidation, made subject to taxation for the purpose of paying the indebtedness of the former city. (Pa.) *Pennsylvania Co. v. Pittsburg*, 1063.

Abolishing Office—Reduction of Salary.

19. MUNICIPAL CORPORATION—Abolishing Office of Auditor.—A city auditor being an officer created by the charter, and having functions to perform which are essential to the operation of the municipal government and which can be performed by no one else, the office is not one that the council is authorized to discontinue when no longer necessary. (La.) *State v. Shreveport*, 494.

20. OFFICE—Power to Abolish or Remove Incumbent.—Where the legislature or a municipal council has created an office, it may destroy it. Where either has discretionary power of removal, it may exercise it without let or hindrance. But where the constitution creates an office, the legislature cannot abolish or nullify either by direct or indirect means. And where the legislature creates an office, a city council cannot abolish or nullify it, either directly or indirectly. (La.) *State v. Shreveport*, 496.

21. MUNICIPAL OFFICE—Attempt to Abolish—Mandamus.—Where a city attempts, in excess of its authority, to abolish or nullify an office, either directly or indirectly, mandamus will lie. (La.) *State v. Shreveport*, 496.

22. MUNICIPAL CORPORATION—Reduction of Auditor's Salary.—Where a city council, which has discretion within certain limits to fix the salary of the auditor, but which has no authority to abolish the office or to remove the incumbent without cause, attempts to do so indirectly by reducing his salary to an extent that no competent person would act, a court will, on mandamus, order the salary to be restored to a reasonable figure. (La.) *State v. Shreveport*, 496.

Fiscal Affairs—Treasurer and Auditor.

23. MUNICIPAL CORPORATION—Duties of Auditor.—Where a charter confides to the council the power of defining the duties of the auditor, an attempt to delegate such authority to the mayor is a violation of the charter. (La.) *State v. Shreveport*, 496.

24. MUNICIPAL CORPORATION—Check by Treasurer for Personal Debt.—A city may maintain an action for money had and received to recover the amount of a check drawn by its treasurer without authority upon its bank account, payable to himself personally, indorsed in blank, received by the defendants in payment of a personal debt of the treasurer, and deposited in the bank in collected in the usual way. (Mass.) *Newburyport v. Spear*, 61.

25. MUNICIPAL CORPORATION—Form of Check Drawn by Treasurer.—An ordinance providing that "no money shall be drawn out of the city treasury except on the written order of the mayor" is

substances, except under certain conditions, is not invalid because the penalties it imposes are heavier, and the regulations prescribed different, from those imposed by a statute of the state. (Md.) *Rossberg v. State*, 626.

Cocaine Ordinance.

9. MUNICIPAL CORPORATION—Penalty for Selling Cocaine.—While the forfeiture of the license of a pharmacist would be a proper penalty for his selling cocaine in violation of law, still a municipal corporation cannot impose this form of punishment without express legislative authority. (Md.) *Rossberg v. State*, 626.

Regulating Markets and Sale of Fish.

10. MUNICIPAL CORPORATION—Regulating the Sale of Fish.—An ordinance forbidding the sale of fish outside the market-house, except fresh fish caught in the waters of the county, is a valid exercise of the police power of the city. (N. C.) *State v. Perry*, 1002.

11. MUNICIPAL CORPORATION—Regulating the Sale of Fish.—An ordinance forbidding the sale of fish outside the market-house may be enforced by a criminal prosecution, regardless of the validity of the contract by the city for the building of the market. (N. C.) *State v. Perry*, 1002.

12. MUNICIPAL CORPORATION—Contract to Build Market-house.—A city may properly contract with individuals to build and furnish it a public market-house, which is to remain under the control of the municipal authorities, and is to be rented to every dealer so far as its capacity will permit, and not exclusively to any particular ones, at reasonable rents. (N. C.) *State v. Perry*, 1002.

Liability for Cars Destroyed by Mobs.

13. MUNICIPAL CORPORATION—Liability for Cars Destroyed by Mob.—The Illinois statute permitting a carrier to recover from the city in which its cars have been destroyed by a mob may be invoked by a carrier in possession as bailee or lessee of cars of other companies. The use of the word "owner" in the statute does not limit its application to absolute owners. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

14. MUNICIPAL CORPORATION—Destruction of Cars by Mob.—A Notice to a city, signed by the vice-president of a railway company, in charge of its legal department, and having attached to it a schedule containing an itemized statement of the property destroyed, the date when and the place where destroyed, and the amount of damages claimed to have been sustained by the destruction of each item of the property, is sufficient notice under the statute making a city liable for the destruction of the property by mob. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

15. MUNICIPAL CORPORATION.—Whether Cars were in Transit at the Time of Their Destruction by a Mob is a question of fact for the jury, in an action by the railway company against a city to recover the loss, and if the evidence tends to sustain the appellee's contention that they were not in transit, the supreme court will not reverse the judgment on the ground that it is contrary to the weight of evidence. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

Consolidation of Cities—Debts and Taxes.

16. MUNICIPALITIES—Consolidation—Debts and Taxes.—The legislative act authorizing the consolidation of two or more cities may make the consolidated city liable for the indebtedness of the old municipalities, or provide for an equitable apportionment of existing burdens by requiring each of the respective municipalities to be re-

should be regarded as de jure until the statute is pronounced unconstitutional, and not invalid ab initio. (Me.) *State v. Pooler*, 543.

2. **DE FACTO OFFICER**—Validity of Acts as to Third Persons.—To protect those who deal with officers apparently holding under color of law, in such manner as to warrant the public in assuming that they are officers and in dealing with them as such, the law validates their acts as to the public and third persons, on the ground that as to them, although not officers de jure, they are officers in fact whose acts public policy requires to be construed as valid. (Me.) *State v. Pooler*, 543.

3. **DE FACTO OFFICER**—Necessity of De Jure Office.—There may be a de facto officer without a de jure office, as where the statute authorizing the creation of the office and the appointment of a person to fill it proves unconstitutional. (Me.) *State v. Pooler*, 543.

4. **DE FACTO OFFICER**—An Office Created or Authorized by the Legislature should be treated as de jure, until otherwise declared by a competent tribunal. (Me.) *State v. Pooler*, 543.

5. **DE FACTO OFFICER**—There may Exist a De Facto Office as well as a de facto officer. (Me.) *State v. Pooler*, 543.

Contract to Serve for Less Than Salary.

6. **OFFICERS**—Contract to Serve for Less Than Salary.—Contracts of a public officer to render services required of him for less than the compensation provided by law are unenforceable as against public policy. (Iowa) *Bodenhofer v. Hogan*, 418.

Official Bonds—New Duties.

7. **OFFICIAL BONDS**, Sureties on.—For What Liable.—The sureties on a county treasurer's bond are not liable for penalties imposed upon him by an act which came into operation after the date of the bond, except such was the intention of the statute. (Ark.) *Hunter State Bank v. Mills*, 20.

8. **OFFICERS**—New Duties—Subsequent Legislation.—The rights and duties attached to the office of county treasurer are created by law, and may be by legislation changed or increased appropriately to the office. (Ark.) *Hunter State Bank v. Mills*, 20.

9. **OFFICERS**—New Duties—New Penalties.—A county treasurer is liable for penalties under a statute passed after his term has commenced, provided the penalty is for failure to perform a duty appropriate to his office. (Ark.) *Hunter State Bank v. Mills*, 20.

Liability for Acts of Subordinates.

10. **GOVERNMENT OFFICER**—Liability for Acts of Subordinates.—Public officers and agents of the government are liable for their own personal negligence or defaults in the discharge of their duties, but not for the acts or defaults of inferior officials in the public service, whether appointed by them or not. (Ill.) *Barker v. Chicago etc. Ry. Co.*, 382.

11. **GOVERNMENT CONTRACTOR**—Liability for Acts of Subordinates.—The rule exempting public officers from responsibility for the negligence or positive wrongs of their subordinates in the discharge of their duties does not extend to a corporation contracting to perform work or render service for the government for compensation and with a view to profit, whose subordinates are employed and paid by it and subject to be dismissed at its pleasure. (Ill.) *Barker v. Chicago etc. Ry. Co.*, 382.

See *Municipal Corporations*, 19-22; *Sheriff*.

dressed to the treasurer and countersigned by the city clerk," has no reference to the form of the check to be used by the treasurer in drawing money from the bank, but only to the regulation of his conduct in making payments, whether by check or otherwise. (Mass.) *Newburyport v. Spear*, 652.

26. MUNICIPAL CORPORATION—Custody of Money by Treasurer.—The treasurer of the city holds all its moneys as its property, and exclusively for its use. But he holds them by virtue of his public official authority and duty, and not merely as the agent or servant of a corporation. (Mass.) *Newburyport v. Spear*, 652.

27. MUNICIPAL CORPORATION—Recovery of Proceeds of Treasurer's Check.—It is no defense to an action by a city to recover the proceeds of a check, drawn without authority on its bank account by the city treasurer and received by the defendant in payment of a personal debt of the treasurer, that the defendant paid the money to others and retained none except the amount of his commissions. (Mass.) *Newburyport v. Spear*, 652.

See Automobiles.

NAVIGABLE WATERS.

NON-NAVIGABLE STREAM—Right to Increase Flow for Floating Logs.—Every person has a right to float logs down any stream in this state that is sufficient in volume to float and carry such commodity, but he has no right whatever to enter and trespass upon the lands through which such stream flows, and erect dams or other obstructions in such stream in order to increase the volume of water therein for floating or any other purposes. A stream that is not capable for carrying logs without the construction of dams for flooding purposes is not navigable for the floating of logs. (Idaho) *La Veine v. Stack-Gibbs Lumber Co.*, 253.

See Injunction.

NECESSARIES.

See Husband and Wife, 1.

NEGLIGENCE.

See Automobiles; Death.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—Exceptions to the Rulings of the Court in Admitting Testimony over objection are not grounds for a new trial, where it is not made to appear what objections were urged to the admission of the testimony claimed to be inadmissible. (Ga.) *Bond v. Sullivan*, 199.

NONSUIT.

See Dismissal and Nonsuit.

OFFICERS.

De Facto Officer—Unconstitutional Statute.

1. OFFICER—Unconstitutional Appointment.—The Acts of a Special Attorney appointed to prosecute violations of the liquor law are not invalidated by a subsequent judicial determination that the statute authorizing the appointment is unconstitutional. The office

9. PARENT AND CHILD—Revocation of Implied Emancipation. Where a boy, capable of making his own living, leaves home with the consent of his father, and for nearly two years receives his own wages and disposes of them at pleasure, the father's objection to the employment and his demand for the boy's wages at the end of that time come too late. (Ky.) *Rounds Brothers v. McDaniel*, 482.
See Trusts, 2.

PARTIES.

PARTIES—Construction of Kirby's Digest, Section 6011.—The obvious intention of this section is to require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it, where it cannot be done without prejudice to the rights of others or by saving their rights. (Ark.) *Thompson v. Grace*, 52.

See State.

PARTITION.

In General.

1. PARTITION—Parties Entitled.—Unless a Tenant in Common is in possession of the land or his title is admitted, he cannot maintain a bill in equity for a partition thereof. (Ark.) *La Cotts v. Pike*, 48.

2. PARTITION—Adverse Possession.—Partition cannot be had of land held adversely. (Ark.) *La Cotts v. Pike*, 48.

3. PARTITION—Parties Entitled—Legal or Equitable Relief.—Where a party in adverse possession of land is having his case tried at law, a court of equity has no jurisdiction to partition the land until the issue of title is determined. (Ark.) *La Cotts v. Pike*, 48.

4. PARTITION—Accounting for Rents.—Where a Bill in Partition prays for an accounting as an incident to other equitable relief, and avers that the defendants are in possession claiming ownership under a contract with a third person and refuse to deliver possession, the court, in ordering partition, may decree an accounting against them for the rents of the property. (Ill.) *Coleman v. Connolly*, 36.

5. PARTITION—Receiver—Payment of Charges on Premises.—In an action for partition, in which a third person intervenes to enforce his right to support from the property, the court may appoint a receiver to take charge of the property and rent it out, and order to be paid from the rents the taxes, other preferred claims, and the allowance due the intervener for support. And the court may, if the parties desire, sell the land, but before the proceeds are divided provision must be made for the support of such intervener. (Ky.) *Webster v. Cadwallader*, 470.

Purchase by Commissioners.

6. PARTITION—Responsibilities of Commissioners.—To permit commissioners to advise the court to order the lands sold, and then become purchasers at the sale, would be to open the doors to concealed fraud. (Ark.) *Fleming v. Cardwell*, 40.

7. TRUSTS—Partition—Commissioners' Purchase of Lands—Conflict of Integrity and Self-interest.—Where partition commissioners have reported that property could not be divided, and another commissioner is appointed who sells the land to them, the sale will be set aside on the ground that such a purchase would be contrary to public policy. (Ark.) *Fleming v. Cardwell*, 40.

OPTIONS.

See Vendor and Vendee, 1.

PARENT AND CHILD.

Fiduciary Relation.

1. **FIDUCIARY RELATION**—Adult Son Purchasing Notes Against Father.—The relation between a father and his adult son who is doing business for himself is not necessarily fiduciary, although such relation might be established in that case by less evidence than would be required as between entire strangers. Hence the son may purchase outstanding notes or mortgages against the father, and equity will not impress a trust upon the transaction in the absence of any evidence except their mere blood relationship. (Ill.) *Dick v. Albers*, 369.

Wages of Minor.

2. **PARENT AND CHILD**—Recovery of Minor's Wages by Parent. Where a parent sues to recover wages earned by his minor son, the employer is entitled to a deduction of the amount expended by the boy during the service for board and clothes. (Ky.) *Rounds Brothers v. McDaniel*, 482.

3. **PARENT AND CHILD**—Right of Parent to Earnings of Minor.—A parent is entitled to the services and earnings of his child during minority. (Ky.) *Rounds Brothers v. McDaniel*, 482.

4. **PARENT AND CHILD**—Loss of Right to Minor's Earnings.—A parent may lose his right to the services and earnings of his minor child by failing to provide it a home, or by such ill-treatment and neglect as forces it to abandon home, or by becoming degraded or dissolute in character, or by emancipating the child. (Ky.) *Rounds Brothers v. McDaniel*, 482.

5. **PARENT AND CHILD**—Loss of Right to Child's Earnings.—A father cannot have the assistance of courts to aid him in securing the services or wages of his child whom he has compelled by neglect, cruel treatment or dissolute habits to secure another home. (Ky.) *Rounds Brothers v. McDaniel*, 482.

Emancipation of Minor.

6. **PARENT AND CHILD**.—When a Child has Been Emancipated, he occupies the same legal relation toward the parent as if he had arrived at full age. The legal duty of the parent to support the child and defray his necessary expenses is extinguished, and so is the right of the parent to claim the services and wages of the child. (Ky.) *Rounds Brothers v. McDaniel*, 482.

7. **PARENT AND CHILD**.—There are Two Kinds of Emancipation: Express and implied—the former the result of express agreement between the father and the child; the latter when the father by acts or conduct impliedly consents to the child leaving home, shifting for himself, having his own time and earnings, and implied emancipation may be inferred from and shown by circumstances. (Ky.) *Rounds Brothers v. McDaniel*, 482.

8. **PARENT AND CHILD**—Revocation of Implied Emancipation. When a father gives freedom to a growing boy and tells him in effect, if not in words, to go out and make his own living and be his own man, and the boy, acting on this implied consent or direction, commences for himself the battle of life and is successful in meeting all its requirements, the father will not, unless he acts in seasonable time, be permitted to reclaim the boy's services or resume the parental authority he has surrendered. (Ky.) *Rounds Brothers v. McDaniel*, 482.

firm, but neither has the right, as against the other, to continue the business of the firm and retain the advantages that come from a direct succession and continuation of a going business. (Mass.) Hutchins v. Page, 656.

9. PARTNERSHIP—Goodwill, Whether Abandoned by Retiring Partner.—Where one partner continues the business after the termination of the partnership agreement, the retiring partner does not lose his right to compel an accounting for the goodwill by a delay of a year, not knowing until then, when he consults an attorney, that he had any rights, and doing nothing thereafter to prejudice his rights. (Mass.) Hutchins v. Page, 656.

10. PARTNERSHIP—Goodwill, Whether Abandoned by Retiring Partner.—Where, upon the dissolution of the partnership, one partner continues the business, and appropriates the goodwill of the firm, he must account for the value thereof to the retiring partner. His liability is the same as though the retiring partner had given him a bill of sale, except that in determining the value, it will be estimated as it would be if it were disposed of at a judicial sale. (Mass.) Hutchins v. Page, 656.

Dissolution and Accounting.

11. PARTNERSHIP DISSOLUTION—Accounting—Value of Machinery.—A partner who continues a profitable manufacturing business of the firm after its dissolution, and takes all the assets thereof including a large number of machines, which are of special design and cannot be purchased in the general market, is properly charged, on an accounting, with the value of the machines to him, or to one in his position, rather than with what they would sell for in the general market. (Mass.) Hutchins v. Page, 656.

12. PARTNERSHIP ACCOUNTING—Books Improperly Kept.—Where the master, in an accounting against a partner who has kept the firm books and accounts improperly and is responsible for their condition, makes the best finding as to profits that he can, and the defendant fails to show that the finding is erroneous, his exception thereto will be overruled. (Mass.) Hutchins v. Page, 656.

PASS-BOOKS.

See Banks and Banking, 9-12.

PAYMENT.

PAYMENT—Cross-demand.—Before a Cross-demand or Setoff can constitute a payment, it is indispensable that an agreement to that effect shall be proved. (Ark.) Parker v. Carter, 60.

PEDDLERS.

See License, 3-8.

PERCOLATING WATER.

See Waters and Watercourses.

PERJURY.

WITNESS—Civil Liability for False Testimony.—A witness who swears falsely is not liable in damages to the plaintiff, who loses his suit in consequence thereof. (N. C.) Godette v. Gaskill, 964.

PERPETUITIES.

1. PERPETUITIES.—The Rule Against Perpetuities has Reference to the Time within which the title vests, and has nothing to do

Unknown Owners.

8. **PARTITION.**—Publication of Summons Against Unknown Owners in partition, in the manner prescribed by statute, confers jurisdiction over them so far as their interest in the land is concerned, and they are bound by the decree in the cause and the deed pursuant thereto conveying title to the purchasers. (N. C.) *Lawrence v. Hardy*, 976.

9. **PARTITION**—Unknown Owners, Person to Represent.—The exercise of the court's discretion in not appointing a disinterested person to represent the interests of unknown owners in partition is not reviewable on appeal to the prejudice of an innocent purchaser. (N. C.) *Lawrence v. Hardy*, 976.

10. **PARTITION**—Unknown Owners, Investment to Protect.—The failure of the court to retain and invest funds sufficient to protect the interests of unknown owners in partition, as directed by statute, does not affect the title of purchasers. (N. C.) *Lawrence v. Hardy*, 976.

PARTNERSHIP.*In General.*

1. **PARTNERSHIP**—Nature of.—In Order to Constitute a Partnership, it is necessary that there shall be something more than the joint ownership of property. (Ark.) *La Cotts v. Pike*, 48.

2. **PARTNERSHIP**—Nature and Requisites of.—Before there can be a partnership there must be an agreement for community of profit and loss. (Ark.) *La Cotts v. Pike*, 48.

3. **PARTNERSHIP**—Nature and Requisites of.—It is ordinarily considered that an agreement to share in the profits is an essential element of every partnership, and yet because one shares in the profits, this does not necessarily constitute him a partner. (Ark.) *La Cotts v. Pike*, 48.

4. **PARTNERSHIP**—Authority of Partner to Bind Firm.—A mercantile instrument given in the partnership name binds all the partners, unless the person who takes it knows or has reason to believe that the partner making it is improperly using his authority for his own benefit to the prejudice of his associates. (N. C.) *Campbell v. Huffines*, 987.

5. **PARTNERSHIP**—Estoppel to Deny.—One Who Executes a partnership contract in duplicate, and afterward agrees to annul the agreement, but leaves the duplicate copy in the hands of the other party, is liable to a third person thereafter induced by the other partner to loan money upon exhibition of such duplicate. (N. C.) *Campbell v. Huffines*, 987.

6. **PARTNERSHIP**—Liability as General Partners.—Where articles of copartnership provide for a limited partnership, but the partners fail to comply with the statute, they become subject to the liabilities, and have the rights of general partners. (Mass.) *Hutchins v. Page*, 656.

Goodwill—Dissolution of Firm.

7. **PARTNERSHIP**—Goodwill.—The Original Intention to Form a Limited Partnership, which proves abortive through failure to comply with the statute, does not affect the rights of the partners in reference to the goodwill on dissolution at the expiration of the time for which the firm was to continue. (Mass.) *Hutchins v. Page*, 656.

8. **PARTNERSHIP**—Goodwill, Right to After Dissolution.—Neither partner has any right to avail himself of the goodwill of the business, after the termination of the partnership, without paying for it. Each may commence a new business in his own name, and take advantage of the fact that he has formerly been a member of the

firm, but neither has the right, as against the other, to continue the business of the firm and retain the advantages that come from a direct succession and continuation of a going business. (Mass.) *Hutchins v. Page*, 656.

9. **PARTNERSHIP—Goodwill, Whether Abandoned by Retiring Partner.**—Where one partner continues the business after the termination of the partnership agreement, the retiring partner does not lose his right to compel an accounting for the goodwill by a delay of a year, not knowing until then, when he consults an attorney, that he had any rights, and doing nothing thereafter to prejudice his rights. (Mass.) *Hutchins v. Page*, 656.

10. **PARTNERSHIP—Goodwill, Whether Abandoned by Retiring Partner.**—Where, upon the dissolution of the partnership, one partner continues the business, and appropriates the goodwill of the firm, he must account for the value thereof to the retiring partner. His liability is the same as though the retiring partner had given him a bill of sale, except that in determining the value, it will be estimated as it would be if it were disposed of at a judicial sale. (Mass.) *Hutchins v. Page*, 656.

Dissolution and Accounting.

11. **PARTNERSHIP DISSOLUTION—Accounting—Value of Machinery.**—A partner who continues a profitable manufacturing business of the firm after its dissolution, and takes all the assets thereof including a large number of machines, which are of special design and cannot be purchased in the general market, is properly charged, on an accounting, with the value of the machines to him, or to one in his position, rather than with what they would sell for in the general market. (Mass.) *Hutchins v. Page*, 656.

12. **PARTNERSHIP ACCOUNTING—Books Improperly Kept.**—Where the master, in an accounting against a partner who has kept the firm books and accounts improperly and is responsible for their condition, makes the best finding as to profits that he can, and the defendant fails to show that the finding is erroneous, his exception thereto will be overruled. (Mass.) *Hutchins v. Page*, 656.

PASS-BOOKS.

See Banks and Banking, 9-12.

PAYMENT.

PAYMENT—Cross-demand.—Before a Cross-demand or Setoff can constitute a payment, it is indispensable that an agreement to that effect shall be proved. (Ark.) *Parker v. Carter*, 60.

PEDDLERS.

See License, 3-8.

PERCOLATING WATER.

See Waters and Watercourses.

PERJURY.

WITNESS—Civil Liability for False Testimony.—A witness who swears falsely is not liable in damages to the plaintiff, who loses his suit in consequence thereof. (N. C.) *Godette v. Gaskill*, 264.

PERPETUITIES.

1. **PERPETUITIES.**—The Rule Against Perpetuities has Reference to the Time within which the title vests, and has nothing to do

with the postponement of the enjoyment or the duration of the title. (Ill.) *Mettler v. Warner*, 388.

2. **PERPETUITIES.**—An Interest Which Begins Within Lives in Being and twenty-one years thereafter is not within the rule against perpetuities, although it may continue beyond the prescribed period. (Ill.) *Mettler v. Warner*, 388.

3. **PERPETUITIES.**—A Devise to an Executor in Trust, directing him to take immediate possession of the property, manage it, and pay the income to the testator's children or their descendants in equal parts per stirpes, and further directing him to divide the estate in the same manner at the expiration of fifteen years, with a provision for survivorship in case of the death of any of the children without lineal descendants, the manifest belief of the testator being that it would be to the advantage of the estate to allow it to remain, as invested by him, in farming lands for a limited time, rather than to have it divided or sold at once, vests the legal title in the trustee and the equitable title in the children upon the death of the testator, and does not offend the rule against perpetuities. (Ill.) *Mettler v. Warner*, 388.

PHOTOGRAPHS.

See Criminal Law, 7; Evidence, 7, 8.

PLEADING.

In General.

1. **PLEADING.**—Defects in Form in a Declaration are Cured by verdict. (Ill.) *Pittsburg etc. Ry. Co. v. Chicago*, 316.

2. **PLEADING.**—Capacity of Corporation to Sue, How Raised.—A defendant who desires to raise the question of the capacity of the plaintiff corporation to sue should do so by plea in abatement. Failing in this, a judgment against him in the name of the plaintiff is valid and enforceable by execution. (Ill.) *Commercial Loan and Trust Co. v. Mallers*, 306.

3. **PLEADING.**—The Plea of Want of Consideration was good as against a general demurrer. (Ga.) *Mackin v. Blalock*, 220.

4. **PLEADING.**—A Verification of a Plea to an Action Founded on an Unconditional Contract in writing is sufficient where the defendant swears that the facts stated therein are true to the best of his knowledge and belief. (Ga.) *Mackin v. Blalock*, 220.

Amendment—Limitations.

5. **PLEADINGS.**—When Amendable to Conform to Proof.—Where an issue is raised on evidence, introduced without objection, outside the pleadings, the pleadings will be considered as amended by the court to conform to it. (Ark.) *Griffin v. Anderson-Tully Co.*, 73.

6. **PLEADING.**—Amendment Changing Form of Action.—Under section 39 of the practice act the plaintiff in an action on an insurance policy may be permitted by amendment to change his form of action from covenant to assumpsit after the expiration of the time limited by the policy for bringing suit. (Ill.) *Monahan v. Fidelity Life Ins. Co.*, 337.

7. **PLEADING.**—Amendment.—A Complaint in an Action Against a Carrier for the value of goods whose transportation was delayed, and for the statutory penalty for the delay, may be amended, in the discretion of the court, to include the penalty imposed by statute for failure to give notice of the arrival of the shipment. (N. C.) *Hockfield v. Southern Ry. Co.*, 945.

8. **PLEADING.**—Amendment Interposing Statute of Limitations. The refusal to allow an amendment pleading the statute of limitations is within the discretion of the court and not reviewable. (N. C.) *Hockfield v. Southern Ry. Co.*, 945.

PLEDGE.

1. **PLEDGE—Necessity of Delivery.**—To Make Valid Pledge as against other creditors, there must be an actual or constructive delivery of the possession of the property. (Pa.) *American Ex. Nat. Bank v. Federal Nat. Bank*, 1071.

2. **PLEDGE.**—A Pledge of a Book Account is not effected by the delivery of a copy of the account, without a delivery of the book itself or without any assignment of the right of the owner therein. (Pa.) *American Ex. Nat. Bank v. Federal Nat. Bank*, 1071.

3. **PLEDGE—Insufficient Delivery of Book Account.**—Where a debtor delivers a copy of a book account to a bank as a pledge, without delivering the book itself or making any assignment of his rights therein, and thereafter the account is collected through another bank with which he has an agreement to apply moneys passing through it to his indebtedness, the pledge to the first bank is not good as against the second bank, it and the debtor having no notice thereof. (Pa.) *American Ex. Nat. Bank v. Federal Nat. Bank*, 1071.

See Banks and Banking, 1; Shipping, 1.

POLICE POWER.

See Municipal Corporations.

POSTAL CLERK.

See Carriers, 13.

PREScription.

See Adverse Possession.

PRINCIPAL AND AGENT.

1. **NOTICE TO AGENT,** When not Imputed to Principal.—The mere fact that the officers of a bank acting as limited agents for a vendee in inducing him to make a purchase of property, know that he intends to mortgage it to such bank to secure pre-existing indebtedness cannot be held to be notice to the vendor, so as to amount to his implied waiver of his vendor's lien. (Cal.) *Finch v. Finnell*, 143.

2. **AGENCY—Recovering Money That has Been Paid to Agent.**—Where money has been paid to an agent for his principal, under such circumstances that it may be recovered back from the latter, the agent is liable as a principal so long as he stands in his original position and until there has been a change of circumstances by his paying over the money to his principal or doing something equivalent to it. (Me.) *Pancoast v. Dinsmore*, 582.

3. **AGENCY—Undisclosed Principal—Rights of Vendee.**—Where one has contracted to take a deed with covenants of warranty from the ostensible owner of land, who is really only an agent, he is not obliged to accept a deed from the principal when disclosed, although he may do so. (Me.) *Pancoast v. Dinsmore*, 582.

4. **AGENCY—Ratification of Agent's Sale.**—Trustees and Executors cannot be held to have ratified an agent's sale of land, by their representative receiving the proceeds without their knowledge. (Ill.) *Coleman v. Connolly*, 347.

PRINCIPAL AND SURETY.

1. **SURETYSHIP.**—A Corporation may Plead *Ultra Vires* as a defense to a contract of suretyship, when sued by one who has knowledge of the original relation of the parties. (Wash.) *Bradley Engineering & Mfg. Co. v. Heyburn*, 1127.

2. SURETYSHIP.—Action by One for Benefit of Others.—Where a person engaged in selling steamship tickets and in receiving deposits of money for transmission to foreign countries converts or embezzles the deposits of numerous persons aggregating an amount exceeding the penalty in his bond required by statute, equity will entertain a suit by one depositor in behalf of himself and others similarly interested to prove their rights to participate in the proceeds of the bond and any recovery thereon, and to compel the surety to pay the amount thereof pro rata to himself and such others as may become parties to the action and prove their claims therein. (N. Y.) *Guffanti v. National Surety Co.*, 848.

3. SURETYSHIP.—In Order for a Surety to Maintain an Action against his principal, it is necessary for him to prove that he has paid the debt or discharged the principal for the amount which he seeks to recover. (Me.) *Vermeule v. York Cliffs Imp. Co.*, 553.

4. SURETYSHIP.—When a Surety Either Pays the Debt for which he has become liable, or extinguishes it so that it is no longer a debt against the principal, the law implies a promise on the part of the principal to reimburse the surety for the amount paid. (Me.) *Vermeule v. York Cliffs Imp. Co.*, 553.

5. SURETYSHIP.—A Deposit by a Surety of Money in Court in payment of a judgment against him may be regarded as a discharge of the liability of the principal pro tanto so as to entitle the surety to recover from the principal. (Me.) *Vermeule v. York Cliffs Imp. Co.*, 553.

See Bail; Officers, 4-9.

Notes.

Principal and Surety, action against principal before maturity of the debt, but after payment made, 564.

action by sureties to compel the principal to pay the debt, 568.

action by the administrator of the surety against the principal, 559.

action of surety against principal before payment made, 559.

assignment of judgment to surety and his right to enforce it, 558.

assumpsit by the latter against the former, when maintainable, 558.

creditors' bill, when maintainable by sureties, 567.

defense of suit, right of surety to require the principal to make, 558.

defense to suit, payment by surety after knowledge of, 559.

defenses not known to the surety do not prevent his recovery against his principal, 560.

demand of surety for payment is not essential to his right to recover, 561.

equitable remedies available to sureties against their principals, 566-568.

estoppel of principal to deny that surety was liable for debt paid by him, 560.

fraudulent conveyances by principal, suit by surety for relief from, 567.

joint and several liability of the principal to two or more sureties, 558.

judgment against surety, effect of as evidence against his principal, 560.

judgment, dormant, effect of payment of by surety, 560.

liability of surety to pay debt must exist to entitle him to recover of his principal, 559.

liability of the former to reimburse the latter, 557.

liability of the principal to pay the debt is an essential to his liability to his surety who pays it, 560.

Principal and Surety, limitations of actions in favor of surety for reimbursement, 559.

negotiable paper, payment of debt by, 563.

notice to principal to defend, 558.

payment by surety, at what time may be made, 561.

payment by surety before maturity of the debt paid, 563, 564.

payment by surety by giving a new note or other obligation, 561, 562.

payment by surety, necessity for, when must be shown, 561.

payment by surety of a debt barred by the statute of limitations, 564, 565.

payment by surety, when deemed voluntary, 564.

payment by surety, when does not entitle him to proceed against his principal, 559, 561.

payment by surety without suit or judgment, 561.

payment in good faith by surety, when creates liability against principal, 560.

payment of the debt by the surety makes his principal his simple contract debtor, 557.

promise of the former to reimburse the latter, when implied, 557.

reimbursement of the latter by the former, implied promise of, 557.

remedies against principal given by statute, whether cumulative, 565.

remedies in equity in favor of surety and against principal, 564.

subrogation, right of surety to, 566.

usurious note, payment of by surety, when does not entitle him to recover of his principal, 560.

PRIVILEGE OF WITNESS.

See Process.

PROBATE LAW.

See Descent and Distribution; Executors and Administrators; Will.

PROCESS.

1. **PROCESS.**—The Exemption of a Suitor or Witness from process is not a natural right, but a privilege having its origin in the necessity for protecting courts from interruption and delay and witnesses and parties from the temptation to disobey process. (N. Y.) *Netograph Mfg. Co. v. Scrugham*, 886.

2. **PROCESS.**—The Exemption of Suitors and Witnesses from process is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him, and therefore the privilege should not be extended beyond the reason of the rule upon which it is founded. (N. Y.) *Netograph Mfg. Co. v. Scrugham*, 886.

3. **PROCESS—Privilege—Persons Under Legal Compulsion.**—Since the reason of the rule exempting suitors and witnesses from process is to encourage voluntary attendance upon courts and to expedite the administration of justice, that reason fails when the suitor or witness is brought into the jurisdiction of the court while under arrest or other compulsion of law. (N. Y.) *Netograph Mfg. Co. v. Scrugham*, 886.

4. **PROCESS—Privilege.**—A Person at Large on Bail is constructively in the custody of the law, and hence is not exempt from service of process in civil suits. (N. Y.) *Netograph Mfg. Co. v. Scrugham*, 886.

5. **PROCESS—Privilege of Witness or Suitor.**—The administration of justice is best subserved by keeping the rule of privilege

within the reason upon which it rests. That reason fails unless the person claiming the privilege is a free moral agent who may come into or depart from the jurisdiction or not as he pleases. (N. Y.) *Netograph Mfg. Co. v. Scrugham*, 886.

6. **PROCESS—Privilege of—Person Charged With Crime.**—Where a person at large on bail comes into the state for trial, and being acquitted remains within the jurisdiction of the court a short time, partly to consult his counsel about other indictments that have not yet been moved for trial, he is not exempt from service of process in a civil suit. (N. Y.) *Netograph Mfg. Co. v. Scrugham*, 886.

See Partition, 8-10.

QUANTUM MERUIT.

See Contracts, 3-9.

QUIETING TITLE.

QUIETING TITLE—Foundation of Equitable Right.—Where land is sold in accordance with law and the provisions of a mortgage, it vests in the purchaser an equitable title, though no deed is made, and when the period for redemption is passed and suit brought, the court properly quiets the title and directs a deed to be made to the purchase. (Ark.) *Morgan v. Kendrick*, 78.

See Records, 2-4.

RAILROADS.

Location of Hack-stands.

1. **RAILROADS—Location of Hack-stands—Right to Designate.**—A railroad company has the right to designate the place, abutting on the platform, where hackmen who are competitors shall stand their vehicles while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage. (Ark.) *Hot Springs v. Demby*, 43.

Lessee Company.

2. **LESSEE RAILWAY—Liability to Employés.**—A railway company running its trains over the leased tracks of another company is not relieved of the duty it owes to its employés to use reasonable care to provide for the safe operation of its trains while upon such leased tracks. (Minn.) *Floody v. Chicago etc. Ry. Co.*, 771.

Damages from Construction of Road.

3. **RAILROAD—Damages to Land Owner from Construction.**—A contractor in constructing the track and roadbed of a railroad over private property, pursuant to the plans made by the company's engineers, is under the legal liability to use all reasonable efforts to protect the land and the crops growing thereon from damage, and for a negligent failure to meet this standard of duty both he and the railroad company are liable. (N. C.) *Willis v. White*, 906.

4. **RAILROAD—Liability of Contractor to Land Owner.**—An independent contractor who has constructed a track and roadbed over private property for a railroad company, according to the plans made by its engineers, is not liable to the land owner for damages to his land and crops from improper drainage occasioned by the error of the engineers in fixing the size of a drain-pipe, which damages accrue after the completion of the work. (N. C.) *Willis v. White*, 906.

5. **RAILROAD—Liability of Contractor to Land Owner.**—An independent contractor who has constructed a track and roadbed over property for a railroad company, in accordance with the plans of its engineers, is not liable for permanent damages to the land owner ac-

cruing after he completes the work and turns it over to the company.
(N. C.) *Willis v. White*, 906.

Crossings—Safety Gates.

6. **RAILROAD CROSSING—Duty of Person About to Cross Track.**
A railroad crossing is a dangerous place, and it is the duty of a person about to cross a railroad track to approach it cautiously and use reasonable care to avoid accident. (Ill.) *Carlin v. Grand Trunk Ry. Co.*, 354.

7. **RAILROAD CROSSING—Instruction on Contributory Negligence.**—Where there is evidence, in an action against a railroad company for an injury at a crossing, tending to show that the injured person went under the safety gates and upon the track where he was struck by a train, the defendant is entitled to an instruction applying the law to these facts, notwithstanding a general instruction has been given on the question of contributory negligence. (Ill.) *Carlin v. Grand Trunk Ry. Co.*, 354.

8. **RAILROAD CROSSING—Safety Gates—Duty of Traveler.**—A person about to cross a railroad track is bound to know that danger exists, and to approach the track with care proportionate to the danger, notwithstanding safety gates have been installed by the company. Although he may rely upon the giving of customary signals, he must exercise due care himself. (Ill.) *Carlin v. Grand Trunk Ry. Co.*, 354.

Negligence of Switchman—Depot Company.

9. **RAILWAY—Negligence of Employé of Depot Company.**—A depot company, operating a union depot under the control and for the convenience of several railway companies, is the servant of the one for which it performs a particular act; and, if the act is negligently performed, the railway company is liable to its employé injured thereby. (Minn.) *Floody v. Chicago etc. Ry. Co.*, 771.

10. **RAILWAY—Negligence of Switchman of Depot Company.**—A switchman in the employ of a union depot company is not a fellow servant of a switchman in the employ of a railway company running trains to the depot, as the term "fellow-servant" is used when the common-law rule is invoked that a master is not liable for injuries received through the negligence of the coemployé. Nevertheless the railway company may be liable to its servant for personal injuries received because of the negligence of the depot employé. (Minn.) *Floody v. Chicago etc. Ry. Co.*, 771.

11. **RAILWAY—Negligence of Switchman of Depot Company.**—The act of a switchman employed by the depot company in throwing a switch for the passage of a railway company's train is the act of the depot company, and may render the railway company liable to its injured employé. *Floody v. Great Northern Ry. Co.*, 102 Minn. 81, followed. (Minn.) *Floody v. Chicago etc. Ry. Co.*, 771.

12. **RAILWAY—Evidence of Negligence of Switchman.**—Evidence considered, and held sufficient to sustain a finding of negligence. (Minn.) *Floody v. Chicago etc. Ry. Co.*, 771.

Killing of Dogs.

13. **RAILROADS—Killing of Dogs.**—Dogs are personal property for the negligent killing of which a railway company is liable. (Ark.) *El Dorado & Bastrop Ry. Co. v. Knox*, 17.

14. **RAILROADS—Killing of Dogs—Negligence.**—Under section 6773 of Kirby's Digest, the killing of a dog by the running of a train is prima facie evidence of negligence of the railroad company. (Ark.) *El Dorado & Bastrop Ry. Co. v. Knox*, 17.

15. RAILROADS—Action for Negligence—Venue.—Kirby's Digest, section 6776, provides that actions for killing horses, mules, cattle or other stock shall be brought in the county where the killing occurred. In the case of a dog this section does not apply. (Ark.) *El Dorado & Bastrop Ry. Co. v. Knox*, 17.

16. STREET RAILWAY—Duty Toward Dog on Track.—A street-car company is not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collision with dogs. A motor-man, operating a car, is entitled to act on the presumption that ordinarily a dog on a street-car track will get out of the way. *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577, followed and applied. No circumstances presented by the record in this case take it out of the ordinary rule. (Minn.) *Henry v. St. Paul City Ry. Co.*, 794.

See Carriers; Master and Servant, 8-12.

RECEIVERS.

See Partition, 5.

1. FOREIGN RECEIVER—Insurance Assessments.—Where a court has assumed charge of the assets and affairs of a mutual insurance company, it may levy assessments on members which the directors might have imposed, and in an action by the receiver in another state to recover an assessment the decree directing the levy is not subject to collateral attack, but the defendant may show that he is not liable upon his contract of insurance. (N. Y.) *Stone v. Penn Yan etc. Ry.*, 879.

2. FOREIGN RECEIVER—Action in This State.—A foreign receiver may maintain an action in this state, upon the principle of comity, unless some public policy will be contravened or the rights of our citizens interfered with. (N. Y.) *Stone v. Penn Yan etc. Ry.*, 879.

RECOGNIZANCE.

See Bail.

RECORDS.

1. REGISTRY LAWS are Intended for the Protection of Subsequent, not prior, purchasers and creditors. (N. C.) *Cox v. New Bern L. & F. Co.*, 966.

2. REGISTRATION OF TITLES—Constitutional Law.—Section 18 of the Illinois act concerning land titles, providing that "the examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs," is constitutional. (Ill.) *Brooke v. Glos*, 374.

3. REGISTRATION OF TITLES—Mandatory Statutes.—The provisions in sections 11 and 18 of the Illinois act concerning the registration of land titles, in regard to the allegations and proofs regarding the occupancy of land, are mandatory. (Ill.) *Brooke v. Glos*, 374.

4. REGISTRATION OF TITLES—Proof of Vacancy of Promises. An applicant for registration of title must prove her allegation that the premises are vacant and unoccupied. It is not enough to introduce in evidence her abstract showing title, with proof that it has been made in the ordinary course of business by makers of abstracts. (Ill.) *Brooke v. Glos*, 374.

See Mortgages, 5-14.

REFORMATION OF INSTRUMENTS.

REFORMATION OF INSTRUMENT — Mistake — Foundation for Relief.—To entitle a party to reform a written instrument upon the ground of mistake, it must be clearly shown that the mistake was common to both parties, and that the instrument does not express the agreement as understood by either; and such mistake must appear beyond reasonable controversy. (Ark.) *Parker v. Carter*, 60.

REMAINDERMEN.

See Adverse Possession, 4, 5.

REMOVAL OF CAUSES.

REMOVAL OF CAUSES—Effect of Filing Record.—Where a state court refuses to remove a cause to the federal court, the act of the defendants in having the record copied and filing the same with the clerk of the United States court does not take the case into that court and render it an action there pending. (Ky.) *Cincinnati etc. Ry. Co. v. Curd*, 444.

REPLEVIN.

See Costs, 2.

RES JUDICATA.

See Judgment, 11-14.

RIOTS.

See Municipal Corporations, 13-15.

ROGUES' GALLERY.

See Criminal Law, 7.

SAFETY GATES.

See Railroads, 8.

SALARIES.

See Municipal Corporations, 19-22; Sheriffs, 1.

SALES.*Acceptance and Rescission.*

1. **SALE OF MACHINE—Acceptance by Vendee.**—Evidence considered, and held that it conclusively shows that the plaintiff accepted an automobile sold to him by the defendant, and, further, that the trial court did not err in its instructions to the jury. (Minn.) *Wirth v. Fawkes*, 778.

2. **SALE—Rescission by Buyer and Return of Article.**—Where one buys a printing-press under an executory agreement that it shall be satisfactory, and after many efforts the seller fails to make the press work satisfactorily, and the buyer then refuses to accept or pay for it, he may refuse to return it until his claim for living expenses of the seller's experts while trying to make the press work have been satisfied. (Ky.) *Kidder Press Co. v. J. V. Reed & Co.*, 450.

"Satisfactory" to Buyer.

3. **SALE—Contract to Furnish Machinery Satisfactory to Buyer.**—Where a person agrees to construct a press for printing wrappers which is in the nature of an experiment, the contract providing that if the machine is not satisfactory it shall be returned, and that the

title shall not vest in the buyer unless the press is satisfactory and the purchase price paid, the seller is bound by the decision of the buyer as to whether or not the press is satisfactory. (Ky.) Kidder Press Co. v. J. V. Reed & Co., 450.

4. SALE—Contract to Furnish Article Satisfactory to Buyer.—A contract of sale which requires the article to be "satisfactory," without stating the person to whom it is to be satisfactory, means satisfactory to him to whom it is sold or furnished. (Ky.) Kidder Press Co. v. J. V. Reed & Co., 450.

Breach of Warranty—Damages.

5. EXECUTED SALE—Breach of Warranty—Remedy of Buyer.—In the case of an executed contract for the sale of a chattel with warranty, there being no contract right or obligation to return it in case it does not prove to be as warranted, the buyer, in the absence of fraud, cannot rescind the sale and reject the chattel. His sole remedy is an action for damages for the breach of the warranty. (Minn.) Wirth v. Fawkes, 778.

6. EXECUTORY SALE—Breach of Warranty—Remedy of Buyer. Where, however, the contract of sale is executory or conditional, the buyer, although the chattel is warranted, has the right to make a trial of it, reasonable as respects both time and manner, and to reject it if it does not fulfill the warranty or conditions, by so notifying the seller. He need not return it; but he will be deemed to have accepted it if he does not exercise his right of rejection within a reasonable time, or if he does any act in relation to it inconsistent with its ownership by the seller. (Minn.) Wirth v. Fawkes, 778.

7. SALE.—The Measure of the Vendee's Damages for a Breach of Warranty on the sale of an engine is the difference between the value of the engine received and what it would have cost him to purchase such an engine as that described in the contract and warranty. (N. C.) Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co., 899.

8. SALE—Damages for Breach of Warranty.—The aim of the law, in case of a breach of warranty by the vendor of machinery, is to put the vendee, as nearly as practicable, in the position he would have occupied if the contract had been kept, so as to award him full indemnity for the breach. What the amount shall be must be determined by the jury, after careful regard to the nature of the case and to its special facts and circumstances. (N. C.) Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co., 899.

9. SALE—Damages for Breach of Warranty—Repairs.—The reasonable cost of repairs may in some cases indemnify a vendee of machinery for the vendor's breach of warranty; but the jury is not necessarily confined to this narrow limit, and may consider it as an element in connection with any other facts which will enable them to ascertain the true amount. (N. C.) Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co., 899.

Conditional Sale.

10. CONDITIONAL SALE—Passing of Title to Vendee's Purchaser.—A conditional sale and delivery of the property to the vendee, reserving title in the vendor, and conferring power and authority on the vendee to sell such property, has the effect of passing title to one who makes a bona fide purchase from such conditional sale vendee, and upon such sale the original vendor's title is divested and at once transferred to the purchaser. (Idaho) Peasley v. Noble, 270.

11. CONDITIONAL SALE—Duty of Vendee's Purchaser to have Money Applied.—Where the vendee of property under conditional sale is vested with the power to sell such property and deliver the proceeds

to the vendor, a purchaser in good faith is under no obligation to follow the purchase price and see that it is delivered by the agent to the original vendor. (Idaho) *Peasley v. Noble*, 270.

12. CONDITIONAL SALE—Forfeiture for Nonpayment.—Where a conditional sale contract, accompanied with a delivery of the possession of the property to the vendee, provides that a failure to make payment at the times and in the manner specified in the agreement shall work a forfeiture of all rights under the contract and entitle the seller to immediately take possession of the property sold, the mere fact of a failure to make any payment at the time or in the manner specified does not per se work a forfeiture of the contract, but in order to effect the forfeiture, it is necessary for the vendor to demand or reclaim the property. A breach or mere failure to pay does not terminate the contract, but has the effect of conferring upon the vendor the option to declare a forfeiture and repossess himself of the property he has contracted to sell. (Idaho) *Peasley v. Noble*, 270.

13. CONDITIONAL SALE—Sale by Purchaser After His Default in Payments.—Where N. delivered possession of a band of sheep to N. & Co. under a conditional sale agreement providing that title should remain in N., and authorizing N. & Co. to make sales from time to time of any part or all of such property, and providing further that upon failure to make any payment at the time and in the manner specified in the agreement, N. & Co. should forfeit all rights under the contract, and that N. might thereupon take possession of the property, held, that notwithstanding a failure of N. & Co. to make payments as stipulated, if N. fails likewise to demand or take possession of the property, the contract is still in force and the agency to sell still exists, and that N. & Co. can transfer a good title to a bona fide purchaser until such time as N. either demands or takes possession of the property. (Idaho) *Peasley v. Noble*, 270.

Note.

- Conditional Sale, bona fide purchaser, Alabama rule respecting, 236.**
 bona fide purchaser, Illinois rule respecting, 278.
 bona fide purchaser, Indiana rule respecting, 283, 284.
 bona fide purchaser, Mississippi rule respecting, 280.
 bona fide purchaser, Pennsylvania rule respecting, 278.
 bona fide purchaser, position of, where not protected by statute, 278.
 bona fide purchaser, protection of, 278.
 bona fide purchaser takes only his vendor's title, when, 273.
 bona fide purchaser, Tennessee rule respecting, 280.
 construing contracts of for the purpose of giving effect to all their parts, 279.
 effect of giving vendee authority to resell, 279.
 estoppel arising from selling goods to retail dealer or one known to be engaged in business of selling, 283, 284, 285.
 estoppel of the original vendor from denying subvendee's title where vendee is authorized to sell, 280.
 exception to rule that vendor can confer no greater title than he has, 279.
 implied authority to resell must rest on business usages, 285.
 indicia of ownership of title, 279, 280, 282, 285.
 limitations of rule as to implied authority to resell goods sold as 285.
 mortgage, effect of vendor's giving purchaser power to make, 285.
 negotiable instruments and other personal property, not subject to the law of, 277, 278.
 possession of property, effect of upon sale to bona fide purchaser, 279.

Conditional Sale, purchasers in course of trade take good title notwithstanding, 285.

resale by authorized vendees, 280.

resale, effect of giving purchaser implied power of, 281.

retail dealers, sales to, when give implied power of resale by, 282.

subvendee, title of where original vendor is authorized to sell though the vendor reserves title, 280.

where there is authority to sell, express or implied, 281.

SALVAGE.

See Shipping, 2-7.

SATISFACTORY TO BUYER.

See Sales, 3, 4.

SCENIC RAILWAY.

See Carriers, 26-28.

SCHOOLS.

See Garnishment, 1, 2; Mechanic's Lien.

SEPARATION OF JURY.

See Trial, 7-10.

SETOFF.

See Garnishment, 3-6.

SHEEP INSPECTION.

See Commerce, 5-8.

SHERIFF.

1. **SHERIFF**—Contract of Deputy to Serve for Less Than Salary.—Where the statutes make it the duty of a sheriff to appoint a chief deputy, and the duty of the board of supervisors to fix his salary, to be paid by the sheriff out of compensation allowed him, a contract by the sheriff with his deputy to serve for a less compensation than that fixed by the supervisors is void, and no obstacle to his recovering the amount fixed by the supervisors from the sheriff. And it is no bar to the action that he has received a less sum in full payment under the illegal contract. (Iowa) *Bodenhofer v. Hogan*, 418.

2. **JUDICIAL SALE**—Right of Ex-sheriff to Sue Bidders.—A sheriff whose term of office has expired may maintain an action against defaulting bidders to recover the amount of bids at sales held by him while in office. (Pa.) *Dickson v. McCartney*, 1078.

SHIPPING.

Pledge of Owner's Credit.

1. **VESSELS**—Pledge of Owner's Credit.—The authority of a master of a vessel to bind the owners in personam falls within the law of principal and agent excepting when such authority arises ex necessitate, and there is no authority ex necessitate in the master of the vessel to pledge the owner's credit where the owner or his managing agent is either at the port of the ship's anchorage, or so near it as to be reasonably expected to intervene personally. (N. J. L.) *May v. Hurley*, 796.

Salvors and Salvage.

2. **SALVORS.**—A Ship is Derelict, in the Maritime Sense of That Word, when it is abandoned without hope of recovery or without intention of returning. The intention is the intention at the time the property is abandoned. If at that time it is such as to constitute an abandonment, and salvors have taken possession, an intention subsequently formed to return and resume charge is not material. (Mass.) *Merrill v. Fisher*, 706.

3. **SALVORS.**—To Constitute a Vessel Derelict, It is Sufficient if there has been an abandonment at sea by the master and crew without hope of recovery. But a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment. (Mass.) *Merrill v. Fisher*, 706.

4. **SALVORS**—Derelict—Abandonment of Stolen Yacht.—Where boys steal a yacht from her moorings, sail it about for several days, and then wholly abandon it in the face of an impending storm, she becomes a derelict. (Mass.) *Merrill v. Fisher*, 706.

5. **SALVORS**—Right to Possession and Compensation.—Salvors who board a derelict have exclusive possession and control until remunerated for salvage services. (Mass.) *Merrill v. Fisher*, 706.

6. **SALVORS**—Right to Possession and Lien.—In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence. But in an ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it is his province to determine the amount of assistance that is necessary. So unless a vessel is derelict the salvors have not the right, as against the master, to the exclusive possession of it, even though he should have left it temporarily, but they are bound on his returning and claiming charge of the vessel to give it up to him. (Mass.) *Merrill v. Fisher*, 706.

7. **SALVORS**—Jurisdiction to Enforce Lien.—The lien of salvors, although generally enforceable only in a court of admiralty, will be recognized in the courts of common law, and the right to possession arising therefrom will be there protected. (Mass.) *Merrill v. Fisher*, 706.

See Carriers, 19-21; Maritime Liens.

SIGNATURES.

See Contracts, 4, 5; Frauds, Statute of, 6-8.

SIGNS.

See Landlord and Tenant, 5, 6.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE**—Sale of Standing Timber.—An option to sell standing timber, after being unconditionally accepted by the vendee, may be specifically enforced against the vendor. (N. C.) *Bryant Timber Co. v. Wilson*, 982.

2. **SPECIFIC PERFORMANCE**—Purchaser Pending Suit.—Where in a suit for the specific performance of a contract to convey stat-

ing timber, the complaint fully describes the property and a lis pendens is filed, a purchaser pending the action takes subject to and is bound by the decree. (N. C.) *Bryant Timber Co. v. Wilson*, 982.

3. **SPECIFIC PERFORMANCE**.—Where the Vendor is Unable to Convey the title called for by his contract, the purchasers may elect to take what he can give and hold him answerable in damages as to the rest. (N. C.) *Bryant Timber Co. v. Wilson*, 982.

4. **SPECIFIC PERFORMANCE**.—Prayer for Damages.—The plaintiff in specific performance has a right to ask for damages, and they can be awarded in case the court refuses the principal relief. (N. C.) *Bryant Timber Co. v. Wilson*, 982.

See Frauds, Statute of, 7, 8.

SPENDTHRIFT TRUST.

See Trusts, 3.

STARE DECISIS.

See Courts, 2, 3.

STATE.

1. **STATE**.—When cannot be Sued.—A sovereign state cannot be sued except by its own consent; and such consent is expressly withheld by the constitution, article 5, section 19. (Ark.) *Pitcock v. State*, 88.

2. **STATE**.—When cannot be Sued—Real Party in Interest.—The question whether a suit is one against a state is not necessarily determined by reference to the parties to the record. If the state is the real party in interest, though only its officers or agents are parties, then it is in effect a suit against the state, and falls within the rule of the constitution, article 5, section 19. (Ark.) *Pitcock v. State*, 88.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Enactment of Law.

1. **CONSTITUTIONAL LAW**.—Statute Legally Passed.—Presumption.—A bill signed by the governor, deposited with the Secretary of State, and duly published as a state law, will be presumed, prima facie, to be duly enrolled and formally passed. (Ark.) *Pelt v. Payne*, 45.

2. **STATUTES**.—Journal of House.—There is no constitutional requirement that the journal of the legislature shall show that a bill was enrolled and signed. (Ark.) *Pelt v. Payne*, 45.

Title of Statute.

3. **TITLE OF STATUTE**.—Under an Act to Regulate the Employment of children generally, the employment of children under a certain age may be prohibited as part of the regulations. (Md.) *Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.*, 636.

4. **TITLE OF STATUTE**.—An Act Unconstitutional Because of a Defective Title may be repealed and re-enacted by a statute the title

of which clearly indicates its subject matter. (Md.) *Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.*, 636.

5. **TITLE OF STATUTE.**—Where a Law is Repealed and Re-enacted under a title that discloses its subject, the new law has all the force and effect of valid independent legislation. (Md.) *Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.*, 636.

6. **TITLE OF STATUTE.**—The Title of an Act is not misleading because it indicates that the statute is to apply to the whole state, while in the body of the act many counties are excepted from its operation. (Md.) *Mount Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine etc. Ins. Co.*, 636.

7. **STATUTE—Title of Amendatory Act.**—Act No. 209, page 312, of 1908, purporting to amend and re-enact section 5 of Act No. 171, page 392, of 1898, imposing a license tax on pawnbrokers, is unconstitutional, null and void, to the extent that it provides for a license tax on money lenders generally. (La.) *State v. Tolman*, 514.

8. **STATUTE—Title of Amendatory Act.**—An act purporting to amend a certain section of a general law is limited in its scope to the subject matter of the section proposed to be amended, under a constitutional provision that "every law shall embrace but one object, and that shall be expressed in the title." (La.) *State v. Tolman*, 514.

STEAMSHIP TICKETS.

See Carriers, 19-21; Commerce, 3, 4; Constitutional Law, 2.

STOCK AND STOCKHOLDERS.

See Corporations.

STREET RAILWAYS.

See Carriers; Railroads.

STRIKERS.

See Municipal Corporations, 13-15.

Notes.

Subrogation, sureties, right of, 566.

SUBTERRANEAN WATERS.

See Waters and Watercourses.

SUNDAY.

See Judgment, 2.

SUPPORT, COVENANT FOR.

See Deeds, 10, 11.

SURETYSHIP.

See Principal and Surety.

SWITCHMEN.

See Railroads, 9-12.

TAXATION.

In General.

1. **TAXATION.**—Between the Power to Create a Subject of Taxation and the authority to levy a tax there is a wide difference. (Pa.) *Pennsylvania Co. v. Pittsburg*, 1063.

2. **TAXATION.**—**A City may Tax Bonds Issued by It and Owned by a Bank** if there is no provision for exemption in them or in the ordinance providing for their issue. The contract of purchase, in such a case, is subject to the taxing power, and its obligation is not impaired by the imposition of a tax. (Ky.) *Bank of Russellville v. Russellville*, 479.

Stock Transfers.

3. **TAXATION—Stock Transfers.**—**The Provisions of the New York statute for a tax on transfers of stock purport to authorize a compulsory general examination of all the private books and papers of a person having made or suspected of having made transfers of stocks as enumerated in the statute, for the purpose of ascertaining whether, if made, he has kept a record thereof and paid taxes thereon as required by the statute.** (N. Y.) *People v. Reardon*, 871.

4. **TAXATION—Stock Transfers.**—**A Demand by a Representative of the state controller upon a member of a firm that "he be allowed to inspect the books of said firm which contained any entries, record or memoranda of any sale, agreement to sell or transfer of stock made within three months," is applicable not merely to the "book of account" required by statute to be kept for inspection, but to every book containing information of any sale or transfer of stock within the period named.** (N. Y.) *People v. Reardon*, 871.

5. **TAXATION—Stock Transfers—Statute Void in Part.**—**The provision of the New York statute taxing transfers of stock, which is unconstitutional because authorizing the controller to secure evidence from the private books of a person under investigation that might be used as the basis of criminal proceedings against him, does not affect the general provisions of the statute.** (N. Y.) *People v. Reardon*, 871.

Tax Sale and Deed.

6. **TAX SALE—Strict Compliance With Statute.**—**The power to sell property for nonpayment of taxes is strictissimi juris, and a failure to comply with the statutory requirements, even in minute particulars, is fatal.** (Mass.) *Charland v. Home for Aged Women*, 696.

7. **TAX DEED—Statements Prescribed by Statute.**—**A tax deed is void which does not contain the statements prescribed by the statute regulating the form of such deeds.** (Mass.) *Charland v. Home for Aged Women*, 696.

8. **TAX DEED—Statement of Cause of Sale.**—**A tax deed must state the cause of sale, by which is meant a statement of such facts as show that there was a legal cause of sale.** (Mass.) *Charland v. Home for Aged Women*, 696.

9. **TAX DEED—Statutory Form—Repetitions.**—**Where the form of tax deed authorized by statute ends with the statement that the grantor was collector of taxes, the repetition of that statement at the beginning of the deed is of no consequence.** (Mass.) *Charland v. Home for Aged Women*, 696.

10. **TAX DEED—Stating Cause of Sale—"Duly."**—**In determining whether a tax deed sets forth a legal cause of sale with sufficient accuracy, no reliance can be put on the use of the word "duly."** (Mass.) *Charland v. Home for Aged Women*, 696.

11. **TAX DEED—Statement of Facts or Conclusions.**—**A tax deed must state facts, not the collector's opinion as to facts. It must state facts, and not conclusions of law.** (Mass.) *Charland v. Home for Aged Women*, 696.

12. **TAX DEED—Forms Used in Practice.**—**In determining what is a suitable form of tax deed, apart from the form allowed by stat-**

ute, it is proper to consider what forms have been used in practice. (Mass.) *Charland v. Home for Aged Women*, 696.

13. **TAX DEED—Statement of Cause of Sale.**—The statement of a legal cause of sale in a tax deed cannot be held insufficient because not reciting in terms that the assessors issued their warrant to collect the tax, where the tax deeds that have been used in practice, are those prescribed by statute, do not contain such statement. (Mass.) *Charland v. Home for Aged Women*, 696.

14. **TAX DEED—Strict Compliance With Statute.**—While the statutory requirements of a valid tax sale must be complied with in minute particulars, the terms in which a tax deed must be drawn are not strictissimi juris, and it is not necessary to state the facts which must be set out in the deed with the precision of a common law indictment. (Mass.) *Charland v. Home for Aged Women*, 696.

15. **TAX DEED.**—In the Statement of the Cause of Sale in a tax deed a reasonable certainty is sufficient. (Mass.) *Charland v. Home for Aged Women*, 696.

See Charities; Licenses, 3-8; Judicial Sale, 7-11; Municipal Corporations, 16-18.

TENANCY BY ENTIRETIES.

See Husband and Wife, 5-8.

TENANCY IN COMMON.

1. **TENANCY IN COMMON—Nature of.**—**Mere Community of Interest** by ownership is sufficient to create a tenancy in common. (Ark.) *La Cotts v. Pike*, 48.

2. **COTENANCY—Duty of Tenant in Possession.**—A cotenant in sole possession of and in receipt of all profits from the common property for many years is deemed to owe to his co-owners the duty of preserving the estate by making needful ordinary repairs and payment of taxes and other annually maturing liens such as interest on a mortgage. (N. Y.) *Clute v. Clute*, 891.

3. **COTENANCY—Agency of Tenant in Possession.**—A cotenant in sole possession of and in receipt of all profits from the common property for many years is in effect the agent of his co-owners, authorized to do what is necessary to preserve their estate, including the payment of taxes and the interest upon a mortgage. (N. Y.) *Clute v. Clute*, 891.

4. **TENANCY IN COMMON—Ouster.**—The Remedy of a tenant in common ousted from the land, or his rights totally denied by the cotenants, is by an ejectment suit for his proportion. (Ark.) *La Cotts v. Pike*, 48.

5. **COTENANCY—Acquisition of Adverse Title by Tenant.**—Tenants in common stand in such confidential relation in respect to the property that it is generally inequitable to permit one, without the consent of the others, to buy in an adverse outstanding claim and assert it for his exclusive benefit to undermine the common title. In such a case the purchasing tenant is regarded as holding his purchase in trust for the benefit of all his co-owners, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures. (Me.) *Coburn v. Page*, 575.

6. **TENANCY—Acquisition of Outstanding Equity by Tenant.**—Where a tenant in common as to a one-fourth interest in lands discovers an outstanding equity against the whole interest and purchases three-fifths thereof, he holds his purchase in trust for himself and the other tenants who hold the three-fourths interest in common with him upon their pro rata contribution toward his purchase; and he is

not entitled to retain one-fourth of the whole equity and give the balance over, but only three-twentieths, which is the one-fourth part of his purchase. (Me.) *Coburn v. Page*, 575.

See Homestead, 1-3; Limitation of Actions, 4; Partition.

THEATERS AND SHOWS.

See Carriers, 26-28; Master and Servant, 15-17.

TIMBER.

1. LOGS AND LOGGING—Right to Remove Trees Cut After Contract Expired.—Under a contract for the sale of growing timber whereby the grantee is authorized to cut and remove timber within a certain period, the title to timber cut by the grantee within that period, but not removed from the land, passes to the grantee, who has the right for a reasonable time thereafter to remove it. (Ark.) *Griffin v. Anderson-Tully Co.*, 73.

2. LOGS AND LOGGING—Measurement of Trees, Date of.—Where growing trees of a given diameter are sold, the measurement is that of the date of the contract and not of the cutting. (Ark.) *Griffin v. Anderson-Tully Co.*, 73.

See Injunction; Navigable Waters; Specific Performance, 1.

TITLE OF STATUTE.

See Statutes, 3-8.

TORT, WAIVER OF TO SUE IN ASSUMPSIT.

See Actions.

TRADE NAME.

TRADE NAME—Laches in Protecting from Infringement.—The general rule that laches will bar equitable relief seems to be qualified in trade name cases, especially in the United States. (Ga.) *Creswill v. Grand Lodge Knights of Pythias*, 231.

See Benefit Association, 3-8.

TREASURER.

See Municipal Corporations, 24, 25.

TREASURER'S CHECKS.

See Banks and Banking, 2, 3.

TRESPASS.

See Limitation of Actions, 1.

TRIAL.

In General.

1. TRIAL—Testing Sufficiency of Evidence to Support Verdict.—Where a case has been tried by a jury and a verdict rendered therein, and the losing party desires to test the sufficiency of the evidence to support the verdict, a motion for a new trial is indispensable. (Ga.) *Mackin v. Blalock*, 220.

2. TRIAL—Stipulation of Facts Applies Only to First Trial.—A stipulation of facts on a former trial is not admissible in the second trial over objection of either party. (Ill.) *Rigdon v. More*, 328.

Misconduct of Attorney.

3. TRIAL—Misconduct of Attorney in Argument.—It is improper for the county attorney in his argument to the jury to refer

to the fact that the case has once before been tried and a verdict of guilty returned which has been reversed on appeal. (Iowa) *State v. Matheson*, 426.

Instructions.

4. **INSTRUCTIONS.**—It is not Error to Fail to Charge upon a Particular Contention of a party when such contention is not presented by the pleadings; nor is it error to fail to charge upon a contention made in the pleadings which is not supported by any evidence. (Ga.) *Grimsley v. Singletary*, 196.

5. **INSTRUCTIONS.**—A Correct and Pertinent Charge is not Rendered Erroneous by failure to give other instructions, appropriate to the case, in connection therewith. (Ga.) *Grimsley v. Singletary*, 196.

6. **INSTRUCTIONS.**—Error in Granting an Instruction is not reversible if no harm results. (Md.) *McGaw v. Acker etc. Co.*, 592.

Misconduct of Jury.

7. **JURY**—Duty to Exclude from Outsiders.—It is the duty of the court, in a homicide case, to see that the jury, after they are charged with the prisoner, are not exposed to contact or do not communicate with outsiders, either during the progress of the trial or after they have returned to their room to deliberate and make up their verdict. (Pa.) *Commonwealth v. Fisher*, 1027.

8. **JURY**—Duty to Exclude from Outsiders.—From the time the jury in a homicide case is sworn until they have returned their verdict to the court, they must be kept entirely aloof and free from contact or communication with other parties than the bailiffs who have them in keeping. (Pa.) *Commonwealth v. Fisher*, 1027.

9. **JURY**—Use of Intoxicating Liquors.—The law requires jurors to be sober, intelligent and judicious persons. Hence courts will not permit a jury, charged with passing upon the life of a prisoner, to receive and use intoxicating liquors while they have the prisoner in charge. (Pa.) *Commonwealth v. Fisher*, 1027.

10. **JURY**—Drinking, Separating and Mingling With Outsiders.—A verdict of conviction in a homicide case will be set aside where the jurors were permitted to pass through crowds in the courtroom and mingle with people in the corridors of the hotel where they stayed, and were permitted separately with tipstaves to visit saloons, drug-stores and barber-shops, where they came in contact with outsiders; and were also permitted to drink intoxicating liquors at the saloons and in their rooms at the hotel. (Pa.) *Commonwealth v. Fisher*, 1027.

Note.

Jury Trial, burden of proof as to the effect of statements made by a juror as to his own knowledge, 1054.

burden of proving the misconduct of the jury, 1040-1042.

communication of jurors with outsiders respecting matters not connected with the case, 1043.

conversation or communication with or in the presence of a juror, 1040.

conversation or communication with or in the presence of a juror, presumption arising from, 1041.

liquors, intoxicating, decisions holding that the use of by jurors is always misconduct, 1034.

liquors, intoxicating, decisions holding that the use of must be shown to have been prejudicial, 1037, 1038.

liquors, intoxicating, drinking after the cause is submitted and while it remains under consideration, 1039.

- Fury Trial**, liquors, intoxicating, drinking of, burden of showing the effect of, 1040.
- liquors, intoxicating, drinking of during the pendency of a trial, when deemed not prejudicial, 1037.
- liquors, intoxicating, drinking of during the pendency of a trial, when deemed prejudicial, 1037, 1038.
- liquors, intoxicating, drinking to the extent of unfitting jurors for duty, 1040.
- liquors, intoxicating, drinking where a capital case is under submission, 1039, 1040.
- liquors, intoxicating, drinking with a witness for one of the parties, 1038.
- misconduct of a juror in communication with judge not in open court, 1045, 1046.
- misconduct of a juror in communicating with other jurors and with officers, 1047-1050.
- misconduct of a juror in conversing with counsel, 1046.
- misconduct of a juror in conversing with witnesses, 1045.
- misconduct of a juror in communicating with outsiders on matters not connected with the case, 1043.
- misconduct of a juror in occupying same bed or room with the sheriff or bailiff in charge, 1048.
- misconduct of a juror in taking meals and otherwise being in the presence and hearing of outsiders, 1041, 1042, 1053.
- misconduct of a juror, test of, where it consists of communication with outsiders, 1044.
- misconduct of the jury, discussions and arguments amounting to, 1059.
- misconduct of the jury does not always entitle the losing party to a new trial, 1034.
- misconduct of the jury in acting on the suggestion that the defendant, if convicted, will be pardoned, 1060.
- misconduct of the jury in arriving at their verdict by lot, 1061.
- misconduct of the jury in arriving at their verdict by taking an average, 1062.
- misconduct of the jury in criminal cases which will entitle the defendant to a new trial, 1034.
- misconduct of the jury in deciding that the majority shall rule, 1061.
- misconduct of the jury in discussing other crimes imputed to the defendant, 1050.
- misconduct of the jury in examining exhibits and other demonstrative evidence, 1052.
- misconduct of the jury in making experiments during their deliberations, 1060, 1061.
- misconduct of the jury in not deliberating as a body, 1059.
- misconduct of the jury in reading law books, 1058.
- misconduct of the jury in reading or having access to newspapers, 1056, 1057.
- misconduct of the jury in receiving evidence out of court, 1050-1052.
- misconduct of the jury in taking papers and other evidence to their room, 1051.
- misconduct of the jury in the manner of arriving at their verdict, 1062.
- misconduct of the jury in the use of intoxicating liquors, 1034.
- misconduct of the jury may consist of the misconduct of a single juror, 1034.
- misconduct of the jury, prejudice from is not presumed, 1054.
- misconduct of the jury, presumption of prejudice from, 1041, 1042.
- misconduct of the jury, tests to show when prejudicial, 1036.

Jury Trial, officers in charge of the jury, statements of entitling the losing party to a new trial, 1049.
 permitting juror to go to the postoffice to receive mail, 1043.
 receiving notes and communications from outsiders, when a misconduct, 1043.
 receiving evidence out of court, presumption as to effect of, 1053.

TROVER.

See Actions.

TRUSTS.

In General.

1. **TRUSTS.**—The Fact That a Devise to a Trustee Places Him in a Position where his duty may conflict with his personal interest does not render it void as contrary to public policy. (Ill.) Mettler v. Warner, 388.

2. **RESULTING TRUST**—Relation of Parent and Adult Son.—Where an adult son in business for himself purchases outstanding notes or mortgages against his father, a resulting trust will not be declared merely because of the relation of parent and child. (Ill.) Dick v. Albers, 369.

Spendthrift Trust.

3. **SPENDTHRIFT TRUST**—Assignment by Beneficiary.—When a testatrix gives property to her executor to pay the income therefrom to her sons, "but no part of the principal of said estate is to be given to my said sons for five years after my death, and then only when in the judgment of my executor they shall have proven themselves to be entirely competent and qualified to take proper care of the same," an assignment by one of the sons within five years after the death of the testatrix is without effect, and his assignee cannot have an accounting against the trustee. (Pa.) Siegwirth's Estate, 1086.

Power to Sell.

4. **TRUSTS**—Authority of Trustee—Power of Sale.—Under the original theory of a trust, the powers and duties of the trustee were confined substantially to holding and caring for the property, but the purposes of the modern trust are of a much broader character, ordinarily requiring greater powers on the part of the trustee, including a power of sale generally given expressly. (Me.) Robinson v. Robinson, 537.

5. **TRUSTS.**—A Power of Sale may be Implied from the fact that a trustee is charged with a duty that cannot be performed without such power. (Me.) Robinson v. Robinson, 537.

6. **TRUST**—Power of Sale.—The Words "Invest and Manage" in a will creating a trust, properly import and imply a power of sale if a contrary intention is not found in the will taken as a whole. (Me.) Robinson v. Robinson, 537.

Mingling and Following Funds.

7. **TRUST FUNDS**—Lien of State After Their Intermingling.—Where the state treasurer deposited state funds in a bank without authority of law, and the bank had notice of the character of the funds and of the relation the depositor sustained to the funds, and the trust funds were mixed and commingled with the general assets of the bank and used from day to day in the commingled form promiscuously in the payment of the debts of the bank and in the purchase of paper and securities, and the bank thereafter suspended

payment and went into the hands of a receiver, and at the time the receiver took charge there was not enough cash on hand to pay the trust account, the lien of the state will attach to all the assets of the bank as a preferred claim for the payment of the trust funds. (Idaho) *State v. Bruce*, 245.

8. TRUST FUNDS—Right to Follow After Loss of Identity.—Trust funds may be followed into the trustee's estate although no particular property or asset can be identified as having been purchased or acquired by the particular funds, where it appears that the trust fund was mixed and commingled with the general funds and property of the trustee's estate and went into the general assets either in the purchase of paper and securities or in the payment of the debts of the trustee, and in such case the lien of the cestui que trust will attach against the entire assets of the trustee's estate for the payment of such claim. (Idaho) *State v. Bruce*, 245.

See Perpetuities.

ULTRA VIRES.

See Corporations, 5, 6.

UNKNOWN OWNERS.

See Partition, 8-10.

USURY.

1. USURY.—A Violation of the Law Against Usury is an unlawful act, although the statute imposes no penalty except to deprive the lender of his right to enforce payment of any interest, and although the statute does not prohibit the borrower from paying usury. (N. J. L.) *State v. Martin*, 814.

2. USURY—Illegal Interest in Disguise.—Every Written Agreement to pay interest in excess of the legal rate, however well the unlawful interest may be disguised, is a violation of law and usurious. (Mich.) *Rosen v. Rosen*, 712.

3. USURY.—Where a Partner Purchases the Interest of his co-partner under a contract that payments are to be made at specified times, "together with the sum of two thousand dollars for the use of said money during said period," the agreement is usurious and unenforceable, if such additional sum amounts to more than the legal interest on the principal for the period named. (Mich.) *Rosen v. Rosen*, 712.

VENDOR AND VENDEE.

Options and Contracts.

1. OPTION—Withdrawal and Acceptance.—An option to sell standing timber, based on a nominal and not a valuable consideration, may be withdrawn at any time before an unconditional acceptance by the vendee, but upon such acceptance the contract becomes mutually binding. (N. C.) *Bryant Timber Co. v. Wilson*, 982.

2. VENDOR AND VENDEE—Consideration for Contract.—Where one contracts for a deed from the ostensible owner, but afterward agrees to accept a deed from the real owner in place thereof, the latter agreement is a new contract, for which a consideration is necessary. (Me.) *Pancoast v. Dinsmore*, 582.

Loss of Property by Fire.

3. VENDOR AND VENDEE.—A Loss by Fire or other accident, not due to the fault of the vendor of the property, must fall upon the vendee, when the title is satisfactory and the contract of sale is

thereafter capable of being specifically performed by the vendor. While at law the legal title may be unaffected by the contract, equity regards that which is agreed to be done as actually performed. (N. Y.) *Sewell v. Underhill*, 863.

Representations to Vendee.

4. **VENDOR—Representations to Vendee—Fraud.**—A statement by a vendor of town lots to the vendees that they will not have to use any money, and their obligation will only be to resell the lots and turn the proceeds over to him until payment is made, does not, standing alone, constitute fraud, in that it amounts to nothing more than a promise. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

5. **VENDOR—Representations to Vendee as to Value.**—Statements of a vendor as to the value of the property, being mere matters of opinion, are not actionable. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

6. **VENDOR—Representation to Vendee as to Value.**—A statement by a vendor to a vendee who is acquainted with the property that it is bound to be the finest residence part of the city and certain to be a profitable investment is a mere matter of opinion. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

7. **VENDOR—False Statements to Vendee—Laches.**—One induced to purchase property by fraud must, within a reasonable time after discovering the fraud, rescind the contract and place the other party in statu quo. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

8. **VENDOR—Delay by Vendee in Rescinding Contract.**—One who purchases land with knowledge, or means of knowledge, of the truth or falsity of the vendor's statements in regard to its value, and several times renews the purchase money notes without objection, waives the fraud if any has been perpetrated. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

Forfeiture and Waiver Thereof.

9. **VENDOR AND VENDEE—Forfeiture.**—When Time is Made of the Essence of a contract for the sale of land, the vendor may declare a forfeiture for nonpayment of the price or any installment thereof; but the right of forfeiture must be clearly and unequivocally proved, and may be waived by extensions of time or indulgences granted the purchaser. (Wash.) *Douglas v. Hanbury*, 1096.

10. **VENDOR AND VENDEE—Waiver of Forfeiture.**—Where the vendor of land, out of nineteen installments of the purchase price, accepts seventeen from a few days to a few months after maturity, he thereby waives a provision making time of the essence, and can not thereafter declare a forfeiture until after demand for payment and the lapse of a reasonable time or by giving specific notice of an intention to claim a forfeiture. (Wash.) *Douglas v. Hanbury*, 1096.

Lien of Vendor.

11. **VENDOR'S LIEN.**—The Question of the Waiver of a Vendor's Lien cannot be raised in the appellate court, if it is not presented by the issues or appears to have been submitted to the trial court. Waiver, to constitute a defense, must be pleaded. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

12. **VENDOR'S LIEN—Enforcement—Transfer to Equity Calendar.**—When an amendment to a petition in a law action is filed seeking the establishment and foreclosure of a vendor's lien, the cause is properly transferred to the equity calendar for trial. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

13. VENDOR'S LIEN—Whether Arises by Implication.—Under the Iowa statute a vendor has an implied lien for the purchase money upon the property sold. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

14. VENDOR'S LIEN—Whether Passes to Assignee.—The lien in favor of a vendor for the purchase price passes to an assignee as an incident of the debt, whether or not the title to the property passes. (Iowa) *State Bank of Iowa Falls v. Brown*, 412.

15. VENDOR'S LIEN, When Exists.—One who sells and conveys real property to another acquires at the time of the sale, unless he waives his rights, a vendor's lien on such property for so much of the purchase price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, which lien is valid against all persons except purchasers and encumbrancers in good faith and for value. (Cal.) *Finnell v. Finnell*, 143.

16. VENDOR'S LIEN, Release of.—A vendor's lien is personal, and may be waived or released without consideration and without writing, and when once waived is gone forever. (Cal.) *Finnell v. Finnell*, 143.

17. VENDOR'S LIEN, Implied Release of.—If a vendor does anything manifesting an intention on his part not to rely on his lien, such as taking security without an express agreement that he may still have the lien, it ceases to exist. (Cal.) *Finnell v. Finnell*, 143.

18. A VENDOR'S LIEN is Presumed to Exist and to Continue, unless an intention on his part that it shall not exist is clearly manifested by his acts or declarations, and the burden of proof is on the vendee or his successors to show such intention. (Cal.) *Finnell v. Finnell*, 143.

19. VENDOR'S LIEN.—The Nonexistence of a Vendor's Lien is not inferable from the mere fact that the parties did not contemplate its assertion in the first instance. The act manifesting an intention to waive it must be one substantially inconsistent with its continued existence. (Cal.) *Finnell v. Finnell*, 143.

20. VENDOR'S LIEN.—Absence of Knowledge on the Part of the Vendor that he has a lien, or the absence of any intention to rely upon it, though he knows it exists, is not equivalent to a waiver thereof. (Cal.) *Finnell v. Finnell*, 143.

21. VENDOR'S LIEN—Waiver, Asking for Mortgage Which is not Given.—The fact that the vendor of land asks a mortgage thereon for the unpaid part of the purchase price, and that such mortgage was not given, does not manifest his intention to waive his vendor's lien. (Cal.) *Finnell v. Finnell*, 143.

22. VENDOR'S LIEN, Whether Waived by Inaction.—The right of the vendor to enforce his lien continues, unless waived, so long as he can commence and maintain an action for the purchase price, and where a promissory note has been given for such money, the lien may be enforced at any time within the period in which an action can be maintained on the note. (Cal.) *Finnell v. Finnell*, 143.

23. VENDOR'S LIEN, Laches in Enforcing.—Where there is an express statute of limitations, mere delay in commencing a suit for a period less than that of the statute is never a reason for dismissing the proceeding. There must be in addition to mere lapse of time some circumstances from which the defendant or some other person may be prejudiced, or such a lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed. (Cal.) *Finnell v. Finnell*, 143.

24. VENDOR'S LIEN — Evidence of Want of Knowledge.—In a suit to foreclose an alleged vendor's lien, evidence that the vendor did not, until shortly before the commencement of the suit, know

that he was entitled to such lien is not admissible for the purpose of proving that he had waived it or was never entitled thereto, or that he relied wholly upon the financial responsibility of his vendor. (Cal.) *Finnell v. Finnell*, 143.

See *Boundaries*; *Corporations*, 4; *Deeds*; *Estoppel*, 6-10; *Franchises*, Statute of; *Specific Performance*.

VESSELS.

See *Shipping*.

VESTING OF ESTATE.

See *Wills*, 20-24.

VICE-PRINCIPAL.

See *Master and Servant*, 8-12.

WAGES OF MINOR.

See *Parent and Child*, 2-5.

WARRANTY.

See *Sales*, 5-9.

WATERS AND WATERCOURSES.

1. **PERCOLATING WATERS.**—The "English Rule" as to Property Rights in percolating underground water rejected. The doctrine of "reasonable user" adhered to. (N. J. L.) *Meeker v. East Orange*, 798.

2. **PERCOLATING WATERS.**—A Land Owner has not an Absolute and Unqualified Property in all water that may be found percolating in his soil, to do what he pleases with it, as with the sand and rock that form part of the soil; his right is to use such waters only in a reasonable manner and to a reasonable extent for his own benefit, as in agriculture, irrigation, manufacturing, domestic consumption, and the like, and without undue interference with the rights of other land owners to the like use and enjoyment of waters percolating beneath their land, or of watercourses fed therefrom. (N. J. L.) *Meeker v. East Orange*, 798.

3. **PERCOLATING WATERS.**—The Defendant, a Municipal Corporation, for the purpose of supplying its inhabitants with water, acquired a tract of land and sank thereon a number of artesian wells, through which it drew out percolating underground water which, but for its interception, would have reached a spring, stream and well upon plaintiff's land, and also withdrew percolating underground water from beneath the surface of his land to such extent as to damage his crops. Held, actionable. (N. J. L.) *Meeker v. East Orange*, 798.

4. **PERCOLATING WATERS.**—Withdrawal for Sale.—Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of subsurface water, or if his wells, springs or streams are thereby materially diminished in flow, or his land rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses. (N. J. L.) *Meeker v. East Orange*, 798.

See *Navigable Waters*.

WAY OF NECESSITY.

See Easement.

WILLS.*In General.*

1. **WILL.**—An Instrument in the Form of a Deed, providing that "this deed is not to become operative until the death of the grantor," is testamentary in character and revocable by a subsequent will. (Mich.) *Moody v. Macomber*, 755.

2. **WILL.**—Evidence to Rebut Testamentary Intent.—An instrument purporting to be a will, and executed with the statutory formalities, is conclusively presumed to have been executed *animo testandi*, and parol evidence is not admissible to show that it was executed for a collateral purpose and that the testator did not intend it to operate as a will. (Mich.) *Kennedy's Estate*, 743.

3. **WILL.**—Parol Evidence is not Admissible to Show the Intention of a testator when he, on paying a mortgage which he had assumed as grantee, took an assignment of the mortgage, running to his daughters, and devised the land subject to the mortgage to his sons. (Mass.) *Lydon v. Campbell*, 702.

4. **WILL.**—Undue Influence.—Declarations of a Testator that he was being hounded to make a will are not competent evidence of undue influence. (Mich.) *Kennedy's Estate*, 743.

Publication and Delivery.

5. **WILL.**—The Delivery of a Will Conveys No Estate to a devisee. (Mich.) *Moody v. Macomber*, 755.

6. **WILL.**—No Publication of an Instrument is required in Michigan to give it effect as a will. (Mich.) *Kennedy's Estate*, 743.

Interpretation and Effect.

7. **WILL.**—The Situation of a Testator When He Made His Will and thereafter, and the circumstances then existing and known to him, are material to be considered in interpreting his language, and may be shown in evidence. (Mass.) *Lydon v. Campbell*, 702.

8. **WILL.**—When the Intent of the Testator is Clear, and is not inconsistent with any rule of law, it is to be given full effect. (Mass.) *Lydon v. Campbell*, 702.

9. **WILL.**—Interpretation Where Language is Clear.—A testator must be allowed to be his own interpreter when he expresses himself in language free from obscurity, which, as by him employed, conveys a certain definite meaning, to the exclusion of any other. (Pa.) *Bender v. Bender*, 1088.

10. **WILL.**—Ordinary and Grammatical Sense of Words.—If construing a will it should be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity or some repugnance or inconsistency with the declared intention of the testator, as extracted from the whole instrument, will follow from so reading it. (Pa.) *Bender v. Bender*, 1088.

11. **WILL.**—Construction of Word "or."—A devise to "Johannes Bender or his children" is substitutional, and the word "or" will not be construed to mean "and" if there is nothing in the general scheme of the will nor in any provision therein requiring such interpretation. The son, if he survives the testator, takes a fee. (Pa.) *Bender v. Bender*, 1088.

12. **WILL.**—Words and Limitations may be Supplied or Rejected when warranted by the immediate context or the general scheme of a will, but not merely on a conjectural hypothesis of a testator's

intention, however reasonable, in opposition to the obvious sense of the instrument. (Pa.) *Bender v. Bender*, 1088.

13. **WILLS.**—**A Devise of All the Rents and Profits or Income from real estate is a devise of the real estate itself.** (Ill.) *Mettler v. Warner*, 388.

14. **WILL.**—**Time of Taking Effect.**—Wills should be construed to speak and take effect as if executed immediately before the death of the testator, unless a contrary intent appears. (Pa.) *McKinley v. Martin*, 1076.

15. **WILL.**—**Adopted Child.**—Where a Testator Gives a certain sum to his executor to pay the income therefrom to his nephew "during his life, and upon his death leaving a child or children surviving him to pay over the principal of said sum to such child or children," and in case of the nephew "leaving no children surviving him," the fund to "revert to and become a part of" the residuary estate, the expression "leaving a child or children" refers to the natural offspring of the life beneficiary and not to his adopted children. (N. Y.) *Leask, Matter of*, 866.

Surviving Husband—Trust—Election.

16. **WILL.**—**Election by Husband.**—The Right of a Surviving Husband to elect between what the law gives him and what his wife's will bestows cannot be controlled by his creditors, notwithstanding the enforcement of their demands will depend upon the choice he makes. (Iowa) *Robertson v. Schard*, 430.

17. **WILL.**—**Trust in Favor of Husband.**—A Wife may Create a Testamentary Trust from which her surviving husband will derive benefit, without vesting him with any interest subject to his creditors' demands. And if he accepts this gift, and waives the estate which the law confers, he takes no interest subject to the claims of his creditors. (Iowa) *Robertson v. Schard*, 430.

Charge on Devise.

18. **WILL.**—**Charge on Devise.**—A Charge of a Mortgage Debt which a testator imposed on a devise includes interest after his death at the rate stipulated in the note. (Mass.) *Lydon v. Campbell*, 702.

19. **WILL.**—**Charging Mortgage upon Devise Land.**—Where a man in paying a mortgage debt, took an assignment of the mortgage running to his daughters, and in his will devised the land to his sons expressly subject to the mortgage, the mortgage debt is a charge on the land in favor of the daughters, and by accepting the devise the devisees subject themselves to the liability of having it enforced by proper proceedings against them. (Mass.) *Lydon v. Campbell*, 702.

Conditions—Vesting and Devesting of Estate.

20. **WILL.**—**Condition Precedent—Vesting of Estate.**—A clause in a will, following a devise to the testator's wife for life, "To my son Joseph I allow the house on Poplar Alley . . . ; if he is living or cohabiting with his divorced wife, he shall never inherit that property," creates a condition precedent; and if the son does not violate it before the testator's death, the estate vests absolutely in him, and is not defeated by his living with the divorced wife between the time when the will goes into effect and the termination of the life estate. (Pa.) *McKinley v. Martin*, 1076.

21. **WILL.**—**Vesting and Devesting of Estate.**—A construction of a will is favored which vests an absolute estate rather than a contingent or defeasible one. The law regards with disfavor conditions

subsequently divesting a vested estate. (Pa.) *McKinley v. Martin*, 1076.

22. WILLS.—The Law Favors the Vesting of Estates, and inclines to a construction favorable to the devisee or grantee, rather than to one against his interest. (Ill.) *Mettler v. Warner*, 388.

23. WILLS.—Vested or Contingent Remainder.—Where a remainder is devised, and the postponement of the enjoyment is for the convenience and benefit of the estate rather than for reasons personal to the devisee, the remainder should be held to be vested. (Ill.) *Mettler v. Warner*, 388.

Witnesses.

24. WILL.—Witness, Whether must Know Contents.—A witness to a will containing a charitable gift, who at the time of attestation does not know that the instrument is a will, is nevertheless a credible witness, that is, one not disqualified to testify by mental incapacity, crime or other cause. (Pa.) *Historical Society v. Kelker*, 1010.

25. WILL.—Witness.—The Time of Qualification of a Witness to a will, by reason of noninterest, must be referred to the time of the execution of the instrument. A witness to a will containing a charitable gift need not be without interest at the time of probate as well as at the time of attestation. (Pa.) *Historical Society v. Kelker*, 1010.

26. WILL.—That a Subscribing Witness has No Recollection whether or not he signed a will duly attested in form raises no question of fact for the jury. (Mich.) *Kennedy's Estate*, 743.

Revocation.

27. WILL.—Revocation.—A Testator Who has Parted With the Possession of his will may revoke it by making another will. (Mich.) *Kennedy's Estate*, 743.

Will of Nonresident—Place of Probate.

28. WILL OF NONRESIDENT.—Place of Probate.—The will of a nonresident who left property in this state cannot here be admitted to probate before its validity has been established in a proceeding in the courts of his domicile. (Mich.) *Glynn v. Corning*, 739.

See Perpetuities.

WITNESS.

1. WITNESS.—Attorney at Law.—An attorney at law may state as a witness the circumstances of a conversation between himself and others as to the formation of a corporation, where he was not acting as attorney for anyone at the time. (Cal.) *Finnell v. Finnell*, 143.

2. WITNESSES.—Impeachment.—In a Prosecution for Assault with intent to murder, if a witness on direct examination does not testify to any facts tending to show that the shooting was not intentional, the state should not be permitted to ask on cross-examination, for the purpose of impeachment, regarding declarations indicating his belief of defendant's guilt and allow proof thereof. (Iowa) *State v. Matheson*, 426.

3. WITNESS.—A Defendant Who has Testified in His Own Behalf in a homicide case may be cross-examined as to discrepancies between his testimony and his prior statements at the time of arraignment. (Mich.) *People v. Poole*, 722.

See Criminal Law, 8-10; Criminal Law; Evidence; Perjury.

WORDS AND PHRASES.

1. WORDS AND PHRASES.—The Word "Work" is of Broad Signification. One of its primary meanings is "effort directed to an

end." It includes taking part in a theatrical exhibition. (Mass.) Commonwealth v. Griffith, 645.

2. **WORDS AND PHRASES.**—The Word "Employ" Means to Use as a Servant, agent or representative. There may be employment without wages or compensation. (Mass.) Commonwealth v. Griffith, 645.

Note.

Definition of account stated, 1021.

of balances, 1021.

of confidence game, 364.

of disorderly house, 820.

of equitable estoppel, 172.

of estoppel, 173, 175.

of heat of passion, 730.

of malice, 729.

of manslaughter, 727.

of murder, 726, 727.

of pass-books, 1021.

WRIT OF ASSISTANCE.

See Mortgage, 16.

X-RAY PHOTOGRAPHS.

See Evidence, 7, 8.

3851



